PARTICIPANT'S MANUAL FOR JUDGES ON THE RIGHTS OF VICTIMS AND WITNESSES

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Preface

The National Judicial College is pleased to publish this Manual for judges attending courses on the Rights of Victims of Crime, and is grateful for the financial grant from the National Organization for Victim Assistance (NOVA) which made the publication possible.

Insufficient attention has been given to the role of victims and witnesses in the American system of criminal justice. This is traceable in part to our heritage in the common law with its sharp division between civil and criminal actions. In legal theory, crime was a breach of the King's peace with the King, (the State), not the harmed individual, as the victim and proper party to bring the prosecution. This theory, combined with federal and state constitutional principles concerned with protecting an accused from an overreaching government, has caused the perception by some that criminals are protected with many procedural safeguards and rights while victims and witnesses are only necessary providers of evidence who must make themselves available whenever required by the system. The perception that our system of criminal justice has been callously indifferent to the financial and psychological interests of victims of and witnesses to crime has resulted in social action and legislation which insist that victims and witnesses be given the fair and considerate treatment that is their right.

In the fall of 1982 the Judicial Administration Division of the American Bar Association provided a "seed money" grant to the National Conference of Special Court Judges. The Chairman of the Conference, Judge Ernest S. Hayeck of Massachusetts, requested The National Judicial College to design and plan a national conference of state judges to examine victims' rights issues and to suggest guidelines with respect to them. In view of the recommendations for the judiciary made in the report of The President's Task Force on Victims of Crime

published in December 1982, the need for such a conference became ever more apparent. In April 1983, initial planning began to take shape, and in August the National Institute of Justice, Department of Justice, provided a substantial grant to fund the conference and the travel and lodging of two judges from each state, the District of Columbia, and the Commonwealth of Puerto Rico.

The National Conference of the Judiciary on the Rights of Victims of Crime met at The National Judicial College November 29 to December 2, 1983 and adopted a set of recommended judicial practices concerning these rights. One of the recommendations was that judges at both trial and appellate levels participate in training programs dealing with the needs and legal interests of crime victims. This Manual has been prepared to implement that recommendation. It is designed for use by participants in local or statewide programs.

The Victims' Rights Project of The National Judicial College, both the Conference and this Manual, was supervised by V. Robert Payant, Associate Dean. The general editor of the Manual was Felix F. Stumpf, Academic Director of The National Judicial College. The research and writing was done by John E. Roberts, Jr., Colonel U.S.A.F. (Ret.), a retired military judge, and H. Arthur Rosenthal, Project Attorney. Special credit must be given to Susan W. Hillenbrand, coordinator of the Victim Witness Project of the ABA Section on Criminal Justice, for the draft discussions of issues she furnished to assist our staff. Much of her language appears in the commentaries, but the College is solely responsible for their final content. The Manual could not have been prepared without the valuable assistance of Janet C. Madigan, Assistant Director of Administration and Mary Kaczor, Development Secretary.

Judge Ernst John Watts, Dean

The National Judicial College

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FOREWORD

Recent and vigorous pressure for recognition of the rights of victims of and witnesses to serious crime to receive fair and considerate treatment by the criminal justice system has resulted in innovative legislation such as "Victims' Bill of Rights" in several states and the Victim and Witness Protection Act of 1982. The responsibility of the judiciary to respect the interests of victims and witnesses was acknowledged by the Chief Justice of the United States Supreme Court in Morris v. Slappy, 461 U.S. ___, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610, 623 (1983):

> Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused . . . But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience . . . .

This Manual uses the Statement of Recommended Judicial Practices that was adopted by the National Conference as the basic framework for the courses suggested for judges. The Statement is set out in its entirety in Part I. In Part II, the Statement of Recommended Judicial Practices is divided into separate sections. Each of these is followed by a commentary with the factual background giving rise to the particular recommended practice, and, when appropriate, a discussion of the legal or constitutional issues relating to it. The commentaries were prepared by the College staff using materials considered and discussed by the conferees. A commentary was not prepared for the introduction to the Statement of Recommended Judicial Practices as it is self-explanatory.

Part III deals with issues that were discussed and considered by the conferees but for which no judicial practices were recommended. It should not be inferred

that the judges considered these issues unimportant. Rather, it appeared from their discussions of many of these issues during the plenary session that the judges felt it to be inappropriate under the doctrine of separation of powers to recommend practices that should be considered by the executive or legislative branches of government. The issues are included in the Manual because they are often raised in the literature and discussions of the rights of victims and witnesses. The National Judicial College makes no recommendation with respect to them. In Parts II and III a consecutive numbering by sections system is used to facilitate references and citations to the Manual.

Immediately following this Foreword is an article by Dr. Marlene A. Young, Executive Director, NOVA and Professor Deborah P. Kelly which highlight major victims' rights issues and serve as a succinct introduction to the entire Manual. Another useful article that should be consulted because it provides a comprehensive and thoughtful analysis of legal problems arising in the field of victims' rights is Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 Miss. L.J. 515 (1982). Additional readings will be found in the Bibliography which appears at the end of the Manual. The Appendices contain valuable source materials which also are referred to in the commentaries as illustrative of the matters which are mentioned. For easy reference to the contents of the Manual, the reader should examine the Table of Contents.

INTRODUCTION

VICTIM RIGHTS: THE ROOTS OF A NEW JURISPRUDENCE*

by

Marlene A. Young, Ph.D., J.D.

The National Conference of the Judiciary on the Rights of Victims of Crime, held at The National Judicial College last November, asked a unique conclave of 104 judges, drawn two-by-two from all fifty states, Puerto Rico and the District of Columbia, to weigh the claims for redress voiced by representatives of the victim-rights movement. After three days of presentations and discussions, the judges adopted a statement that warmly endorsed the victims' call for what may be called a new jurisprudence--one that recognizes that justice may not be able to avenge every wrong, but that it can and should vindicate every victim of wrong-doing simply by treating them as something more human than the carriers of evidence.

To this observer, who was both a planner of the conference and a member of the teaching faculty, the conference was almost an award ceremony, honoring the merits of the victim-rights movement after its decade-long pursuit of recognition. I am grateful to have had a role in that conference and to have this additional opportunity to reflect on the goals of the conference and on the goals of the movement as a whole.

Now, as then, I approach the assignment with some trepidation. For I spoke to the conferees after they had heard from a survivor of a rape, and the victim of an armed robbery, and from the mother of a murdered college student -- and their tragedies, along with literally hundreds of others I have encountered, defy anyone's ability to comment on, certainly not in the guise of an "authority." It is also difficult for me "to address the bench," for I was raised to have secular reverence for the judiciary. Yet perhaps for that very reason, I have entertained day-dreams from time to time of someday speaking to an audience of those who make their living by protecting and dispensing justice.

I cannot say I leapt at the opportunity to fulfill those dreams at the conference in Reno. In fact, I found that I was unable to frame an argument in support of my cause; it was too difficult a task for this advocate, given the constraints of time, and the more compelling, first-hand accounts by the victims, and the nature of the audience. So I abandoned the role of the advocate for the more comfortable posture of the reporter. Now, as then, I find it easier to take on the assignment by telling a story--the story of the victims' movement.

*This article is a revision of the address given by Marlene A. Young, Ph.D. J.D., Executive Director, National Organization for Victim Assistance. It has also been submitted for publication to The Judges' Journal (American Bar Association).

The story perhaps can be told in the movement's achievements, none of which were more gratifying than the publication of recommendations in 1983 by the President's Task Force on Victims of Crime, whose chairman, Assistant Attorney General Lois Haight Herrington, also addressed the conference. But behind that landmark call for reform were years of work which resulted in concrete, if little-noticed, successes:

° From 1973 to 1983, the number of state-funded victim compensation programs grew from 9 to 39.

° From 1973 to 1983, the number of victim service programs soared from a handful of rape crisis centers, a few child abuse programs, and a few general victim assistance programs to literally thousands of programs of all types throughout the country, along with state-assisted domestic violence programs in 40 states, state-aided sexual assault programs in over 15 states, and state-subsidized victim/witness programs in some 17 states.

° From 1973 to 1983, thought became father of the act as the "victim" impact statement" changed from an idea in the mind of James Rowland, Chief Probation Officer of Fresno, California, to a mandatory procedure in 14 states and the Federal court system.

° And, from 1973 to 1983, a new form of justice emerged as rights for victims were statutorily defined in twelve states and in the Federal system, through the enactment of the Victim and Witness Protection Act of 1982.

These highlights give some parts of the story, suggesting at least the what, and the where, and the when. To fulfill the rest of the reporter's assignment, one may subsume the "who" and "how" under the final item on the checklist -- the question of why the victims' movement took hold. The why is found in the victims themselves.

The conference attendees, like all criminal court judges, have heard from victims countless times, and have been sympathetic. But a number of judges at the conference told me that they were given insight into the ongoing distress that a victim endures in ways that they had rarely perceived in the courtroom.

The pain of millions of victims can perhaps best be described in terms of the injuries they sustain. Over the years, we at the National Organization for Victim Assistance have characterized the injuries done to victims of crime in three ways: financial injury, physical injury, and emotional injury. Such injuries may seem self-explanatory, but they are not. Their impact is rarely appreciated fully.

Consider finanacial injury. Burglary, vandalism, theft, and fraud are common examples of crimes which cause financial loss. Perhaps in recognition of the seriousness of personal crime, we all try to downplay the gravity of so-called property crimes. Burglary is so common that people often are embarassed to even complain of their loss. Vandalism is often shrugged off as the price of an increasingly urban and mobile society. The consequences of theft and fraud are hidden even more deeply. However, the financial impact of such supposedly lesser crimes can be devastating:

° Michael and Jane Stockton were burglarized. They lost $65,000 worth of furniture and other personal property, including some family heirlooms. They had an insurance policy--which paid them $9,500. For them, burglary was a horrifically serious crime.

° Mary Grey was a 73-year-old widow when she invested her life's savings in a "life" lease in an apartment building with promises of nursing care and medical attention when she became older. She moved to her new apartment and found it unhabitable. In the months that followed, she was harassed by her new landlord and was often left without electricity or heat. She moved out after six months to live in a shabby hotel room while she applied for welfare. The fraud committed on Mary Grey, making her final years ones of destitution, was a serious crime.

If we tend to keep ourselves from understanding what financial loss means to many of its victims, we probably do not have the capacity, even if we wanted to, to comprehend what physical injury means. True, most of us have suffered a serious cut, or a burn, or a broken bone But few of us know from personal experience what it is to be mutilated, or crippled, or paralyzed. How do we make connection with the crime victims who have suffered these injuries? And how can we relate to the surviving family and friends of the victim of murder?

I do not have the answer. But I know that to begin to understand, we must confront the pain of the assaulted.

° We should confront the pain of Lois James, who was a purse-snatch victim at 83 years of age. She suffered only minor injuries, bruises and abrasions, but after a year and a half in and out of bed, she died, never able to recover from the physical shock.

° And we should confront the pain of Tim Cohen, a 18-year-old athelete who was turned into a paraplegic by a drunken driver. I, for one, do not know how I would face such a change in my life, but I am certain that I would grieve for my former self; I would mourn the loss of my physical freedom; I would be afraid. Yet even these obvious lessons of confronting the repercussions of crime are threatening, and so, most often, are ignored.

Perhaps that is why we find it so difficult to meet the most hideous duty -- to confront the death of those who are murdered and the pain of their surviving loved ones. I have often heard it said that the anguish of the murder victim goes with him to the grave. I once stood on the steps of a courthouse and listened while a judge gently lectured a mother that her murdered daughter was dead, and so he had to be concerned with the defendant.

For me, that moment crystallized the outrage that many survivors face when they are told, in effect, that they would be deemed "deserving victims" had the offender taken their money, but not if the theft was of a loved one's life. The families and friends who live on know that murder does not produce one victim who "blessedly" rests in peace -- it leaves behind many lifetimes of sorrow.

Perhaps, ultimately, we may all come to contemplate what the reckless or intentional killing of another human being really means, and we will then

recognize both the physical consequences of some crimes and the emotional trauma of most crimes. For homicide compels us to look into the immediate horror, and its aftermath, which follow criminal violations.

Emotional injury is the common denominator of victimization. None of us expects to be a victim. All of us fear its consequences. The pattern of reaction, once it strikes, is similar: shock and disbelief; denial; a confused turmoil of anger, fear, helplessness, depression, and self-blame; and finally resolution -- or at least "coping."

Shock and disbelief is commonly noted in the reaction of crime. I have heard victims say over and over again, "I can't believe it happened." And for some, there is denial: "It didn't happen." This is but one of the victim's ordinary emotional reactions we too easily label "pathological."

Emotional turmoil is almost always a part of the response to crime. Whether the loss entails a plant in the front yard, a car stereo, $50,000 worth of property, or the victim's physical well-being, the emotional consequences are often disorienting and confusing.

Among the most confusing to outsiders are the common indicators of self-blame. Even experienced criminal justice professionals often read these confessionals to mean that the victim "deserved" what happened. Such interpretations are almost always unjustified. The victim, like the rest of us, has been "trained" by our culture to be responsible for his life. When an arbitray, random, unexpected intrusion occurs, he rebels at the randomness and the dreadful idea that bad things happen to good people. In his effort to restore order to his world, he finds an explanation in the line, "I was stupid -- it was my fault."

This is but one of the confusing by-products of victimization. The victim and others around him often become victims, if you will, of his new emotional characteristics -- his loss of concentration, his depression, his insomnia, his rages -- with none of them knowing that these are the normal, and thus less frightening, symptoms of injury.

The issue of guilt and blame relates strongly to what some have termed the "second" injury. The three injuries recounted above all come as a direct result of the criminal attack. Many crime victims claim that others injure them too, that family, friends, neighbors, in fact, society and its institutions, have sometimes hurt them more than did the criminal. These second injuries take three forms: isolation, indignities, and injustice.

Many crime victims feel isolated. Their tendency toward self-blame is often confirmed by others who do not want to feel an identity with that stupid (or wicked) person, for in discerning character defects in the victim, they distance themselves from meeting his fate. Typical statements which reveal the victim's distress at being ostracized -- or his fear of being ostracized -- include:

"If I tell my neighbor about how upset I am, he'll tell me that my door should have been locked."

"I'm so frightened. If my boyfriend finds out I was attacked, he will leave me."

"My friends and my pastor tell me I should get over my son's murder. How can I get over it? He's my son..."

"The detective told me that if I was his daughter, he'd get me to move out of this neighborhood."

"Everyone, everyone has grilled me on why I chose to go to that bar that night."

Social isolation is often compounded by indignities. If one is a rape victim, one faces a rape examination -- surely a physical trauma in itself, often a reexperience of the rape. If one is a burglary victim, one may face giving "elimination" fingerprints, or see the publication of one's name and address in the local paper, or be subjected to the confiscation of one's property. If someone lives while a loved one dies, he may face questions, autopsies, even the choice of how to dispose of the remains, all without consultation or permission.

And then there are the injustices. Most of us hunger for justice when we are criminally violated. But we realize soon there is little justice, not for us. It is not our case. It is the "state's" case. We are at most the carriers of evidence, no more a part of the proceedings than any other piece of evidence noted in the prosecutor's file. Victims face delays and a frustrating lack of information. They rarely have their day in court, since most cases are disposed of administratively, without their involvement. If by chance they are called in to testify in a hearing or trial -- and it actually takes place -- they may find themselves in an environment in which they seem to be treated as the guilty party, and are required to respond to these attacks without benefit of counsel. And in cases resulting in guilty pleas or convictions, the victims are not notified of that, much less are they asked to appear at the sentencing hearing or express their feelings to the judge.

These cover some aspects of the story of the victim-rights movement, and may help to explain why people of good conscience have joined with the victims themselves to find ways to help quicken the healing, to break down the barriers of isolation, to end the indignities and the injustices.

But the story is still being written. Many of the pioneers of the victim-rights movement, including several distinguished judges and government officials who attended the conference, have pointed to signs in one state after another that the dictates of "equal justice" are forming a holistic new social policy and jurisprudence. Among the examples they cite:

° The Oregon Supreme Court ruled that police officers were liable when they did not obey a new law mandating the arrest of a battering spouse;

° The Arizona legislature and courts have given real meaning to "victim participation;" because Robert Durkin and his family had been denied their right to comment on the plea-bargained sentence given the murderer of a close relative, the plea was vacated, a trial was held, and the jury, in effect, agreed with the family's assessment of the seriousness of the crime.

° In Nebraska, Betty Deharsh finally got back what belonged to her -- the van and personal belongings of her murdered son -- without

having to pay the storage fees of over $1,000 that the police authorities were demanding.

° Nevada and Wisconsin have both moved to grant the right of a speedy trial to the victims of traumatizing crimes. District attorneys in both states are pondering how to back up these supposed rights with fair and effective remedies. One suggestion: bar a local court system from starting any new trial, civil or criminal, after the victim's properly-invoked speedy trial motion has not been acted on in the specific time period and there is no compelling reason to delay the trial on due process grounds.

° In Alabama, the legislature recently gave victims or their representatives the right to be seated at counsel table during all judicial proceedings -- a counterpart to the defendant's right of confrontation that, despite the trepidation of some prosecutors and defense attorneys, seems thus far to be workable and fair.

There are many who doubt that the reform agenda implicit in these jurisprudential experiments -- and in the growing network of services to the victimized -- can be acted on by our tradition-laden system of justice. I have no patience with those doubts. Because the reforms can be implemented, they should be implemented.

Law enforcement officers can learn to deal with a victim's distress compassionately.

Victim advocates can try to restore victims to the pre-crisis level of functioning.

Prosecutors can learn to deal with the victim as a person rather than treat him like evidence.

Others have their parts to play. But none have the opportunity to make a difference more than those we entrust to the triers of law in our courts -- for we all look to the bench, sooner or later, to hear articulated the dictates of justice in our society.

Perhaps I state the case too strongly, but it is difficult to respond weakly once you have confronted the anguish of humanly-inflicted pain.

And perhaps I present the case too simplistically, but even after you immerse yourself in the genuine complexities of the victimization experience, you come to appreciate that fundamental fairness to the accused and his accuser alike is grounded on a simple sense of symmetry, of equity.

The story-in-progress of the victim-rights movement is challenging us all to rediscover who we are, and by what values we govern ourselves.

In my view, we are a compassionate society which nonetheless belittles the victim.

We are a generous people who still avoids our own vulnerabilities by ignoring the casualties among us.

And sadly, we remain a country that has not yet conformed its self-governing institutions to our sense of justice.

So I trust that the story has not yet come to an end, that it is still being written. The November 1983, conference held at The National Judicial College will be remembered as the time when the judiciary took up the pen.

We in the victim-rights movement who read the "Recommended Judicial Practices" adopted by those judges can fairly conclude that they remembered the victims, and their stories, and their traumas, and their search for equity. Over the course of four days of meetings, those judges joined in our striving to reach our ultimate goal:

Justice for all, even the victims.

MAJOR ISSUES OF VICTIM CONCERN*

by

Deborah P. Kelly**

Two questions are addressed: (1) What do victims want from the criminal justice system? and (2) Why should their concerns be considered?

Victims' needs can be divided into two general categories (a) relief from the administrative inconvenience of going to court and (b) more participation in the criminal justice process. First, what do we know about victims' concerns regarding administrative issues and the corresponding services designed to relieve these problems, and second, what are victims' requests for more systemic reforms that might increase their status in the judicial process.

ADMINISTRATIVE INCONVENIENCE

Because studies have focused almost exclusively on this issue, the impression has been created that victims are primarily troubled by administrative run-around, especially loss of time (delay, waiting, postponements) and money (missed pay, transportation, babysitting).

Although these problems occur, such studies mask more fundamental problems victims experience with law enforcement. Indeed, the purpose of these studies often predetermines their results. Their purpose is usually to manage witnesses and promote their cooperation. Their design is to ask victims specific questions, such as "Did you have trouble with transportation, parking, or finding the court building?" As victims are usually not asked more substantive questions about their role in the judicial process, it is logical that their responses are limited to issues of court inconvenience.

Victim-Witness Assistance programs were designed to alleviate many of these problems and compensate victims for crime costs or court inconvenience. In spite of these services described in Table I, many concerns remain unanswered:

(1) Services are frequently provided only to those select witnesses the state needs to make its case. As most cases are dismissed or plea bargained,

*This article was originally submitted by the author to the American Bar Association, Section on Criminal Justice in her capacity as a consultant to the Section. We are grateful for the permission to reprint which has been granted by the American Bar Association. No further reprinting or reproduction may be made without the express permission of the American Bar Association.

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many victims never benefit from such programs because they are not needed to testify or provide further evidence.

(2) Services may be provided which are relatively unimportant to victims while other more important needs are ignored. For example, although many victims experience problems with transportation, babysitting, and parking, most do not judge these problems as serious. Their wishes to participate more fully are rarely addressed in these programs.

(3) Some victim-witnesses assistance programs are that in name only. Frequently, they enable prosecutors to manage rather than assist victims. In Washington, D.C., for example, the victim-witness units have primarily served bench warrants and tracked down key witnesses who leave the court's jurisdiction.

TABLE I
Redressing Court Inconvenience and Crime Costs

A. Compensation for Court Inconvenience

External: payment for time lost
transportation
parking
protective intervention with employer

Victim's Priorities:
to minimize time &
financial loss

Internal: separation from defense witnesses
protection from intimidation
explanation of court procedures
notification of postponements
better scheduling

B. Compensation for Crime Costs

Restitution
Medical Payment
Crisis Intervention
Property Promptly Returned
Compensation

Although it is clearly important that services have been developed to remedy the problems itemized in Table I, other critical concerns are overlooked. These services address procedural difficulties associated with the court and crime but they do not affect the more fundamental issue of expanding victims' role in the judicial process.

STRUCTURAL REFORM

Above all, victims want their personal interests recognized by the judicial system. They are surprised to learn how little their opinion matters; how rarely their interests are considered. They soon find that, as William McDonald put it, "Their role is like an expectant father in the delivery room--necessary for things to have gotten underway in the past but at the moment rather superfluous and mildly bothersome."

Victims' comments clearly indicate that they deeply resent being excluded from deliberations. To illustrate, when a sample of 100 rape victims were asked

how they would improve police and court procedures most wanted their role and status in the judicial system to be increased. Though victims are legally irrelevant to the state, their proposals called for the state to recognize that the case is extremely relevant to them. If, for example, three victims were attacked and the prosecutor selects only one as a witness, the others still need to be kept informed but usually are not.

As Table II shows, victims want police to provide information on the status of their assailant. They want to be called when the defendant is arrested and notified that he is in jail, on bail, or roaming the neighborhood - victims want this information - regardless of their utility to the case. Additionally, they want police officers to support, not second-guess their behavior; to focus on the offenders, not the victims; to question the crime, not their judgment in, for example: living in the "inner city," dating the offender, leaving their windows open, or walking home alone.

TABLE II
Victims' Recommendations for Improving Police Services

Information on:	investigation	
	arrest	(regardless of victims'
	defendant's status:	utility to case)
	bail, jail	

More Compassion from Officers:
- no disrespectful questions
- no judgmental questions

Vigorous Investigation of Suspects

Victims also are very concerned that law enforcement officials provide them more recognition in the legal system. As Table III shows specifically, they want to be included, consulted, and offered an opportunity to participate in determining what happens to their assailant.

Victims also want better legal representation of their interest. Many feel that in addition to being excluded, their case was not well prepared, their interests were not well protected, sufficient time was not devoted to their case, no continuity in personnel was provided, and no consideration was given for the impact of postponements. Decisions on case disposition and sentencing were ususally made regardless of their interest. It is this imbalance victims seek to correct.

TABLE III
Victims' Recommendations for Improving Court Services

More attention to victims' opinions on case disposition
Opportunities to attend hearings, especially trial and sentencing
Opportunities to participate in deliberations
Consideration of their schedule when rescheduling
Better legal representation
Notice of final outcome, sentence

WHY LISTEN TO VICTIMS?

There are at least four reasons to correct this judicial imbalance at once and institutionalize victims' role in the judicial process.

(1) Victim satisfaction with the judicial process is essential to its operation. Studies have shown that 87 percent of crime comes to police attention only because victims report. If they decide the inconvenience is too great, more crimes will be commited with immunity.

(2) Presently the criminal justice system only exacerbates the loss of control victims experience. Even if, for example, their transportation and parking is paid for, victims must still regain control over what was once their orderly lives. When victims are included and informed only at the state's whim, this loss of control is compounded. Information is an important first step toward reestablishing control but it is not enough. It is critical that at some point in the judicial process victims be given an opportunity to speak up, whether at a pretrial conference, plea negotiation, or sentencing. Establishing a victim's right to participate would help reduce their sense of disorder and demonstrate a newfound respect for victims' rights.

(3) Attorneys frequently object to increased victim participation because they assume such involvement is synonymous with harsh penalties, retribution, obstruction, and delay. There is no evidence to support these assumptions; the evidence that exists suggests the contrary. In Florida, for example, pretrial settlement conferences which include victims, police officers, prosecutors, defense attorneys and judges in deliberations, found that cases were disposed of more quickly and victims did not demand that prosecutors "throw the book" at offenders but rather usually agreed with recommendations. Victims frequently turned down invitations to participate but those police officers and victims who attended pretrial conferences felt more positive toward the courts as a result.

(4) Due process may be extended to victims without compromising defendant's rights. Currently experimental programs exist that alter the judicial process to recognize victims. California, for instance, recently approved a Victims' Bill of Rights, which formalized victims' rights to information, due process and notice. Such legislation will benefit both victims and potential victims. It is a public statement that the law is concerned with more than issues of administration, budget and defendant's rights. Victim-impact statements also provide opportunities for victim participation. Maryland was the first federal jurisdiction to formally approve victim-impact statements and over a year later the program is considered a success.

As Table IV illustrates, many victims' concerns are receiving attention. However, to truly address victims' needs the criminal justice system must not limit reforms to "courtesies and conveniences" or as one dissenter put it, "housekeeping and etiquette." The judicial system must respond to victims' major objections--the criminal justice system's indifference to their personal opinions and interests. Not only do we owe it to victims to provide opportunites, services, and procedures which correct this, but on an administrative level; we depend on victims to help in crime control. It is only fair that victims' rights be taken more seriously. Victims do not ask to conduct or sing solo, they merely ask that their voices be allowed to join in the chorus.

TABLE IV
Summary: Victims' Major Concerns

Victim Need	Existing Programs	Potential Improvements	Benefit
A. Immediate			
Clean up crime site	Rare, New York Services	Adopt	Minimize victim trauma; portray criminal justice system as victims
Replace locks	"	"	Minimize costs to victim
Medical injury	Compensation for qualified	More emergency awards; advertised compensation programs	"
Crisis Counseling	Numerous, especially sexual assault	Institute personal contact with center as police procedure & improve relations with law enforcement	Minimize victim trauma; support victims' passage through criminal justice system
B. Investigation			
Information on Progress of Defendant's Status	Vary - police dept.	Provide to all victims regardless of their usefulness as witness; provide central number to call for information	Buys time for criminal justice system; victim understands police are trying to find assailant
Return Property	Vary; victim-witness	Photograph & return promptly (Kansas)	Minimize inconvenience

Victim Need	Existing Programs	Potential Improvements	Benefit
Minimize Retelling Crime Incident	Individual department's policy	Minimize number of officers who interview victim; tape record statement	Minimize victim trauma
Protection Against Intimidation	Varies in jurisdiction	ABA model statute	Promote witness cooperation
C. Court			
Transportation/ Parking	Prosecutors' offices coordinate; victim-witness units	Advertise; reimburse	Promote cooperation; minimize inconvenience
Financial Loss	Witness compensation;	Advertise; increase witness fee; intervene with employers; extend eligibility requirements to include domestic violence	"
	Restitution	Condition of probation	
Minimize Delay	Little representation of victims' schedules	Equivalent of speedy trial for victims	"
Notice of Postponements	Victim-notification	Central phone number, commitment by prosecutors to be on time for appointments with victims; realistic case scheduling	"

Victim Need	Existing Programs	Potential Improvements	Benefit
D. Substantive			
Understand Court Procedures	Brochures, films, victim-witness court companions	Give brochures to all victims who contact police	Assist victims in re-establishing control; promote cooperation
Information on Case	Bill of Rights; victim-witness	Give to all interested victims; not just those who will be state witnesses	"
Notification of Outcome & Sentencing Date	"	" Pass Victims' Bill of Rights in more states	Provide victims with feeling of closure & control
Protection of Victims' Reputation & Privacy	Ombudsmen	Private counsel; if victim has moved since crime do not ask for current address in court	Promotes goodwill toward criminal justice system; minimize trauma
Better Representation	Ombudsmen; private counsel	Expand prosecutors' responsibility to include victims	Promote victim satisfaction; cooperation
E. Post Conviction			
Recognition of Personal Interest in Case	Victim-impact	Adopt widely	Allow victim participation which creates greater satisfaction with criminal justice system

Victim Need	Existing Programs	Potential Improvements	Benefit
Information on Defendant's Release	Varies	Provide information to interested victims on defendants place of incarceration & parole	Minimize victims' fear; demonstrate awareness of personal costs of crime
Prevent Offender from Financially Benefiting from Crime	Son-of-Sam laws	Adopt widely	Show respect for victims; discourage criminal profit

PART 1

STATEMENT OF

RECOMMENDED JUDICIAL PRACTICES

STATEMENT OF RECOMMENDED JUDICIAL PRACTICES

Adopted at the Plenary Session of the National Conference of the Judiciary on the Rights of Victims of Crime at The National Judicial College, Reno, Nevada, December 2, 1983.

INTRODUCTION

Victims of crime often receive serious physical, psychological and financial injuries as a result of their victimization. Victims of and witnesses to crime frequently must take time off from work and make other personal sacrifices, possibly subjecting themselves to risk of intimidation and injury, in the performance of their civic duty. The criminal justice system depends on the willing cooperation of victims and witnesses in order to perform its primary function of protecting all citizens in this country.

We, as trial judges from the United States, the District of Columbia and the Commonwealth of Puerto Rico, have concluded that a number of steps can be taken to help victims of crime and strengthen their protection from harm for all persons in our society. Because the criminal justice system is composed of separate independent agencies, including the police, prosecutors, practicing defense bar, courts and parole boards, all must work together to accomplish this goal. Moreover, some of our recommendations would require new legislation. We have concluded that it is our responsibility as trial judges not only to make improvements within the judicial system, but to take the initiative in coordinating the various elements of the criminal justice system and take the leadership role that is consistent with the doctrine of separation of powers.

We are confident that our recommendations will greatly help victims of and witnesses to crime by improving the necessary information and services provided, afford them additional protection from harm, and create increased respect for the judicial process by improving their participation in the criminal justice system.

We believe that all of this can be accomplished without impairing the constitutional and statutory safeguards appropriately afforded all persons charged with crime. Our goal is not to reduce the rights guaranteed defendants but rather to assure the rights of victims and witnesses.

I. FAIR TREATMENT OF VICTIMS AND WITNESSES

JUDGES SHOULD PLAY A LEADERSHIP ROLE IN ENSURING THAT VICTIMS AND WITNESSES ARE TREATED WITH COURTESY, RESPECT, AND FAIRNESS.

A. INFORMATION ABOUT COURT PROCEDURES AND FACILITIES

ALL VICTIMS AND WITNESSES IN CRIMINAL CASES SHOULD BE PROVIDED ESSENTIAL INFORMATION ABOUT COURT PROCEDURES AND COURTHOUSE FACILITIES. JUDGES SHOULD ENCOURAGE THE FOLLOWING PRACTICES:

1. That victims and witnesses be provided with information regarding the rights and privileges available to victims and witnesses, and about the physical layout of the courthouse, parking areas, public transportation routes, witness fees, state compensation funds, and other available financial assistance;

2. That court administrators establish reception areas and provide victims and witnesses information about public and community services;

3. That prosecutors explain to victims the criminal justice system insofar as it relates to the victims' cases and what is expected of the victims in the prosecution of the cases.

B. NOTICE TO VICTIMS AND WITNESSES

VICTIMS AND WITNESSES SHOULD BE FULLY INFORMED ABOUT THE CRIMINAL JUSTICE PROCEEDINGS IN THEIR CASES. JUDGES SHOULD ENCOURAGE:

1. That the victims should be able to obtain from appropriate court personnel information concerning the status of their cases;

2. That, if requested, prosecutors inform victims of serious crimes that they may obtain, if possible, timely notice of all bail, pretrial, trial and posttrial hearings, if the victims provide a current address or telephone number;

3. That if requested, appropriate officials, if possible, give timely notice to victims of serious crimes about the release of the defendant from custody, pretrial and posttrial, if they provide a current address and phone number;

4. That victims be informed by prosecutors of the disposition of their cases.

C. SPECIAL SERVICES

JUDGES SHOULD RECOGNIZE THAT VICTIMS AND WITNESSES MAY REQUIRE SPECIAL SERVICES AND SUPPORT, BOTH MATERIAL AND PSYCHOLOGICAL. JUDGES SHOULD ENCOURAGE THE FOLLOWING PRACTICES:

1. Separate waiting areas for defense and prosecution witnesses;

2. Interpreter and translator services for victims and witnesses while they are in the courthouse;

3. An "on call" system to minimize unnecessary trips to court;

4. The expeditious return of evidence;

5. The availability of special transportation and protection to and from the courthouse when witnesses' safety is a consideration;

6. Informing the public generally of the importance of supporting the witnesses' participation in court proceedings and encouraging the adoption of legislation to accord witnesses the same protection from adverse actions by employers as are customarily given jurors and members of the National Guard;

7. Child care services for witnesses;

8. Crisis intervention, counseling and other support services for victims;

9. Ensuring the victim is not charged for rape examinations or other costs of collecting and preserving evidence;

10. Establishing fair and appropriate witness fees.

D. RESTITUTION

JUDGES SHOULD ORDER RESTITUTION IN ALL CASES UNLESS THERE IS AN ARTICULATED REASON FOR NOT DOING SO, WHETHER THE OFFENDER IS INCARCERATED OR PLACED ON PROBATION.

II. VICTIM PARTICIPATION

VICTIMS SHALL BE ALLOWED TO PARTICIPATE AND, WHERE APPROPRIATE, TO GIVE INPUT THROUGH THE PROSECUTOR OR TO TESTIFY IN ALL STAGES OF JUDICIAL PROCEEDINGS.

A. PARTICIPATION MAY INCLUDE BUT IS NOT LIMITED TO THE FOLLOWING:

1. Pretrial release or bail hearings;

2. The propriety and conditions of diversion;

3. The scheduling of court proceedings;

4. Continuances or delays; judges should state on the record the reason for granting a continuance;

5. Plea and sentence negotiations;

6. Sentencing;

7. Victim/offender mediation in nonviolent cases, when appropriate.

B. TO ASSIST VICTIM PARTICIPATION:

1. A victim's advisor should be permitted to remain in the courtroom with the victim, but not participate in the judicial proceedings;

2. Victim impact statements prior to sentencing should be encouraged and considered;

3. The victim or the victim's family should be allowed to remain in the courtroom when permitted by law and when it will not interfere with the right of the defendant to a fair trial.

III. PROTECTION

JUDGES SHOULD USE THEIR JUDICIAL AUTHORITY TO PROTECT VICTIMS AND WITNESSES FROM HARASSMENT, THREATS, INTIMIDATION AND HARM.

A. THIS SHOULD INCLUDE:

1. Encouraging that separate waiting rooms be provided for defense and prosecution witnesses;

2. Requiring that bail be conditioned on the defendants having no access to victims or prosecution witnesses;

3. On showing of good cause, limiting access to the addresses of victims and witnesses;

4. Encouraging that victims and witnesses be advised that if they agree to be interviewed prior to trial by opposing counsel or investigators, they may insist that the interviews be conducted at neutral locations;

5. Encouraging legislation or rules which would require parole boards to advise the judge, the prosecutor, the public, and the victim where appropriate, prior to any hearing on the release of an offender convicted of a serious crime.

B. JUDGES IN PROTECTING SENSITIVE VICTIMS (MINORS, VICTIMS OF SEXUAL ABUSE, FAMILIES OF HOMICIDE VICTIMS, THE ELDERLY, AND THE HANDICAPPED) MAY CONSIDER THE FOLLOWING:

1. Expediting trials of cases involving sensitive victims;

2. Encouraging specially designed or equipped courtrooms to protect sensitive victims, provided that the right of confrontation is not abridged;

3. Permitting the use of videotaped depositions in cases involving sensitive victims, provided that the right of confrontation is not abridged;

4. Allowing sensitive victims to have an individual of their choice accompany them in closed juvenile proceedings, closed criminal proceedings, and in camera proceedings.

IV. JUDICIAL EDUCATION

JUDGES AT THE TRIAL AND APPELLATE LEVELS SHOULD BE ENCOURAGED TO PARTICIPATE IN TRAINING PROGRAMS DEALING WITH THE NEEDS, COMFORTS AND LEGAL INTERESTS OF CRIME VICTIMS.

State, regional and national programs and conferences for judges and nonjudges should be held on methods to improve the treatment of victims and witnesses and to develop solutions to the problems suggested.

V. ALL THESE RECOMMENDED JUDICIAL PRACTICES ARE SUBJECT TO EXISTING RULES OF COURT, STATUTES AND CONSTITUTIONAL PROVISIONS.

CONCLUSION

Judges have a role in improving the treatment of victims and witnesses by reason of their position in the American Judicial System and in their communities.

Judges believe that fair treatment of victims and witnesses can, consistent with constitutional limitations, be brought about by changes in the law, rules of procedure and legislation. Judges believe that they can influence the actions of others, including officers of the court and public officials, in the treatment of witnesses and victims. Judges also can encourage community support for change in the treatment of witnesses and victims. By their attitude and the attitudes of their staff, judges can set examples in the treatment of witnesses and victims.

We urge that our fellow judges exercise their leadership role in improving the treatment of victims and witnesses. Victims of crime should not be victims of the criminal justice system.

A summary of the presentations and panel discussions that took place at the National Conference appeared in The Criminal Law Reporter and is reproduced to provide background for the Recommended Judicial Practices.

STATE JUDGES DISCUSS THEIR ROLE IN HELPING CRIME VICTIMS*

Meeting of 104 trial judges produces "Statement of Recommended Judicial Practices."

The concept of "victims' rights," perhaps an unfamiliar one only a short while ago, has had considerable impact on the criminal justice system in recent years and will lead to even greater changes in the future. This assessment was presented to a group of state judges who met in conference recently at The National Judicial College in Reno, Nevada. The conference was cosponsored by the College itself, the National Institute of Justice (NIJ), and the National Conference of Special Court Judges of the American Bar Association's Judicial Administration Division.

Though not all the items that form the agenda of the "victims' movement" are matters for the judicial branch, some do touch most directly on trial judges. With this in mind the conferees--two trial judges from each state, the District of Columbia, and Puerto Rico--assembled to discuss victims' concerns and adopt recommended procedures for dealing with them.

The guidelines that emerged from the meeting are by no means the first to be developed on this topic. The ABA, at its most recent annual meeting, adopted Guidelines for Fair Treatment of Crime Victims and Witnesses in the Criminal Justice System, 33 CrL 2407, and the President's Task Force on Victims of Crime has issued a lengthy set of recommendations, 32 CrL 2458; both these documents have sections on the judiciary's role. In addition, victims' rights groups are lobbying in the legislatures--and having considerable success.

These developments demonstrate that judges had better take the initiative, the conferees were told by several speakers. As Ernst John Watts, the Judicial College's dean, put it, "We're in a new era of victims' rights." Judges can either lead the change, Watts said, or wait for somebody else--the legislature--to tell them what to do. Along the same line, Judge Pamela Isles, of South Orange County, California, Municipal Court, remarked that the victims' movement "is changing the system faster than any other movement has." NIJ Director James K. Stewart asserted that innovations responding to victims" concerns "mark a turning point in the criminal justice system." And Frank Carrington, of Virginia Beach, Virginia, noted that a related field with a great deal of growth potential is third-party civil litigation by crime victims.

Concern for victims is evident at the highest levels of the judiciary, Justice Florence K. Murray of the Rhode Island Supreme Court pointed out. Last Term, in reversing a decision that recognized a Sixth Amendment right to a "meaningful attorney-client relationship," the U.S. Supreme Court faulted the court below for "wholly fail[ing] to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. * * * [I]n the administration of criminal justice, courts may not ignore the

concerns of victims." Morris v. Slappy, 33 CrL 3013 (1983). This language is encouragement for trial judges to recognize victims' rights, Justice Murray declared.

Stewart reminded his listeners that judges can adopt innovative practices without formal legislation. Such action can serve as an example to others in the criminal justice system, he said.

Stewart also stressed that judges should not underestimate their role as "embodiments of justice." Research into the perceptions of victims and witnesses shows that the judge's actions are very important; for example, victims derive a good deal of reassurance from observing a judge admonish a defendant.

WHAT OF DEFENDANTS?

Assistant Attorney General Lois Haight Herrington provided a survey of the issues along with an account of the findings of the President's Task Force and a summary of its recommendations. She called for a "complete refocusing of the criminal justice system," pointing out that it is, after all, the original victimization that sets the process in motion.

Talk of "refocusing" or "balancing" the system inevitably brings up the question of what effect changes on behalf of victims will have on the rights of defendants. Herrington said it is a "basic proposition" of such calls for change that "we don't want to touch any of the criminal's rights," and that it isn't necessary to do that in order to provide rights for victims.

But while rights may not be affected, tactics could well be. For example, one part of the process upon which Herrington focused was the preliminary hearing--"one of the most egregious parts of the system," she called it. In some jurisdictions, according to the Task Force's report, the preliminary hearing has become a "minitrial"; victims are grilled for hours by defense counsel, Herrington said. But the Constitution does not guarantee the right of confrontation at this stage of the process, she continued. In line with the Task Force's recommendations, she advocated the use of hearsay at preliminary hearings.

Several victims who addressed the judges mentioned another weapon in defense counsel's arsenal, trial postponements, as one of the most frustrating aspects of their ordeal. The victim of a robbery-rape-kidnapping asserted that her life "was basically put on hold" because of the numerous postponements of her assailant's trial. Other speakers noted that defense attorneys are well aware of the emotional difficulties continuances cause and use them as means to induce the victim to give up the prosecution. Judge Isles remarked that preventing such manipulation of continuances is a particularly difficult task for a judge. It was also noted that a tightening up on the availability of continuances would effect more than just the defense camp; one of the victims told of a postponement occasioned by the trial judge's acceptance of a speaking engagement.

But legislative help may be on the way in some jurisdictions. Dr. Marlene A. Young, Executive Director of the National Organization for Victim Assistance, noted that Wisconsin and Nevada have begun to look at the concept of a "speedy trial act" for victims.

"DEPERSONALIZATION"

The judges were urged by several speakers to combat the "depersonalization" of victims. It's time, they were told, to "bring the victim, as a person, into the system." Several of the victims spoke, with obvious resentment, of being treated as "an object" or "just evidence." Judge Isles noted that "primarily, victims want a voice and want us to be responsive to their loss." This theme resurfaced in remarks by Clark County (Las Vegas) District Attorney Robert Miller, concerning prosecutors' duties with regard to victims. The system tends to depersonalize the criminal act, he noted, and the person with most at stake is left behind. My job, Miller said, is to represent "all the people" but to pay particular attention to the victim.

Assistant Attorney General Herrington recommended "compassion" toward victims and gave examples indicating that compassion can take many forms. On one hand it can be a matter of appearances, such as making clear to the victim that the "victim" impact statement" has been read and considered. But compassion can be outcome-determinative too; it means, for example, not dismissing a case because of prosecutorial error if the defendant's rights are not implicated.

"IMPACT STATEMENT"

A basic premise of victim's movement groups, such as Mothers Against Drunk Driving (MADD), is that the effect of the crime on the immediate victim and the victim's family should be taken into account when the judge decides on a penalty. To this end those groups and many others advocate submission of a "victim's impact statement" to the judge for consideration during sentencing. The guidelines eventually adopted by the judges "encouraged" the use of such statements (recommendation II.B.2).

But unresolved details remain. Herrington noted that the statement is sometimes prepared by the probation officer, who may feel a need to be an advocate for the defendant. On the other hand, Robert Calderone, Nevada's Chief Probation Officer, defended the practice of having the report prepared by his office. It was noted that trial courts--even judges in the same jurisdiction--are not in agreement as to whether they would prefer to hear directly from victims or to have statements filtered through the probation department. And one of the victim-speakers noted that even an impact statement doesn't present the "whole picture."

NIJ Director Stewart called for changes in the traditional practice of excluding the victim from deliberations concerning the offender's fate. Studies conducted in three courts have shown, he said, that victims are not unreasonable or obstructive in plea bargaining, and that revenge doesn't seem to be a major factor for them. NIJ, he noted, is currently researching a court program in parole and sentencing decisions.

Justice William Callow, of the Wisconsin Supreme Court, who formerly sat on the trial bench, noted that he could not accept a plea bargain until it was discussed with both the arresting officers and the victim. This ensured that the bargain was a reasoned one and was not reached casually. District Attorney Miller said he has a policy of requiring "consent" to pleas.

VICTIM-OFFENDER CONFRONTATION

Criminals as well as judges need to understand what their acts do to their victims, Justice Callow noted. Recounting his experience as a trial judge, Justice Callow said that perpetrators of property crimes often thought they "did the victims a favor"--they were convinced that the victims got more back in insurance proceeds than they lost. So, he said, I began to arrange confrontations, monitored by probation officers, between victims and offenders at which the impact of the crime was discussed. The victims made clear that the objects they lost, even if insured, were often of immeasurable sentimental value. More important, they made the offenders understand how the crime robbed them of their sense of security. As a result, all the offenders appeared to be impressed with the wrongfulness of their acts, Justice Callow said. On the other side, the victims tempered their anger and frustration by seeing that the offenders had some redeeming points.

The program was so successful, the speaker said, that none of the offenders reappeared in court on burglary charges. The public perception of the court also improved. But the program was limited to nonviolent offenders and should not be used in cases of violence, Justice Callow added.

He also noted that restitution was always discussed at these confrontations. Defense counsel is in a better position at sentencing, he pointed out, if it can be reported that the victim and defendant have met, resolved their differences, and agreed on restitution.

SENTENCING PRACTICES

Representatives of several lobbying groups addressed the conferees and expressed criticism of various current judicial practices. High on their list of perceived evils was lenient sentencing, particularly in cases of child molestation and offenses involving drunk drivers. Patricia Linebaugh, Director of Society's League Against Molestation (SLAM), asserted that while her group has succeeded in increasing the penalties in California for sex offenses against juveniles, the courts haven't used the new sanctions "because they don't recognize child molestation as a serious problem." She was challenged by one of the judges but maintained her position; courts don't know how to deal with child molestation, she said, and they are extremely lenient, rarely imposing prison terms on first offenders.

Candy Lightner, President of MADD, advocated getting around the leniency of trial judges by the enactment of mandatory sentences. Similarly, she said, we propose to attack the problem of overly lenient plea bargains by limiting the prosecutor's authority to bargain in certain kinds of cases.

One of the judges objected to mandatory sentences in all cases. Suppose, he said, the defendant's family is in the car and they die; why can't I take this "punishment" into account? Also, he asked, why shouldn't I be allowed, in DWI cases, to consider the injury or damage that actually resulted?

Lightner responded to the latter point by saying that when judges had discretion they didn't use it. We found, she said, that all DWI defendants were given the minimum fine and straight probation no matter what the facts of the case were.

Another issue in molestation cases stems from judicial attitudes toward youthful witnesses. Several speakers urged rejection of what they saw as the commonly held belief that young witnesses are generally untruthful in their allegations of sexual molestation. Dr. Patricia A. Resick, Associate Professor at the University of Missouri's psychology department, maintained that young children don't lie about sexual assaults; when they recant their complaints it's because they have been told that their accusations will lead to a family breakup or other stress. Judge Isles, too, disputed the idea that young sex-offense victims are just engaging in fantasy. She added that sexual assaults will color the victim's life, so judges shouldn't expect the victim to "react like a normal kid."

Pretrial release is another area of concern for many victims' groups. Betty Jane Spencer, President of Protect the Innocent, noted that her group has worked to change laws on bail so that more than just the defendant's likelihood of showing up for trial may be considered.

RECOMMENDATIONS

In between sessions with these speakers, the judges met in small groups to formulate their recommendations. A drafting committee synthesized the subgroups' efforts, and the entire group then met in plenary session to approve the final set of guidelines. The conferees have been charged with the task of urging implementation of the recommendations in their own jurisdictions; in addition, the recommendations will be submitted to the ABA for production of a set of ABA standards.

The recommendations reflect the judges' consensus that on many issues their role is to "encourage" certain practices rather than to take responsibility for them in the name of the judiciary. For example, the job of providing victims with information about the stages of the criminal process falls to the prosecutor.

Not all the issues discussed at the conference were mentioned in the recommendations. For example, participation by victims in the sentencing process was approved, but the recommendations do not address the question of sentencing in general.

PART 2

RECOMMENDED JUDICIAL PRACTICES WITH COMMENTARIES

I. FAIR TREATMENT OF VICTIMS AND WITNESSES

§ 2.1 JUDGES SHOULD PLAY A LEADERSHIP ROLE IN ENSURING THAT VICTIMS AND WITNESSES ARE TREATED WITH COURTESY, RESPECT AND FAIRNESS.

A. INFORMATION ABOUT COURT PROCEDURES AND FACILITIES

ALL VICTIMS AND WITNESSES IN CRIMINAL CASES SHOULD BE PROVIDED ESSENTIAL INFORMATION ABOUT COURT PROCEDURES AND COURTHOUSE FACILITIES. JUDGES SHOULD ENCOURAGE THE FOLLOWING PRACTICES:

1. That victims and witnesses be provided with information regarding the rights and privileges available to victims and witnesses, and about the physical layout of the courthouse, parking areas, public transportation routes, witness fees, state compensation funds and other available financial assistance;
2. That court administrators establish reception areas and provide victims and witnesses information about public and community services;
3. That prosecutors explain to victims the criminal justice system insofar as it relates to the victims' cases and what is expected of the victims in the prosecution of the cases.

Commentary

§ 2.2 Need for Information About Facilities, Services and Financial Assistance.

Victims generally are ignorant of the courthouse environment, the rules to be followed, and the services and assistance available. To most victims, involvement in the court system is an unfamiliar, confusing and intimidating experience. Providing them with relevant information may lessen these tensions and increase respect for the judicial system. For example, a walk-through tour of the courthouse, reinforced by a comprehensive brochure can overcome many anxieties. See The Victim Service System: A Guide to Action 1983, NOVA p. 113. The American Bar Association's publication, Reducing Victim/Witness Intimidation: A Package urges that courts prepare and distribute witnesses' handbook containing needed information. Two examples of simple but adequate brochures may be found in Appendix 3. Some courts provide more extensive handbooks.

Since courthouses tend to be in the downtown section of cities, many victims who drive to the courthouse have no knowledge of where to obtain parking, free or otherwise. Information about free or reserved parking is needed. For those using public transportation, information about routes and schedules would be similarly useful. Information about other forms of victim assistance (such as witness fees or victim compensation programs for which the victim may be eligible) should be available in the courthouse. This will not directly affect the victim's participation in the court process, but it may be the last opportunity to ensure that the victim is aware of such programs. Thirty-nine states, the District of Columbia and the Virgin Islands have state-funded victims compensation programs, but many of these are poorly advertised and unknown to victims. Even in those few states where legislation requires law enforcement agencies to notify victims of the compensation program, victims may easily be missed. The cost of posters around the courthouse, printed material on application procedures and requirements and perhaps a mention in the witness handbook would be minimal.

§ 2.3 Court reception areas and information.

A number of courthouses around the country are providing information such as that noted above. Some do this through means of inexpensive witness handbooks or other printed materials. The court should provide a victim and witness reception center which furnish information, both verbal and written, to victims. Where these centers exist they are highly visible as the victim enters the courthoue and are often staffed by volunteers.

None of the suggested services involve constitutional or other legal issues, and are of minimal costs. Even these expenses can be, and are, frequently reduced by the use of senior citizens and other volunteers.

§ 2.4 Need for Information About the Criminal Justice System

Victims who have been required to participate in court proceedings deserve explanations of how the court system works and how they fit into the system. They should know, for example, that the process is an adversarial one between the state and the defendant and that their testimony is essential to the fair resolution of the case. Victims should be able to learn about the procedure for scheduling of

the phases in the criminal process, and be given a general understanding of bail hearings, arraignment, pretrial, trial events, and sentencing hearings. An explanation of these procedures is necessary to identify to victims events in which they have an interest and may wish to attend.

The ABA Guidelines for Fair Treatment of Crime Victims and Witnesses in the Criminal Justice System, Recommendation 2, recommends that an information system includes what "the victims can reasonably expect from the system and what the system expects from them."

§ 2.5 IB. NOTICE TO VICTIMS AND WITNESSES

VICTIMS AND WITNESSES SHOULD BE FULLY INFORMED ABOUT THE CRIMINAL JUSTICE PROCEEDINGS IN THEIR CASES. JUDGES SHOULD ENCOURAGE:

1. That the victim should be able to obtain from appropriate court personnel information concerning the status of their cases;
2. That, if requested, prosecutors inform victims of serious crimes that they may obtain, if possible, timely notice of all bail, pretrial, trial and posttrial hearings, if the victims provide a current address or telephone number;
3. That if requested, appropriate officials, if possible, give timely notice to victims of serious crimes about the release of the defendant from custody, pretrial and posttrial, if they provide a current address and phone number;
4. That victims be informed by prosecutors of the disposition of their cases.

Commentary

§ 2.6 Information about case status

When victims are required to testify at criminal proceedings, they are provided advance notice of date, time and place. However, victims' interests are not limited to those proceedings where their presence is necessary to the prosecution of the offense. Advance notice of other significant proceedings is also important whether or not the victim has the right to attend or participate. Timely information as to the outcome of any important phase of the criminal process is similarly important, for it enables the victim to "close" the case mentally and to be free of additional, disruptive demands by the system. Prior and prompt notification of any delays or the rescheduling of such events is one of the primary concerns of victims, just because it is often not given. Finally, knowledge of defendant's release or incarceration may affect the victim's own plans about where he or she will live or work.

§ 2.7 Information about proceedings

Victims do not have the expertise or time to keep themselves aware of the scheduling of events in their cases. An "automatic" notification system, utilizing modern information processing systems to ensure that victims who provide their current telephone number and address, are given timely, pertinent information, is a cost-effective remedy.

Recent legislation has recognized this need and has required prior notification of those legal events in which the victims' participation is proper. For example, Indiana and Minnesota require notice to the victim prior to the court's consideration of plea recommendations (see Appendix 4h), since victims in these states may be present at the court's consideration of plea agreements. California and Connecticut require advance notice concerning sentencing because victims in those states may present statements at the hearing.

Arizona, Arkansas, California, Massachusetts, Oklahoma, and New Mexico require advance notice to victims regarding the scheduling of parole hearings (though the New Mexico statute does not provide for victim participation in the hearing) (see Appendix 4j). The Attorney General Guidelines issued pursuant to the Victim and Witness Protection Act of 1982 call for notice to the victim of sentencing and parole hearing dates.

§ 2.8 Information about release of defendant

Victims or witnesses might be in danger of harm or intimidation when a defendant is released from custody. The judges attending the conference recognized this fact and concluded that it is essential that victims be informed of such release whenever it might occur. Oklahoma requires victim notification as soon as practicable following a parole board's recommendation and the governor's approval or denial of parole. Wisconsin calls for notification when felons are released from custody, as do the Attorney General's Guidelines.

§ 2.9 Information about disposition

Legislation which encourages notification of the outcome of a proceeding is a part of the Washington and Wisconsin "Bill of Rights for Crime Victims and Witnesses" which call for the victims to be informed of the final dispostion in the case. The Attorney General's Guidelines require that U.S. Attorneys inform victims of serious crimes of the sentence imposed in the case and the date on which the defendant may be eligible for parole.

§ 2.10 IC. SPECIAL SERVICES

JUDGES SHOULD RECOGNIZE THAT VICTIMS AND WITNESSES MAY REQUIRE SPECIAL SERVICES AND SUPPORT, BOTH MATERIAL AND PSYCHOLOGICAL. JUDGES SHOULD ENCOURAGE THE FOLLOWING PRACTICES:

1. Separate waiting areas for defense and prosecution witnesses;
2. Interpreter and translator services for victims and witnesses while they are in the courthouse;
3. An "on call" system to minimize unnecessary trips to court;
4. The expeditious return of evidence;
5. The availability of special transportation and protection to and from the courthouse when witnesses' safety is a consideration;
6. Informing the public generally of the importance of supporting the witnesses' participation in court proceedings and encouraging the adoption of legislation to accord witnesses the same protection from adverse actions by employers as are customarily given jurors and members of the National Guard;
7. Child care service for witnesses;

8. Crisis intervention, counseling and other support services for victims;
9. Ensuring the victim is not charged for rape examiniations or other costs of collecting and preserving evidence;
10. Establishing fair and appropriate witness fees.

Commentary

§ 2.11 Secondary victimization: the allegation of many victims that they are victimized twice--once by the criminal and again by the criminal justice system--is a common one. That this "secondary" victimization is unintentional makes it no less real, nor does it absolve the various criminal justice agencies from seeking positive solutions. A fair criminal justice system must alleviate the very real monetary and psychic costs suffered by victims and witnesses as a result of their participation in the criminal process. The judges attending the National Conference on the Rights of Victims of Crime recognized that certain specific services should be provided.

§ 2.12 Separate waiting areas: Victims and prosecution witnesses often must wait for court proceedings in the same room as defendants and their "associates." These common waiting rooms have created a danger of witness intimidation. Even where the intimidation effort is not successful, the exposure may have a substantial traumatic effect on the victim or witnesses.

The problem is significant. A 1981 study by the Victim Services Agency (VSA) in Brooklyn found that even where the courthouse had separate witness reception centers 15 percent of all instances of intimidation occurred in the courthouse. That VSA study (Witness Intimidation: An Examination of the Criminal Justice System's Response to the Problem) thus strongly recommended that separate victim and prosecution witness waiting rooms be augmented by separate entrances and elevators.

The President's Task Force on Victims of Crime, Judicial Recommendation 3 states that, "Judges or their court administrators should establish separate waiting rooms for prosecution and defense witnesses." Reducing Victim/Witness Intimidation: A Package, ABA (1981), Recommendation 6 adds:

> Of slightly lesser importance is to have those [separate waiting] facilities include some provisions for child care, reading material and the like. "On call" witness systems, while not a primary subject of this Package, can also be utilized to reduce witness intimidation by reducing the requirement that the witness spend substantial time at the court facility.

In addition, several states, e.g., Oklahoma, Washington and Wisconsin victims' "Bills of Rights" include the right to a secure waiting area within the courthouse, if feasible.

§ 2.13 Interpreter and Translator Services: Many victims of crime do not speak or understand English. While prosecutors may see to it that translation services are available during the victim's testimony, non-English speaking victims also require translation services to help them find the courtroom and to utilize whatever other services for victims exist in the courthouse. The fact that victims do not speak English should not exclude them from any assistance which would otherwise be provided.

§ 2.14 "On call" Witness Notificaton: The subpoena process used in most jurisdictions is both onerous to the victim and costly to the system. Victims and witnesses are often embarrassed when a uniformed officer appears at their home or place of business to present them, in presence of their neighbors or co-workers, with a subpoena to appear in court. Moreover, reliance on personal service results in victims and witnesses failing to receive timely notice of scheduling changes which invariably plague criminal proceedings. Victims thus waste much valuable time waiting in the courthouse for delayed proceedings or making unnecessary trips to the courthouse for proceedings which have been continued. Witnesses' costs escalate as a consequence of the delays and postponements, as does the witness "drop out" rate.

Personal subpoena service is not really necessary for victims and witnesses except in unusual cases. Mailed subpoenas which notify victims and witnesses that they will be allowed to remain "on call" for court appearances spare victims both from long courthouse waits as well as those unnecessary trips occasioned by continuances. A side benefit to the system is that it decreases the number of witnesses using the court's waiting facilitites at any one time.

Many jurisdictions supplement their "on call" system by the use of phone numbers which victims may call to receive the latest scheduling information. Commonly there is a recorded message for the evening which states both the next day's required appearances and any schedule changes. This "on call" and phone notification system has proven to be an extremely useful scheduling tool. In fact, the use of such a combined mail and telephone subpoena and scheduling system has proven more efficient and therefore more cost-effective not only for the victims, but for the criminal justice system.

The President's Task Force on Victims of Crime recommends that "Prosecutors and courts. . . cooperate in implementing an effective on call system." See Prosecutor Recommendation 5 (page 68) and Judiciary Recommendation 2 (page 74). The ABA Guidelines for Fair Treatment of Crime Victims and Witnesses in the Criminal Justice System (#4) call for notification to victims and witnesses of scheduling changes which will affect their required attendance at criminal justice proceedings. The Victim Service System: A Guide to Action, 1983, NOVA at page 117 describes automatic "telephone alert" systems of notification being used today in some jurisdictions.

§ 2.15 Expeditious return of evidence: In many instances, victims of theft are still without their property months and sometimes years after it has been recovered. They are thus victimized not only by the criminal but also by the criminal justice system which retains possession.

The rationale for maintaining custody of recovered stolen property generally does not outweigh victim's right to and need for return of his/her property.

Victims have a real psychological need for return of a thing of value taken without permission. Prosecutors may fear arguments based on objections to an improper chain of custody or the actual loss of evidence; they may want the advantage derived from the dramatic effect of showing to the jury the actual property stolen. But photographs or other facsimilies have nearly the same evidentiary value as the stolen property. Further, the use of photographs, though not costless, does outweigh the warehousing expense if the state keeps the property. On balance then, the state's retained custody of stolen property can only occasionally be justified.

Several states have enacted "Bill of Rights" for crime victims and witnesses which recognize the victims' right to prompt property return. Washington and Wisconsin, for example, state that "if feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis and property the ownership of which is in dispute shall be returned to the person within ten days of being taken." Moreover, Kansas requires seized property be photographed. Since the photograph is by Kansas statute admissible as evidence, the property may be returned to its owner. Maryland and Minnesota also allow photographs of stolen property to be substituted for the acutal property for evidentiary purposes in most instances.

The ABA Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System, paragraph 13, states that "Victims of property crimes should have their property returned as expeditiously as possible, e.g., through photographing such property for use in evidence." Finally, the President's Task Force on Victims of Crime recommends that police and prosecutors jointly develop methods for speedy return of the victims' property (Police Recommendation 2, Prosecutor's Recommendation 6), and that judges cooperate in making expeditious pretrial rulings on the admissibility of such photographs (Judiciary Recommendation 9)).

§ 2.16 Escort services: Victims who are bewildered by the courthouse or are apprehensive of the proximity of the defendant or his associates would be considerably relieved if they had some court official to escort them to and from the courtroom and to stay with them while waiting to testify. The escort need not be an employee of the court; volunteers are especially suited for such a role, provided they are clearly identifiable as court representatives.

§ 2.17 Efforts to protect from adverse employer/creditor actions: Whether or not they pay victim employees during their absence from work to attend court, many employers are extremely unhappy with the employee absence. Employers may not only resent the loss of work, but also feel that either a victim employee has exaggerated the need to be in court or that the employee is somehow personally responsible for the crime occasioning the absence. As a result, victims may not only lose considerable wages to attend court proceedings, but their jobs as well. Creditors, too, are often unsympathetic to victims' resulting loss of wages. In both instances, official intervention, even if only in a form letter from the judge, would both provide credence to and alleviate the victim's plight.

Victims' "Bill of Rights" in Oklahoma, Washington and Wisconsin state that victims and witnesses have the right to employer intercession services that encourage employers to minimize the loss of pay and other benefits of employees. Other states go further. Illinois, Nevada, New York and Wisconsin, for example, have laws prohibiting employers from dismissing or penalizing employees absent from work in response to subpoenas in criminal cases. The Nevada statute is reproduced in Appendix 4. Illinois and New York, however, specifically allow wages to be withheld (as does Wisconsin, unless the crime is employment related).

On the federal level, the Attorney General's Guidelines issued pursuant to The Victim and Witness Assistance Act of 1982 require notification of an individual's employer if the employee's cooperation in the prosecution of the crime caused absence from work, and notification to creditors if cooperation affects ability to make timely payments. The recently adopted ABA Guidelines for Fair Treatment of Crime Victims and Witnesses in the Criminal Justice System is in accord.

The Model Sentencing and Corrections Act has also recognized the need for provision of such services. It provides:

Section 5-103. [Victim Attendance at Investigation or Criminal Trial Process.]

(b) A person may not discharge a victim from employment because of absences from the employment caused by attendance at a stage of the investigation or criminal trial process at the request of a law office or the prosecuting attorney.

(c) A person who violates this section is liable in a civil action to the victim for loss caused by a wrongful discharge and reasonable attorney's fees and he may also be required to show cause why he should not be held in contempt of court.

§ 2.18 Child care: Victims and witnesses with children find court appearances particularly troublesome since they must obtain care for their children while in court. Often they learn they must appear on relatively short notice. Frustrations further mount when the appearance is cancelled after a babysitter has been found. Secure child care facilites should be available on or near the courthouse premises. The service should be free, e.g., through use of volunteer babysitters; in no case should cost prohibit its use by poor victims.

§ 2.19 Psychological assistance: Many crime victims, especially rape victims and children, suffer severe mental trauma as the result of defendant's actions. As a consequence such victims may require pyschological counseling. Often such counseling is necessary to ensure that the victim is capable of giving accurate trial testimony. This may involve providing professional psychiatric counseling, or the staffing of crisis centers. See generally, the President's Task Force on Victims of Crime, Mental Health Community Recommendation 4 which states, "The mental health community should work with public agencies, victim compensation boards, and private insurers to make psychological treatment readily available to crime victims and their families."

§ 2.20 Payment for evidence collection, particularly post-rape examination: Victims of most crimes are not required to pay for evidence collection. Rape victims who must pay for their examiniation are a notable exception. For a greater number of rape victims, the cost is a psychological as well as financial burden. Even if the victim appreciates the need for physical evidence and willingly undergoes the examiniation, she may regard the fact that she must pay for it a subtle implication of the system's skepticism of her allegations.

In recent years, some efforts have been made to remedy this situation. Legislation in Oklahoma requires interviewing officers to inform rape victims that they have the right to a free medical examination for the procurement of evidence to aid in the prosecution of their assault. New Mexico appropriated moneys to provide sexual crime evidence collection kits to law enforcement agencies and hospitals throughout the state. The Maryland statute which provides that such examinations

are free of charge to the victim appears in Appendix 4. Though the President's Task Force on Victims of Crime, Executive and Legislative Recommendation 12, suggests the use of budgeting legislation, rape examination payments do not appear to require formal legislation. Existing police or prosecutor budgetlines should be susceptible to judicial pressure to pay these costs.

§ 2.21 Witness fees: The provision of services to victims and witnesses, discussed above are meant to ease the financial burdens on witnesses arising from their cooperation with the criminal justice system. This need in part arises from state's failure to provide witness fees which adequately reimburse witnesses for the true costs of their involvement. As Victim Service System: A Guide to Action-1983, NOVA, notes as an example on p. 134:

> The fifty cents offered to witnesses in Connecticut many decades ago was at the time fair to the point of being generous, but unfortunately the legislature there has never factored in a cost-of-living escalator to the stipend so that it is the state's token of appreciation today.

Very few states provide as witness fees anything approaching the actual monetary costs of lost wages, child care, parking, meals, and if the witness is from out of town, lodging. Yet the states freely use judicial process to compel the attendance of witnesses. Judges should certainly urge remedial legislation.

§ 2.22 ID. RESTITUTION

JUDGES SHOULD ORDER RESTITUTION IN ALL CASES UNLESS THERE IS AN ARTICULATED REASON FOR NOT DOING SO, WHETHER THE OFFENDER IS INCARCERATED OR PLACED ON PROBATION.

Commentary

§ 2.23 Victims who incur financial loss as the result of crime are usually uninsured and also lack the resources to bring a civil action against the offender. Even if resources are available, civil actions are usually impractical. Studies show that in 94% of crimes involving financial loss the amount is less than $500 and in 78% of the crimes the amounts are less than $50. There are, or course, cases in which the amounts involved would appear to make civil suits practical, but in the typical case the offender, particularly after apprehension, is poor, unemployed, and "judgment proof." Even if the defendant is solvent, there is little chance of achieving civil recovery before the disposition of the criminal charges. The only effective chance the victim of the offense ordinarily has for recovery of his or her losses is that some arrangement be made for restitution as a part of the plea bargaining process or in the sentence itself. It is extremely important to victims of violent crime that their restitutional needs be given appropriate consideration; this is certainly one of the central concerns in the literature on victims rights.

Statutes of several states, the President's Task Force on the Victims of Crime, and the Victim and Witness Protection Act of 1982 all indicate that restitution should be given high priority in sentencing whenever the victim of the crime has suffered financial loss. The comprehensive Utah statute providing for restitution has been reproduced in Appendix 4c. See also Code of Alabama, Vol. 12A, 1983 Supplement, §§ 15-18-67 and § 15-18-78.

There are many legal issues in this area, but they are essentially procedural in nature and are only highlighted here. A thorough treatment is found in Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 Miss. L.J. 515, pp. 529-550 (1982).

The power of the court to include restitution to the victim as a part of the sentence or as an order related to sentencing existed early in the common law, and did not fall into disuse until the civil and criminal processes became conceptually separate as the common law developed. Richard E. Laster, Criminal Restitution: A survey of its Past History and an Analysis of its Present Usefulness, 5 U. of Richmond Law Rev. 71 (1970). Even after the two systems became separate it was not uncommon (and is not uncommon today) for police or prosecutors to elect to take action depending on whether restitution had been made.

The practice of including restitution to the victim or the victim's survivors has been revitalized by state legislation. The statutes are so varied in their terms and procedures that examination of the sentencing statute of the particular jurisdiction is required to determine the power of a court to order restitution.

One of the questions that arises in statutory construction is who is a "victim" to whom restitution can be ordered? An extremely strained view of who is the victim of a crime is found in People v. Daniels, 447 N.E.2d 508 (Ill. App. 1983), in which it was held to be improper to order restitution to a wife for property that was in her husband's car which the defendant was convicted of stealing. When a similarly narrow view that the survivors of a person killed in an automobile accident were not victims of the vehicular homicide of which the defendant was convicted was reached in State v. Stalheim, 552 P.2d 829, 79 A.L.R. 3d 969 (Or. 1976), the legislature promptly amended the statute. See State v.Dillon, 637 P.2d 602 (Or. 1981). The holding in Daniels, supra, certainly does not reflect the modern trend, which is to give a more practical, common sense construction to the term "victim."

A similar issue is whether restitution can be ordered only for losses caused by the precise offense of which the accused is convicted. Again, some jurisdictions early took the very narrow view that restitution is authorized only for the offense of conviction. People v. Becker, 84 N.W.2d 833 (Mich. 1957) (no restitution for injured pedestrian because conviction was for only leaving the scene of an accident). That view does not reflect the modern trend and is probably not even the law in Michigan today. See State v. Pettit, 276 N.W.2d 878 (Mich. App. 1979) (restitution for funeral expenses proper although conviction for driving while impaired). In re Application of Trantino, 446 A.2d 104 (N.J. 1982), contains an excellent discussion of restitutional interests of survivors of homicide victims. The court in United States v.McLaughlin, 512 F. Supp. 907 (D. Md. 1981), ordered restitution for total embezzlement although 4 of 5 counts dismissed as result of plea bargain.

Another problem occurs because of the general sentencing scheme of the jurisdiction. For example, in Virginia restitution can be required only as a condition of probation and can be applied only after the defendant is released. However, a Virginia defendant can be placed on probation only if be has made partial restitution or submits to the court a plan for restitution that appears to be "feasible"

under the circumstances. Code of Virginia 4A § 19.2-305.1. Sentencing schemes of many states allow imposition of restitution even though the defendant is imprisoned. Some states permit periodic imprisonment and allow restitution to be made a condition for entry in such a program. Nearly all jurisdictions provide that restitution can be made a condition for probation. Obviously total incarceration impairs the ability of the defendant to make restitution. The judges attending the National Conference on the Rights of Victims of Crime concluded that if restitution was appropriate it ought to be adjudged regardless whether the defendant was imprisoned and lacked a present ability to pay. It was their feeling that although the restitution order might be unenforceable at the time of sentencing, the financial condition of the defendant might improve so that it might later become enforceable.

Generally, courts have limited awards for restitution to readily determined or liquidated amounts, as extended or contested hearings may unnecessarily delay the sentence. However, there are no strict procedural requirements for determining the appropriate amount of restitution and it may be based upon information, even hearsay, in the presentence report. Cannon v. State, 272 S.E.2d 709 (Ga. 1980); State v. Smith, 658 P.2d 1250 (Wash. App. 1983).

The financial ability of the defendant to pay must be taken into consideration in any order for restitution, otherwise constitutional problems of imprisonment for debt or involuntary servitude arise. Bearden v. Georgia, 461 U.S. ___, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

A federal district court has recently held that the provision of the Victims and Witness Protection Act of 1982 that "The Court" shall determine the loss to the victim and order restitution in that amount unconstitutionally deprives the defendant of the jury trial in civil cases guaranteed by the Seventh Amendment of the Federal Constitution. United States v. Welden, 568 F. Supp. 516 (N.D. Ala. 1983). Even if that holding is upheld, the Seventh Amendment has not been held to apply to the states and determination of the amount of restitution by a state court without a jury is permissible unless there is a violation of a state constitutional provision. Hardware Dealers Mutual Fire Ins. Co v. Glidden Co., 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931); Bringe v. Collins, 335 A.2d 670 (Md. 1975); Cannon v. State, 272 S.E.2d 709 (Ga. 1980); State v. Smith, 658 P.2d 1250 (Wash. App. 1983).

Restitution should be considered and included as a part of the sentence when appropriate. It is only fair to the victims and just to the offender that he or she be required to repay the loss suffered. It has often been noted that apart from the justice of compensation for injuries, the requirement that restitution be made has a very pronounced rehabilitative effect. It makes the offender appreciate the extent of the harm he or she has caused and causes him or her to realize that the harm was caused to a real person.

While the ABA Standards for Criminal Justice provide that the sentencing decision may properly deal with making restitution of the fruits of the crime or reparation for the loss or damage caused by the crime, the Commentary to Standard 18-2.3 at page 18-99 cautions that the "criminal justice system should not be employed to supplement a civil suit or . . . to perform [the] functions of a collection agency." This expression of policy should not be taken to limit in any way the authority of the court to include reparation or restitution in the sentence adjudged.

The President's Task Force on Victims of Crime recommends, and the Victims and Witnesses Protection Act of 1982 requires, that the court should state on the record its reasons for not including restitution in any case in which there has been financial loss. The judges attending the National Conference on the Rights of Victims of Crime agreed.

II. VICTIM PARTICIPATION

§ 2.24 VICTIMS SHALL BE ALLOWED TO PARTICIPATE AND, WHERE APPROPRIATE, TO GIVE INPUT THROUGH THE PROSECUTOR OR TO TESTIFY IN ALL STAGES OF JUDICIAL PROCEEDINGS.

A. PARTICIPATION MAY INCLUDE BUT IS NOT LIMITED TO THE FOLLOWING:

1. Pretrial release or bail hearings;
2. The propriety and condition of diversion;
3. The scheduling of court proceedings;
4. Continuances or delays; judges should state on the record the reason for granting a continuance;
5. Plea and sentence negotiations;
6. Sentencing;
7. Victim/offender mediation in nonviolent cases, when appropriate.

Commentary

§ 2.25 Victim participation in pretrial or bail hearings

Victims of violent crimes are naturally and understandably fearful after the offender has been apprehended, charged, and released. Actual or perceived intimidation of the victim and witnesses or their family or friends is more prevalent than usually thought, according to the Victim Services Agency statistical survey made of the Brooklyn courts in 1981. There is also a real danger in many cases that further offenses might be committed against the victim. It often appears to the victim that the perpetrator has been automatically released prior to trial and is allowed to threaten further harm. Victims feel they are defenseless and that they should at least be allowed to appear before the court to attempt to prevent or have conditions placed on the release of the defendant.

The traditional view in nearly all jurisdictions is that pretrial incarceration or denial of bail is justifiable only if such restraint is required to assure the defendant's presence at trial. The Eighth Amendment to the Constitution of the United States provides that excessive bail shall not be required and, with the due process clauses of the Fifth and Fourteenth Amendments, protects the "traditional right to freedom before conviction (permitting) the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951).

More recently the view has been advanced that a proper function of the denial of bail is the protection of society and the prevention of further offenses by the defendant. The pure form of this view, which is often referred to as "preventive detention," is that pretrial release may be denied if it reasonably can be predicted that if released the defendant will pose a significant danger to the community or the victim because of the seriousness of the offense for which clear proof is available or because of the defendant's past criminal record. Although a system of preventive detention with elaborate procedural safeguards has been upheld in the District of Columbia United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), cert. denied, 455 U.S. 1022 (1982), most jurisdictions have not adopted preventive detention as a justification for denial of pretrial release. See the excellent discussion of this issue in Huihui v. Shimoda, 644 P.2d 968 (Hawaii 1982), which held to be unconstitutional a statute that precluded bail for a "serious crime where the proof is evident and the presumption great" if the defendant was already on bail on a felony charge.

The issue whether the defendant is to be detained prior to trial or released subject to monetary or other conditions is a legal question of constitutional dimension, and the victim's personal feelings or opinions concerning the propriety of release are given little weight under current law. Victims should nonetheless be consulted concerning the initial decision whether to release the defendant, because the victim may have important factual information concerning an intention to flee or attempts at intimidation that have been made. It is also true that the Supreme Court has not ruled whether preventive detention, as such, is constitutionally impermissible. See Murphy v. Hunt, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982), vacating for mootness Hunt .v. Roth, 648 F.2d 1148 (8th Cir. 1981), which had held a Nebraska constitutional provision that prohibited bail for violent sexual offenses to violate the Eighth Amendment.

The victims' views should also be invited and considered concerning the conditions that should be placed on pretrial release, particularly with regard to any protective orders that might be appropriate. As a minimum, ABA Standard for Criminal Justice 10-1.2 indicates that the pretrial release of the defendant on personal recognizance should be accompanied by an order to refrain from criminal law violations and from threatening or otherwise interfering with potential witnesses. But information received from the victim may indicate that imposing additional conditions on release may be appropriate or required. And, of course, the victim's views and testimony may be essential if a pretrial detention hearing is held to determine whether a previous release order should be revoked or modified.

§ 2.26 Victim participation in pretrial diversion decision. A victim who has made a formal complaint of criminal behavior, albeit minor in nature, may feel that the ends of justice have not been met upon learning that the defendant has not been prosecuted and criminally punished, and has rather been "diverted" into a noncriminal rehabilitation or community service program. In many cases, the fact that pretrial diversion has been used is not disturbing, because the victim of a minor offense, such as vandalism or petty theft, is typically more concerned with the conditions of the pretrial diversion program selected. Usually victims want to receive restitution for their losses and to see that the offender is placed in a meaningful educational or rehabilitative program, particularly, when as is often the case, there is an ongoing relationship, familial or neighborly, with the offender. As such programs are used primarily for youthful offenders who have committed nonserious acts of marginal criminality, victims of such offenses often favor a noncriminal disposition which serves to give a strong lesson without creating a permanent criminal record.

Pretrial diversion of an offender into some form of noncriminal rehabilitative or corrective program has always been available and frequently used by prosecutors through the simple technique of deferring prosecution pending performance by the offenders of certain agreed conditions. See United States v. Lockwood, 382 F. Supp. 1111 (E.D.N.Y. 1974); United States v. Hicks, 693 F.2d 32 (5th Cir. 1982). In recent years more formalized procedures for pretrial diversion by the prosecutor or pretrial intervention by the court have been adopted in several states. There is little uniformity in the various statutory systems that have been created, and the degree of supervision possible by the court varies tremendously. In some jurisdictions, use or refusal to use pretrial diversion is within the absolute discretion of the prosecuting attorney e.g., Cleveland v. State, 417 So.2d 653 (Fla. 1982). In other states the prosecutor's discretion with regard to pretrial diversion is subject to judicial review by the trial court e.g., State v. Hammersley, 650 S.W 2d 352 (Tenn. 1983). In still other states the pretrial diversion program is under the supervision of the court, e.g., State ex rel. Moore v. Corcoran, 653 S.W. 2d 657 (Mo. 1983); State v. Spendolini, 454 A.2d 720 (Conn. 1983). It is perhaps this variety in the mechanisms of the various programs which has caused the relevant ABA Standard for Criminal Justice, The Prosecution Function 3-3.8(a) to read merely, "The prosecutor should explore the availability of noncriminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges. Especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition."

The modern trend appears to be reflected in the statutes of some states which require that the victim's views be considered in the decision to divert, or that the victim at least be informed of the pending diversion and be given an opportunity to be heard. Among such states are Connecticut, New Jersey, and South Carolina. Both the Victim and Witness Protection Act of 1982 and the Attorney General's Guidelines issued persuant to the Act require consultation with the victim about disposition by pretrial diversion.

§ 2.27 Victim participation in the scheduling of court proceedings.

Victims and witnesses are very often required to attend a number of court proceedings during the course of a criminal case. Yet it appears to them, and is often true, that their personal or professional plans or availability are not taken into consideration in scheduling various pretrial hearings or the trial itself. They may begin to feel that defense attorneys, prosecutors and judges view them as little more than pieces of evidence which must be available on demand. Persons in the criminal justice system probably give little regard to initially established dates because they assume they will not be met. The Commentary to the ABA Standards for Criminal Justice, Chapter 11, Discovery and Procedure Before Trial, Standard 11-5.4 page 11-91 states: "The trial planning stage often gets short shrift because criminal cases rarely go to trial. Cases that are scheduled for trial often end with a negotiated plea of guilty. Even if the defendant persists in demanding a trial, a trial is not likely to commence on the day it is scheduled to begin . . . . There are dozens of reasons (and multiple variations on each) why a trial set for a certain day will almost certainly not commence on that day. Because everyone knows that the case will not be tried, no one prepares the case for trial." Regular trial participants probably do doubt that a case will go to trial on the date scheduled. Victims and witnesses, who are poorly informed about the system, are often merely told to be present for trial on that date and must arrange their personal schedules accordingly.

The scheduling of certain pretrial events, for example, arraignment, pretrial detention hearings and preliminary hearings, are not easily adjusted for the personal plans of the victim because they are required by statute or court rule to be held within specific times. Similarly the speedy trial statutes or rules of the particular jurisdiction may cause a case to be set for trial at a time inconvenient to the victim or witness. Those specific legal issues aside, there remains the often complex problem of managing the court's docket. To dispose efficiently of the many cases filed, the court must have a well-established system for scheduling all cases, preferably the kind of caseflow management program advocated by American Bar Association Commission on Standards of Judicial Administration, Trial Courts, Standard, 2.51(b). That Standard provides in part, "Scheduling procedures should so operate that conflicts in schedules of attorneys and other necessary participants are reduced to a minimum," and the Commentary to the Standard provides, "The court should allow departure from the normal case schedule when good cause is shown." Within this framework, the plans and personal obligations of the victims or witnesses ought to be considered along with, and given equal weight to, the plans or desires of the other participants.

§ 2.28 Victim participation in the granting of continuances or delays.

As the scheduled time for trial approaches, the victim must make many personal arrangements for transportation, family care, modification of other plans, and arrangements for time off from work. These matters are not only inconvenient, but often involve considerable cost. The victim must emotionally prepare himself or herself for what he or she can expect to be a grueling experience. Victims must also mentally review the crime they wish to put behind them. These psychological problems are more significant when children are witnesses. A continuance after the victim has prepared and perhaps appeared for trial greatly exacerbates the financial and emotional problems arising from the crime itself, causing a perception that he or she is now being victimized by the criminal justice system.

Continuances are sought for many reasons, some of which are insubstantial and detrimental to the criminal justice system. They are sought sometimes for the purpose of delay or for the personal convenience of the counsel or court. Unfortunately for the victims or witnesses, some judges appear to grant continuances almost as a matter of course. Such judges as well as prosecutors and defense counsel tend to be tolerant of each others' desires for schedule changes, as they are aware their own reasons for seeking continuances would not bear close scrutiny. Since victims are not a part of the insiders network, their scheduling concerns do not receive the same consideration. A fact that contributes to the lack of concern for the victim's or witness' interest is that no one within the system is under any obligation to explain to the victim (or any one else) the reasons for the granting of a continuance.

While any continuance may concern or inconvenience a witness, the most persistent grievance reported in the many discussions of victims' rights is that victims and witnesses do not receive timely notice when there has been a change in the trial schedule. They arrive at the courthouse only to be told without explanation that the case has been postponed. They must return at a later date, again disrupting their personal lives.

The ease with which continuances are granted by some courts is a problem of long standing. In 1973 the National Advisory Commission on Criminal Justice Standards and Goals in its Report on Courts provided in Standard 4.12, "Continuances should not be granted except upon verified and written motion and a showing of good cause."

Standard 12-1.3 of the ABA Standards for Criminal Justice provides: "The court should grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case." Standards 3-2.9 and 4-1.2 emphasize the duty of counsel for both sides to efficiently discharge their responsibilities, to exercise candor in requesting continuances, and to seek delays for only legitimate purposes. If these standards were strictly enforced, particularly the requirement that the courts make an independent determination of the necessity for delay, continuances would be greatly reduced, and those for the personal convenience of the participants would be virtually eliminated.

In the President's Task Force on the Victims of Crime, it is recommended that in ruling on requests for continuances judges should give the same weight to the interests of victims and witnesses as is given to the interests of the defendant. Sometimes the defendant's interest may be of constitutional dimension which must outweigh the personal or emotional concerns of the victim or witnesses. See State v. Ransom, 661 P.2d 392 (Kan. 1983), (desire for continuance to accommodate plans of prosecution witnesses overcome by defendant's right to a speedy trial).

If good cause is shown, continuances cannot be avoided. The denial (or granting) of a continuance is subject to reversal for abuse of judicial discretion as due process rights and the right to effective representation by counsel may be implicated. People v. Gzikowski, 651 P.2d 1145 (Cal. 1982). Valid grounds for continuances arise unexpectedly as essential witnesses may become temporarily seriously ill, in which case a continuance for a reasonable time might be required even though alternative forms of evidence are available. United States v. Faison, 679 F.2d 292 (3d Cir. 1982). The decision whether to grant a continuance requires the court to exercise its discretion in balancing the defendant's rights against the public interest in the prompt and efficient administration of justice, taking into consideration not only the value of the right asserted but also all of the circumstances of the case including the length of the delay requested and whether other continuances have been granted. Among the factors that are proper to consider is the convenience or inconvenience to the parties, the court, and the witnesses. State v. Wollman, 273 N.W.2d 225 (Wis. 1979) (joint trial with witnesses and counsel for codefendants ready); State v. Ashness, 461 A.2d 659 (R.I. 1983) (15 witnesses ready to testify when defendant first expressed dissatisfaction with appointed counsel). But see Commonwealth v. Smith, 275 A.2d 98 (Pa. 1971) (inconvenience to 80-year-old female robbery victim not sufficient to deny delay when defense witnesses inadvertently absent).

The personal interests and plans of victims and witnesses should be learned and considered if it is known in advance that a continuance will be requested. However, consultation with the victim or witnesses may not be appropriate or possible if a continuance is justified by an unforeseen event. Even in that situation, though, there is no reason not to consult with the victim concerning the convenience of a new trial date.

Those attending the National Conference of the Judiciary on the Rights of Victims of Crime adopted the recommendation of the President's Task Force that judges should explain on the record the reasons for granting continuances. This will clearly encourage adherence to the standards requiring that continuances be granted only for good cause. In any event, common courtesy should require that a reasonable explanation for continuances be given to victims or witnesses who have been inconvenienced.

Whether a plea settlement is couched in terms of concessions or recommendations as to the sentence or in terms of the charge to which the defendant will plead, sentencing is the real focus of the bargain as the charge establishes the range of the sentence that can be imposed. Sentencing should be exclusively a judicial function and the sentence should not be determined solely by the criminal striking a deal with the public prosecutor. Plea negotiation having been recognized by the Supreme Court as a necessary part of the criminal justice system in the United States, Santobello v. New York, supra, (sentence concession); Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) (charge bargaining), there appears to be no valid reason for courts to abstain from supervision of the practice.

If the law of the jurisdiction permits approval or disapproval of the plea agreement, and the bargain in essence always relates to the sentence to be imposed, the judge's discretion in evaluating the propriety of the agreement should be guided generally by the same principles followed in an initial sentencing decision. If viewed this way, the judge should certainly take into consideration the impact of the crime on the victim and should receive factual information from the victim concerning that impact and any consequential loses. This would be consistent with the practice suggested in the ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.3(f).

§ 2.29 Victim participation in the negotiation of defendant's pleas.

Victims are very disturbed by plea negotiations in which the prosecutor and defense counsel take it upon themselves to compromise the case against the defendant, sometimes in flagrant disregard of the facts or the seriousness of the crime as perceived by the victim. Victims do, and properly should, expect that the prosecutor's "starting point" in the negotiations takes into account their version of the crime and its impact on them, and that their interests, to the extent feasible, are reflected in the plea agreement. They are particularly concerned if, as a part of the agreement, charges relating to them are dismissed entirely in return for a plea to other charges, as their restitutional and other interests may be disregarded. Too often they have not been notified by the prosecutor that negotiations are taking place, or asked for their opinion, or given the opportunity to make the full facts of the offense known before the defendant's offer to plead is accepted. Or, if they have been given such an opportunity, their views may have been rejected or disregarded. In such cases, victims feel that they must have some recourse before the plea is accepted or the agreement approved.

The President's Task Force on Victims of Crime, Prosecution Recommendation 2, The Victim and Witness Protection Act of 1982, The Attorney General's Memorandum of July 12, 1983 on Victim-Witness Assistance, The ABA Guidelines for Fair Treatment of Victims and Witnesses, ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.1(d), and various state victim rights initiatives or legislative acts uniformly insist that prosecutors obtain and consider the victim's attitudes and opinion before entering into a plea agreement. As an example, the Indiana statute requiring consultation with the victim on plea negotiation may be found in Appendix 4h.

Courts historically tend to avoid notice of the practice of plea negotiating. The traditional judicial position was one of condoning the practice only to the extent of acknowledging that prosecution was an exclusively executive function not subject to judicial review. In fact, the typical practice at the time of the entry of a plea was to act as if no agreement existed or that no promises had been made. See, e.g., Christian v. State, 195 N.W.2d 470 (Wis. 1972). It was felt that any participation by the trial judge in plea agreements, or even an awareness of a plea agreement, tended to deprive the defendant of an unbiased sentence determination or tended to coerce a plea of guilty. However, following the acknowledgement of plea negotiating in Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.ed.2d 747 (1970), and its apparent sanctioning in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), a more objective view of the judge's role with regard to agreements concerning the plea has evolved. There is, of course, still a danger that the judge's statements or actions with regard to a plea discussion may deprive a defendant of due process. See State v. Byrd, 407 N.E.2d 1384 (Ohio 1980), and annotation, 10 A.L.R. 4th 689 (1981).

§ 2.30 Victim participation in sentencing. If there is a guilty plea, victims may not be given an opportunity to appear before the court to relate the actual facts of the offense or the harmful consequences suffered by them as a result of the crime. Even in a contested case in which victims are called as witnesses, their testimony may be limited to facts that are relevant only to the guilt of the accused, and consequential losses or psychological or other damages may not be revealed. Yet victims observe that during the sentencing proceedings all information that is in any way favorable to the defendant is fully presented to the court and the defendant is given an absolute right to speak to the court before sentence is handed down. Victims thus perceive that the sentencing process does not adequately take their concerns into consideration and that they are not treated fairly.

There does not appear to be any rule of law or evidence that would preclude information from the victim or relatives relevant to sentencing being presented to the court either by way of testimony or by a written statement. In determining an appropriate sentence, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); see also Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); the defendant has a due process right only that the information upon which the sentence is based is accurate, and that he is given an opportunity to rebut any unfavorable information that is presented to the court. United States v. Papajohn, 701 F.2d 760 (8th Cir. 1983). Subject to that limitation, information or opinions relating to the offense furnished by the victim or others may properly be considered in sentencing. People v. Bachman, 414 N.E.2d 1369 (Ill. App. 1981) (letter from rape victim to court); State v. Small, 411 A.2d 682 (Me. 1980) (unsolicited letter from fire marshal in arson case); State v. Lack, 650 P.2d 22 (N.M. App. 1982) (certificate from victim concerning actual damages). A few states have, by statute, expressly authorized victims or their representatives personally to appear before the court to express their views with regard to the sentence.

As noted above, a statement from the victim is required as a part of the presentence report in federal cases. The President's Task Force on Victims of Crime recommends an impact statement as a minimum, and suggests the victims should be allowed to address the court. The ABA Guidelines Fair Treatment of Victims and Witnesses provide a qualified suggestion that testimony be permitted and the Attorney General's memorandum on victim/witness assistance endeavors to assure that the victim's views with regard to the sentence be presented to the court. The ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures, do not specifically address whether input from the victim concerning the sentence should be required or permitted, but the Standards do not preclude such information or evidence. Standard 18-5.1(d)(ii)(A) provides that a presentence report should contain "a complete description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt." Standard 18-6.3 (d)(i)(B) places upon the prosecutor the burden of presenting at the sentencing proceeding "those facts at his or her disposal which are relevant to a proper sentence." Standard 18-6.4(b) suggests that such facts may be presented by the calling of witnesses.

Information from the victim should be produced in order to make a proper determination of the actual monetary and physical harm or losses of the victim, whether restitution should be adjudged, and if so, in what amount. It would also appear that in order to assess the true circumstances of the offense for which the defendant is to be punished, complete and accurate information from the victim should be required.

It is parenthetically noted that although the authority of the court to allow the victim to testify would seem to exist apart from any statutory provision, there may be some problem with the victim personally appearing to express his or her feelings with respect to an appropriate sentence in those remaining jurisdictions that provide for jury sentencing or in those jurisdictions that use juries in the penalty phase of capital cases. This would be that the prejudicial effect of an emotionally charged statement might outweigh its probative value. See Federal Rule of Evidence 403. Such problems could be resolved on a case by case basis.

§ 2.31 Victim-offender mediation. Among the offenses with the highest rates of recidivism are nonviolent thefts and residential burglaries. One reason for this is that the profits realized by the offender are satisfactory while the risk of detection is fairly low. Such offenders are willing to accept an occasional arrest and conviction as merely a reasonable cost of the business in which they are engaged. Another reason that thieves and burglars tend to be repeat offenders, a reason that has more significance from the victims' point of view, is that they have rationalized themselves into believing that their stealing is not harmful or morally wrong because the victims simply recover from insurance companies and frequently recover compensation for more than was actually stolen. This, of course, is a serious misconception.

Many home owners are inadequately insured or not insured at all. Those that do have insurance, usually have to bear a substantial deductible portion from actual loss. The financial cost to the victim is nearly always very real. The victim also suffers the psychological injuries of the loss of feeling secure in the home and the fear of future intrusions. Often property stolen has irreplaceable sentimental value.

Justice Callow of the Wisconsin Supreme Court discussed at the National Conference of the Judiciary on the Rights of Victims of Crime a technique of mediation he used while sitting on the criminal trial bench in a metropolitan area. Prior to sentencing in certain cases in which the offender seemed susceptible to rehabilitation, he would ask that the probation department arrange an entirely voluntary meeting between the thief and the victim. At the meeting the victim explains the true impact of the criminal act and shows what the actual financial loss was. The offender learns that the crime really hurt someone. At the meeting the offender is given the opportunity to offer a plan of making restitution acceptable to the victim, which is later presented to the court as a part of the presentence report. Justice Callow's experience was that these mediation sessions so personalized the crime that very few offenders who participated were ever charged with a new offense. The victims, too, benefitted from the program by being allowed to directly participate in the disposition of the case. This victim-offender mediation program is described in greater detail in Callow, Crime and Consequence, 20 The Judges' Journal 35 (Summer 1981).

§ 2.32 B. TO ASSIST VICTIM PARTICIPATION:

1. A victim's advisor should be permitted to remain in the courtroom with the victim, but not participate in the judicial proceedings;
2. Victim impact statements prior to sentencing should be encouraged and considered;
3. The victim or the victim's family should be allowed to remain in the courtroom when permitted by law and when it will not interfere with the right of the defendant to a fair trial.

Commentary

§ 2.33 Advisor to assist victim. The public prosecutor's primary role is to represent the state's interest in the administration of criminal justice; his or her obligation to advance or protect specific interests of a particular victim is only secondary. The defense counsel's role is exclusively to protect the legal interests of the defendant. The judge, in a sense, protects the interests of both sides. No one, however, is responsible for protecting the interests of the victim. Yet, evidence presented, or suppressed, interlocutory rulings, and judgments of the criminal court may have an adverse impact on the reputation, psychological well-being, and pecuniary rights of the victim, whose interests may not have been adequately considered during the trial. For example, the dismissal or modification of a charge may expedite the disposition of the criminal case but may also hinder or preclude the victim's recovery of restitution or reparation. Similarly, a narrow view of relevance on either direct or cross-examination of the defendant or other witnesses might result in testimony in the criminal case being available or not available to impeach, contradict or corroborate testimony in a future civil trial. The lack of adequate representation of the victim's interest is of real significance; the victim, because he or she is ordinarily a witness, is often not allowed to be present when such issues are argued or when damaging, embarrassing character or reputation evidence is presented.

Victims may have a need for assistance or advice of counsel for similar reasons both before trial and at the sentencing of the defendant. The victim may be given the opportunity to participate in plea discussions but be utterly unable to understand the technical effect the plea proposed might have with regard to the victim's rights. With regard to sentencing, the public prosecutor may not have the motivation, resources, or expertise necessary to fully present evidence and arguments concerning appropriate restitution.

In the majority of jurisdictions some participation in the prosecution by private counsel employed by the victim or estate of the victim is permitted. State v. Sandstrom, 595 P.2d 324 (Kan. 1979); State v. Riser, 294 S.E.2d 461 (W. Va. 1982); People v. Farnsley, 293 N.E.2d 600 (Ill. 1973); 27 C.J.S. District and Prosecuting Attorneys, § 29(1)c., 63 Am. Jur., 2d, Prosecuting Attorneys, § 9. In some jurisdictions permission for such participation is expressly provided for by statute, as in the Kansas statute found in Appendix 4k. In either case, however, the courts are insistent that the public prosecutor consent to and supervise the activities of the private counsel. This practice seems to be a continuation of common-law practice prevalent through the early 19th century. The judges attending the National Conference on the Rights of Victims of Crime seemed to be of the opinion, however, that private counsel might be engaged not merely to protect the future civil entitlements or other interests of the victims, but to ensure a vindictive prosecution. The public prosecutor's duty is not merely to convict but to see that justice is done, and he or she must disclose factors favorable to the defendant. A private counsel on the other hand, owes fidelity exclusively to the client and may have exculpatory information which he or she is not obliged to reveal. The same would apply to any other friend-in-court or advisor to the victim. This potential conflict between the interests of the state in the fair administration of criminal justice and the victim's desire for vindication has caused a minority of jurisdictions to prohibit participation by private prosecutors as fundamentally unfair. State v. Harrington, 534 S.W.2d 44 (Mo. 1976); State v. Peterson, 218 N.W. 367 (Wis. 1928).

§ 2.34 Victim impact statements. See § 2.30 (Victim participation in sentencing).

§ 2.35 Victim's relative or companion presence in court. Victims have a real, personal interest in the trial of the defendant who harmed them. They are interested not only that their restitutional or other interests are protected, but they want also to ensure that false or misleading testimony is not given about the facts of the case or about their own background or character. In the case of young or otherwise sensitive victims, particularly those of sex offenses, the victim might have a real interest in having the comforting presence of a friend or close relative in the courtroom with them as they testify even though such companion might potentially be called as a witness. Yet it appears to victims and their families that they are automatically excluded from the trial upon the request of the defense counsel whether or not there is any necessity for sequestration or regardless whether there is any real intention to call them as a witness. It is particularly hurtful for the survivors of homicide victims to be excluded from the courtroom when there does not appear to be a remote chance of their being called to testify.

"The exclusion, separation or sequestration of witnesses--a practice also referred to as putting the witness 'under the rule'--is at least as old as the Bible." Weinstein and Berger, Evidence, Vol. 3, p. 615-3 (1982 ed.) (referring to story of Susanna and the Elders, in which Daniel demonstrated the falsity of the allegation against Susanna by interviewing her accusers separately). At common law whether particular witnesses should be excluded from the court during the testimony of other witnesses was within the discretion of the court, and sequestration is still a discretionary matter in many jurisdictions. State v. Ashness, 461 A.2d 659 (R.I. 1983). In other jurisdictions the sequestration of witnesses is said to be a matter of right. Federal Rule of Evidence 615 was expressly adopted to make "the rule" a matter of right by providing, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, . . . " (Emphasis supplied.)

It must be observed that "the rule" is not totally inflexible. If the victim or witness is not exposed to the testimony of others on the same point, there is no reason for applying the rule. For example, in Dixon v.State, 348 N.E.2d 401 (Ind. 1976) the court found no error when the mother of a 16-year-old rape victim testified first and was then allowed to remain in the courtroom while the victim, who had been sequestered, testified. The court did note that there would potentially be a problem with "the rule" if it had been necessary for some reason to recall the mother, but that did not occur. In Virgin Islands v. Edinborough, 625 F.2d 472 (3d Cir. 1980) the court found no prejudice when the mother of a young victim, who was also a witness, was not sequestered upon request of defense under Federal Rule of Evidence 615. The court went on to note that there was probably no error, as presence of mother was arguably "essential to the presentation" of the prosecution case and thus fell into exception 3 to Federal Rule of Evidence 615. A recently enacted Nevada statute providing a qualified entitlement for victims to have an "attendant" with them in the courtroom may be found in Appendix 4g. Also see in Appendix 4g the Alabama Crime Victims' Court Appearance.

Judiciary Recommendation 8 of the President's Task Force on Victims of Crime provides that judges should allow the victim and a member of the victim's family to attend the trial, even if identified as witnesses, absent a compelling need to the contrary. In jurisdictions in which sequestration is required as a matter of law, and sequestration can not be avoided by rearranging the order of witnesses it would seem to be appropriate that the court ensure that the rule and the reasons for the rule are explained to the person being excluded. In jurisdictions in which the matter is discretionary, but the sound exercise of discretion calls for exclusion an explanation of the reasons for application of the rule might be appropriate. It would seem always to be appropriate in any jurisdiction to require that a clear showing be made that the person whose exclusion is desired is, in fact, a known or probable witness and that the reasons for the rule of sequestration are applicable.

III. PROTECTION

§ 2.36 JUDGES SHOULD USE THEIR JUDICIAL AUTHORITY TO PROTECT VICTIMS AND WITNESSES FROM HARASSMENT, THREATS, INTIMIDATION AND HARM.

A. THIS SHOULD INCLUDE:

1. Encouraging that separate waiting rooms be provided for defense and prosecution witnesses;
2. Requiring that bail be conditioned on the defendants having no access to victims or prosecution witnesses;
3. On showing of good cause, limiting access to the addresses of victims and witnesses;
4. Encouraging that victims and witnesses be advised that if they agree to be interviewed prior to trial by opposing counsel or investigators, they may insist that the interviews be conducted at neutral locations;
5. Encouraging legislation or rules which would require parole boards to advise the judge, the prosecutor, the public and the victim where appropriate, prior to any hearing on the release of an offender convicted of a serious crime.

Commentary

§ 2.37 Separate waiting rooms. See § 2.12.

§ 2.38 Restricting access of defendant to victims and witnesses.

As previously noted victims of and witnesses to crimes of violence are naturally apprehensive about intimidation or harm when the offender is at liberty. Many victims, particularly victims of domestic violence, are very likely targets of intimidation or harm, but because of financial reasons or responsibilities related to their families or employment are unable to remove themselves from potential danger. The victim or witnesses are particularly vulnerable to intimidation or harm if the offender knows where they live or work and what their usual activities are. While many witnesses are threatened, harassed, or intimidated, a 1981 Victim Services Agency study of intimidation in the Brooklyn Criminal Courts indicated that a strikingly high percentage of victims or witnesses who knew the defendant prior to the crime experienced threats or intimidation in their neighborhoods or while at work.

The same study and other studies that have been made indicate that intimidation or threats are significantly reduced if the court personally admonishes the defendant or issues restraining orders. It is therefore suggested that restraints as a condition of pretrial release should be imposed limiting access to the victim or witness whenever there is a danger of intimidation. Courts should be sensitive to the fears of victims or witnesses and aware of the pervasiveness of intimidation or attempts at intimidation, which might often be subtle. An admonishment or even a mild protective order will deter intimidation, and courts have at their disposal means to prevent intimidation by issuing very restrictive orders. But for such orders to be effective, courts must ensure that police and prosecutors bring violations of them to the attention of the court.

The Victim and Witness Protection Act of 1982 provides for the issuance of both temporary and permanent orders prohibiting the harassment, as defined in the statute, of the victim or witness. For the order to be permanent, the existence of the harassment must be shown by a preponderance of the evidence. The Act does not limit the scope of the order, and presumably the court could order the defendant to remain away from and not communicate with the victim or witness if that was found necessary to prevent the harassment. Statutes of some states are more specific in this regard as is the American Bar Association Model Statute for protecting victims and witnesses from intimidation. The Model Statute provides that "upon good cause" the court may order that the defendant maintain a "prescribed geographic distance" from the victim or witness and have no communication with them except through an attorney.

As a general rule a witness belongs to neither the government nor the defense. Both sides, including the defendant, have the right to interview witnesses in order to prepare for trial. United States v. Cook, 608 F.2d 1175 (9th Cir. 1979). But this right is not absolute and is subject to reasonable controls, such as limitations as to the time and place of such interviews, if there is an indication of a need for security or to prevent obstruction of justice. Gregory v. United States, 369 F.2d 185 (D.C.Cir. 1966); State v. Lerner, 308 A.2d 324 (R.I. 1973).

§ 2.39 Limit on access to the addresses of victims or witnesses. Victims of violent crimes by strangers and bystander witnesses to such crimes are often exposed to intimidation by the offender or his or her associates if their names and addresses are made known. This is also true if the victim's or witness's address was known to the offender at the time of the offense, but the victim or witness has moved to avoid intimidation or harm. In some cases the release of the victim's or witness' name and address may place them in real danger. If the crime is spectacular or notorious, the victims or witnesses may be subjected to widespread publicity and their right to be free from interference by the press or curiosity seekers might be destroyed if their names and addresses are disclosed.

Victims and witnesses may have important reasons that their identity and location be kept in confidence, but it often appears to them that their names and addresses are released to any one with very little thought being given to the matter. In many areas police reports with victim and witness names and addresses are routinely funished to reporters and defense attorneys.

Many jurisdictions require that police and prosecution records be public. Where such is the case, newspapers and defendants have ready access to victims' names and addresses. Even where this is not the case, defense counsel and defendants are almost always able to obtain the information through routine discovery procedures.

ABA Standards for Criminal Justice, Discovery and Procedure Before Trial, Standard 11-2.1(a)(i) provides that the normal practice should be that, upon request of the defense, the prosecuting attorney will disclose the names and addresses of the witnesses. The disclosure may be "restricted" or "deferred" by the court "upon a showing of cause" under Standard 11-4.4. The practice in some states is similar to the Standards. The federal practice and that of other states is different in that the onus for obtaining the name and address is shifted to the defense when there is a dispute as to release of the information. Federal Rule of Criminal Procedure Rule 16, Discovery and Inspection, does not require the prosecution to furnish the defense with the names and addresses of its prospective witnesses. However, if the defense can show a need for the information, the federal district court may order its release if, in its discretion, it finds that the need outweighs the potential for danger to the witness. United States v. Cavallaro, 553 F.2d 300 (2d Cir. 1977); United States v. Rogers, 549 F.2d 490 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977).

Whether or not the names and addresses of potential witnesses are furnished prior to trial the general rule is that under the Sixth Amendment the defense is entitled to cross-examine a witness at trial concerning his or her correct address, Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). This kind of cross-examination may be needed to place the witness in the proper setting so that the weight and credibility of the testimony can be appraised by the finder of fact. But the right to learn the present address of the witness

on cross-examination is not absolute and must give way to a legitimate concern for the safety of the witness. United States v. Cavallaro, supra; State v. Novosel, 412 A.2d 739 (N.H. 1980); People v. Stanard, 365 N.E.2d 857 (N.Y. 1977).

Executive and legislative Recommendation 1 of the President's Task Force is that legislation be enacted to prevent names and addresses of victims or witnesses from being made public or available to the defense, absent a clear need as determined by the court. The Attorney General's Guidelines direct that officials should avoid disclosing the address of victims or witnesses and that prosecutors should resist attempts by the defense to obtain this information. These positions are consistent with Federal Practice under F.R.C.P. 16. If the court is not able to control the initial release of names and addresses, it can certainly encourage police and prosecutors not to make the release a simple matter or routine.

The judges attending the National Conference recognized that there were substantial issues with regard to refusing the disclose the identity of the witnesses against the defendant and thus specifically limited their recommendation to restricting access to the address of the witnesses.

§ 2.40 Interviews at neutral locations. Almost any meeting with defense counsel and certainly with the defendant is anxiety-producing for the victim. Such anxiety may be increased considerably if the defendant or his or her counsel appears unannounced at the victim's residence or workplace and demands to speak with the victim, or if the victim, in response to what he or she perceives as a mandatory request, meets with defense counsel at the attorney's office or other place considered by the victims as the "defendant's."

ABA Discovery and Procedure Before Trial Standard 11-4.1 and the Uniform Rules of Criminal Procedure, and usual state rules provide that counsel for the parties not advise witnesses who have relevant material or information to refrain from discussing the case with opposing counsel or refrain from showing opposing counsel any relevant material. However, prosecutors and judges are not prohibited from informing victims of their rights in responding to defense requests for information, or suggesting ways victims who do agree to meet with defense might do so more comfortably. United States v. Cook, 608 F.2d 1175 (9th Cir. 1979). It must be noted that an overzealous insistence by a prosecutor that a witness consent to be interviewed of defense counsel only under certain conditions might interfere with the defendant's right to effective assistance of counsel. Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966).

Victims are under no obligation to meet with defense counsel. If the victim refuses to do so, the defendant may request an order by the court. Such order may contain the conditions necessary to provide for the legitimate fears of the victim. Such interviews may thus be placed at a neutral location, such as, the courthouse, perhaps with a friend or acquaintance of the victim present.

§ 2.41 Notification of parole hearings. Just as victims have an interest in the original sentence imposed on the defendant, they have an interest in parole hearings which may alter or affect that sentence and result in early release of those who have victimized them. When they are denied the opportunity to present the parole board with their concerns or to provide it with relevant information, they often feel that the parole board is deliberately refusing to consider relevant factors which might weigh against a favorable decision for the defendant.

Traditionally, parole has been a matter between the parole board and the defendant. As parole is an executive rather than a judicial function, neither the prosecutor, the court, nor the victim are ordinarily involved. See generally Pressler, Practice and Theory of Probation and Parole, Columbia University Press (1969). Recently, however, victims have begun to protest their exclusion from parole board hearings. Often these victims may be aware of information the board will not have. The defendant, through his family or friends, may have threatened retaliation against the victim who testified against him. In such instances, victims may at least be allowed to suggest special conditions which might be appropriate if parole is granted. A threatened victim may ask that the parolee be required to maintain a designated geographical distance from the victim's residence or place of business.

At least six states provide for some type of victim participation in parole board hearings (Alabama, Arizona, Arkansas, California, Massachusetts and Oklahoma). Several additional ones require advance notice to victims of forthcoming parole hearings. Others require timely notice of the parole board decision once this has been made, as recommended by the ABA Guidelines and the Attorney General's Guidelines. (The Arizona Statute may be found in Appendix 4j.) The President's Task Force goes further, calling on the parole board to notify victims of crime and their families in advance of parole hearings and to allow these individuals or their representatives to attend parole hearings and make known the effect of the offender's crime on them.

§ 2.42 Protection of Sensitive Victims.

Commentary

The judges attending the National Conference of the Judiciary on the Rights of Victims of Crime clearly showed very special interest in the adoption of procedures that could alleviate some of the unique problems of the sensitive victim as a witness. At the same time they clearly expressed their concern that innovative procedures should not diminish the trial and constitutional rights of defendants.

§ 2.43 Expedited trials. Until the case is closed, sensitive victims, especially minors, find it particularly difficult psychologically to put the crime behind them. Repeated continuances, prolonged worry about defendant's release, and increased uncertainty about their own testimony all serve to reinforce the criminal experience as a major disruptive force in the conduct of their lives. The commentaries to at least two ABA Standards endorse the use of priorities in setting the court's calendar. The commentary to the ABA Standards Relating to Trial Courts, Standards § 2.51 at p. 92 [Caseflow Management Program] provides "[a]ttention should be directed to such factors as the [need] in various types of cases . . .for prompt or emergency attention . . ." The commentary to the ABA Standards for Criminal Justice, Speedy Trial, Standard 12-1.1 [Priorities in scheduling criminal cases] notes, at p. 12-7 that "[a]dditional factors to be taken into consideration in determining case priorities include . . . '[a]ny significant problem or interests of particular concern to the community,' the gravity of the offense. . ."

Though all crime victims prefer the speedy disposition of their case, sensitive victims are particularly vulnerable to the adverse affects of a prolonged criminal process. A six-year-old child who is engaged in a year-long case has lived a sixth of his or her life under the cloud of the criminal prosecution. Moreover, such a prolonged criminal procedure requires children to maintain and even reinforce memories of these traumatic events. The same is true of all victims of sexual offenses. Similarly, the anxiety associated with protracted disposition of crimes of violence may adversely affect the health of elderly victims or witnesses.

§ 2.44 Specially designed courtrooms. Victims of sexual offenses or crimes of violence may be terrified to be near and to be looked upon by the person who has inflicted such fearful harm. The fear may be so great that the victim is not able to testify coherently. Although these problems affect all witnesses, their impact is greater on children. One technique suggested to alleviate these problems is the use of courtrooms designed to restrict the actual close proximity of the defendant and the victim or witness. Another proposal is to have the witness testify from behind a one-way mirror so as to be seen by the defendant, counsel and the trier of fact, yet be relieved to some degree of the discomfort of public testimony. Still another suggestion that has been made is that a "child-courtroom" be provided. This would be an informally and comfortably furnished room in which the child victim, the judge, the defense counsel, and the prosecutor would all be seated during the child's testimony. The room would be separated by a one-way mirror from another room from which the child witness could be observed by the defendant, the jury and the spectators. The defendant would have earphones and a microphone with which he could communicate with his counsel. This was originally suggested in the often-cited article by David Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977 (1969).

The notion that some special accommodations or evidentiary rules should be adopted for sensitive victims is prevalent in Victims' Rights literature and has been the subject of state legislative proposals. See, e.g., Parker, 17 New England L. Rev., 643 (1981-1982); Parker, The Child Witness Versus the Press: A Proposed Legislative Response to Globe v. Superior Court, 47 Alb. L. Rev. 408 (1983) (discussing specially designed courtrooms and statutes of four sates providing for videotaped depositions in sex cases).

Specially designed courtrooms raise issues concerning the confrontation clause and due process. Early Supreme Court cases used language indicating that physical confrontation--and awareness of the confrontation by the witness--was an essential ingredient of the Sixth Amendment guarantees. Mattox v.United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895) ("the advantage . . . of seeing the witness face-to-face, and of subjecting him to the ordeal of cross-examiniation"); Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899) (". . . witness who confront him at the trial, upon whom he can look while being tried . . ."); Dowdell v.United States, 221 U.S. 325, 31 S.Ct. 590, 55 L.Ed. 753 (1911) (. . . the right of the accused to meet the witness face-to-face, and thus to sift the testimony produced against him. . . "). But see California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (opportunity to cross-examine at trial sufficient to admit preliminary hearing testimony used as substantive evidence to contradict recanting prosecution witness).. In United States v. Benfield, 593 F.2d 815 (8th Cir. 1979), a videotaped deposition of a hospitalized victim was held to be inadmissible under the confrontation clause because the defendant was required to observe the testimony on a closed circuit television and the witness was not made aware that he was watching. Similarly the confrontation clause has been held to be violated when the witness and defendant were so positioned during a preliminary hearing that they could not see each other. Herbert v. Superior Court, 172 Cal. Rptr. 850 (Cal. App. 1981) Annot.; 19 A.L.R. 4th 1286.

Specially designed courtrooms in which the child is separated from the defendant and public has the clear advantage of allowing the child to discuss his or her experience in more comfortable, normal surroundings. This homelike atmosphere might result in evidence that would not otherwise be obtained. However, this advantage must be weighed against its potential for impairment of the defendant's right to due process and a fair trial. The defendant, of course, is presumed to be innocent. Separation of the defendant from the other trial participants has the danger of diminishing that presumption in the eyes of the jury. A showing should be made that the defendant has intimidated or attempted to intimidate the witness before there is any substantial departure from the normal rules of criminal procedure. The fact that the witness is frightened to repeat the allegations in open court when there has been no attempt to intimidate may have significance as to credibility.

§ 2.45 Videotaped depositions. Victims of sexual offenses find it difficult, traumatic and embarrassing to testify in public about the sordid details of the offense. This is especially so when they are required to repeat and relive the testimony at a series of hearings. It has been advocated that the testimony of such victims be presented to the trier of fact by way of videotaped depositions. A Florida statute providing for such videotaped testimony may be found in Appendix 41.

Two fundamental constitutional issues are raised by the use of videotaped deposition to protect the witnesses from the psychological trauma of testimony in the usual courtroom setting. The first is that the use of depositions, videotaped or otherwise, inherently conflicts with the right of the defendant, the press and the community to a public trial. The very nature of depositions is that they are conducted in privacy and at the convenience of the parties. The second constitutional issue is whether the use of videotaped depositions deprive the defendant of the right guaranteed by the Sixth Amendment to be confronted by the witnesses.

The Supreme Court has never construed the confrontation clause so literally or so rigidly as to exclude all out-of-court statements by witnesses. Depositions of unavailable witnesses have been held to be admissible in criminal cases notwithstanding the confrontation clause, provided that an adequate opportunity for cross-examination is afforded and a good faith effort to obtain the presence of the witness has been made, Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). In addition to actual unavailability of the witness and the opportunity for cross-examiniation, there must also be compliance with the technical notice and other requirements of the jurisdiction for the admissibility of depositions. Among the usual requirements is that the defendant be given opportunity to be present during the taking of the deposition. State v. Wilkinson, 415 N.E.2d 261 (Ohio 1980). At least one court has held that the right to be present during the deposition includes the right to face-to-face confrontation. United States v. Benfield, 593 F.2d 815 (8th Cir. 1979). See also Right to Physically Confront Witness at Videotaped Deposition, 1979 Wash. Univ. L. Q. 1106. But see Jones v. State, 445 N.E.2d 98 (Ind. 1983).

The unavailability of the witness for the purpose of admission of depositions may be satisfied by mental or physical illness or infirmity as well as by actual absence from the jurisdiction. United States v. Tunnell, 667 F.2d 1182 (5th Cir. 1982) (stroke); State v. Burns, 332 N.W.2d 757 (Wis. 1983) (mental illness); State v. Vialpando, 599 P.2d 1086 (N.M. App. 1979) (advanced age and poor condition). This gives basis to the argument advanced that the trial judge can make a preliminary finding that the stress of giving testimony in open court would be so great that a witness is not available and a prior deposition may be admitted. Arkansas has enacted a statute which in essence is a legislative determination that child victims of sexual offenses are unavailable for testimony and that their videotaped depositions shall be admitted. State v. Lee, 639 S.W.2d 745 (Ark. 1982) (discussing Ark. Stat. Ann. Section 43-2036 Supp. (1981), a copy of which may be found in Appendix 4n).

Concepts concerning the use of depositions in criminal trials apply equally to the admissibility of videotaped depositions. The form of a deposition is largely irrelevant to its admissibility so long as technical rules concerning authenticity, notice, and cross-examination are satisfied. If depositions are to be used, it is clearly more meaningful and satisfactory to the jury that they be recorded by some audio-visual device. But, it does not appear that in the present posture of the law the admissibility of a deposition is enhanced by the quality of the reproduction. See People v. Zehr, 442 N.E.2d 581 (Ill. App. 1982). Experience has suggested, however, that preliminary hearings, other earlier testimony and depositions should be videotaped. The California statute providing for such videotaping of preliminary hearing testimony with the determination of admissibility made at trial is found in Appendix 4m. The witness might become actually unavailable, of course. But the real value of the videotaped testimony is that it is available. The defendant might willingly accede to its use to spare the trauma to the victim; the quality of the testimony on the tape might also lead the defendant to decide that the best course would be to seek a disposition of the charge without trial.

§ 2.46 Companion for sensitive victims in closed proceedings. It is often reported that some sexual offenses are not reported or prosecuted because the victim, or in the case of children, the victim's parents, wish to avoid the ordeal of a public trial. Some victims find appearing in an open, crowded courtroom so embarrasing and traumatic that they are unable to testify, or if they do testify they suffer long lasting psychological harm from the experience, thus adding to the trauma of the crime itself. Apart from the anguish of testifying about intimate details in open court, victims understandably resent it when the experience that was a horror to them is given wide and scintillating publicity. Many of these problems are alleviated when the trial of the defendant is closed to the public. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) the Supreme Court held that a statute which mandated the closing of trials of sex offenses against minor victims abridged the First Amendment right of the press and public to attend criminal trials. The Court acknowledged, however, that traditionally courts have discretion to close portions of such trials on a case-by-case basis to protect sensitive victims from the trauma of public testimony.

There have been a few cases in which a court has acceded to a request to limit access of the public to a particular hearing and then become extremely literal in "closing the court" by excluding the parents, representatives, or friends of sensitive victims. This approach, particularly in a case involving a young child, may make the victim feel more abandoned and the giving of testimony more difficult.

There does not appear to be any requirement whatever that the court exclude the parent or companion of a sensitive victim merely because it has found it appropriate to close a hearing to the public. The cases dealing with the right of the public to attend criminal trials, including Globe Newspaper Co., surpra, make it clear that whether to close the court and the extent to which access of the public should be limited to a hearing calls for the exercise of discretion in tailoring the closure order to the circumstance of the particular case. See also Federated Publications, Inc. v.Swedeberg, 633 P.2d 74 (Wash. 1981), cert. denied, 456 U.S. 984 (1982). (Excluding members of the press who refused to conform to carefully drawn guidelines.)

One of the legal justifications for limiting the access of the public to a hearing involving the testimony of a young child is to relieve some of the embarrassment and discomfort which arises in testifying and making the testimony more available. Depriving the victim of the emotional support of his or her parents or friends defeats that purpose. See Parker, The Child Witness Versus the Press: A Proposed Legislative Response to Globe v. Superior Court, 47 Alb. L. Rev. 408 (1983). Courts have the responsibility to evaluate the circumstances of each particular case with a view to balancing the trial rights of the defendant with the need for psychological protection and support of the victim in deciding which persons should be excluded from the courtroom and which should be permitted to remain.

IV. JUDICIAL EDUCATION

§ 2.47 JUDGES AT THE TRIAL AND APPELLATE LEVELS SHOULD BE ENCOURAGED TO PARTICIPATE IN PROGRAMS DEALING WITH THE NEEDS, COMFORTS AND LEGAL INTERESTS OF CRIME VICITMS.

State, regional and national programs and conferences for judges and nonjudges should be held on methods to improve the treatment of victims and witnesses and to develop solutions to the problems suggested.

Commentary

§ 2.48 The President's Task Force on Victims of Crime observed that judges are often drawn from specialties in the legal profession that have no exposure to the effects of crime and lack the experience to understand the victim's point of view. The Task Force cited with approval the observation of Judge Reggie Walton, Superior Court of the District of Columbia, that:

> The Judicial College should develop a course of instruction, to be incorporated into the course designed for new and experienced judges, which focuses on victims of crime.

Judges have historically received little or no judicial training before ascending the bench. In recent decades, the availability of judicial education in the states has improved, although this varies considerably among the states. The mission of The National Judicial College is to help correct this deficiency at the national level by offering a broad variety of career training to sharpen the skills of trial judges. But none of this judicial training to date has dealt in any detail with the legal interests and concerns of victims of crime. The lack of specific training in victims' rights tends to frustrate experienced judges who are sensitive to victims' problems but do not know what can be done to alleviate them.

Trial judges are in a position to address immediate concerns of crime victims, but may not be sufficiently aware of the nature of those concerns. Appellate judges also have a great need for training in recognizing the severe problems encountered by victims of crime.

This Manual for judges has been designed specifically to implement the recommendations of the President's Task Force and the Conference encouraging training programs dealing with the needs and legal interests of crime victims.

PART 3

ISSUES DISCUSSED BUT FOR WHICH JUDICIAL PRACTICES WERE NOT RECOMMENDED

§ 3.1 Background of issues statements: Prior to the National Conference of the Judiciary on the Rights of Victims of Crime, the attendees were asked to complete a questionnaire about practices in their jurisdictions which highlighted the issues that were to be discussed. This questionnaire will be found in Appendix 2, along with the list of specific issues that were discussed during the Conference. These may be useful to participants in state courses to evaluate rights and services furnished victims and witnesses in their own jurisdictions. A statement was prepared by the College staff for each of the issues that was discussed. These issue statements served as the basis for the commentaries to the adopted recommended practices included in Part 2.

Summaries of the statements on the issues for which practices were not adopted are included here as these and similar issues might be discussed in local or state judicial training session.

§ 3.2 Should the court consider a statement from the victim on a decision not to prosecute?

Comment

§ 3.3 There are many instances when, for any number of reasons, the public prosecutor will decline to prosecute a case in which the victim has a real interest, either emotional or financial. The reasons for such refusals to prosecute and the victim's response will be discussed at greater length in § 3.7. The issue here is whether victims have any right to seek review of a decision by the public prosecutor not to initiate prosecution.

The discretionary powers of the public prosecutor are extremely broad. In discussing the extent of his or her authority it must be remembered that the function of the prosecutor is to represent the state in criminal prosecutions. In carrying out this function, the prosecutor must investigate and evaluate complaints of criminal acts and decide whether and when to prosecute, and whether or when to discontinue a case. Commonwealth v. Malloy, 450 A.2d 689 (Pa. Super. Ct. 1982), and cases cited therein. As noted by the Supreme Court, ". . . a citizen lacks standing to contest the policies of the prosecuting attorney when he himself is neither prosecuted nor threatened with prosecution . . . 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, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536, 541 (1973).

In some jurisdictions a private citizen may file with a trial court a complaint declined by the prosecutor, but even in those states his or her refusal to prosecute will be disapproved only if there has been a clear abuse of prosecutorial discretion. See Discretionary Authority of the Prosecutor, National College of District Attorneys, 1977 pp. 28-45.

The refusal of the public prosecutor to pursue a given case is a matter of legitimate concern. Since the prosecutor is a public, nearly always elected, official, his refusal to properly discharge duties is in the political realm. Other possible alternatives are discussed in the Commentary to ABA Standards for Criminal Justice, The Prosecution Function, Standard 3-2.1.

§ 3.4 Should the court consider a statement from the victim on the specific offense with which the defendant is to be charged?

Comment

§ 3.5 The precise criminal violation with which the defendant is to be charged is ordinarily in the exclusive discretion and control of the public prosecuting attorney. Victims are often distressed upon learning that the criminal charge does not adequately address their actual injuries, or in the case of a multiple offender, may not even include the offense with which they are concerned. Several considerations are involved in charging decisions which might not fully take into account the rights of a particular victim. One factor is that in evaluating the case, the prosecutor might depend too heavily on a report of the investigating police officer which might omit key facts of importance to the victim. It is not only that the victim might perceive that treatment of the offender is too lenient; there may be occasions that the investigation reports do not disclose circumstances or relationships that might cause the victim to feel that the charge presented is too harsh. It has thus been suggested that before selecting the specific offense to be charged, the prosecutor should consult the victim to ensure that all pertinent facts and the desires and interests of the victim are considered.

The basic legal consideration is that the public prosecutor's discretion as to which offenders to prosecute and which offenses to charge is virtually unfettered. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); Commonwealth v. Dunlap, 377 A.2d 975 (Pa. 1977). The many considerations that must be made are reflected in the ABA Standards for Criminal Justice, The Prosecution Function, Standard 3-3.9. Among these are that the prosecutor should take into account the extent of harm caused by the defendant, but has no obligation to present all charges which the evidence might support. The prosecutor in exercising discretion as to the appropriate charge may also have to consider the availability of the defendant as a witness in another case or whether a particular charge might result in a disposition of the case by a plea of guilty.

Neither the President's Task Force on Victims of Crime nor the Attorney General's memorandum on victim-witness assistance suggest that the victim should be consulted on the specific charge to be made. In the Commentary to the ABA Standards for Criminal Justice, The Prosecution Function, Standard 3-3.9 it is indicated that in the charging decision the prosecutor should evaluate the motives and interests of the victim or witnesses to the crime. It would seem necessary for the prosecutor, at the very least, to discuss the case with the victim before the charging decision is made. This is particularly true with regard to the obligation to assess the actual harm done by the offense and the victim's need for restitution or reparation.

§ 3.6 Should the court have the authority to permit private prosecution?

Comment

§ 3.7 Public prosecutors may elect not to pursue certain cases for many reasons. There may be a professional evaluation that the evidence is not legally sufficient to warrant prosecution or a feeling that the victim contributed to the offense or in some way is not entirely free from blame. It may be that in the prosecutor's judgment the testimony of the victim would not be credible at trial. Or there may be a decision made that the case is simply not sufficiently serious to justify the expenditure of the state's time and resources required for prosecution. Whatever the reason for the prosecutor's decision not to prosecute, it may appear insufficient from the victim's perspective. Some victims in that situation desire to have the opportunity to initiate prosecution themselves.

Early in our history and even today to some extent in England, criminal prosecution by private citizens was the norm. It was not until the creation of full-time public prosecutors in the eighteenth and nineteenth centuries that private prosecution fell into disuse. Today private prosecution is considered an anomaly. The ABA Standards for Criminal Justice, The Prosecution Function, Standards 3-2.1 and 3-3.4 insist that the prosecution of criminal cases should be the function of a public prosecutor who is a lawyer and that the decision to institute criminal proceedings should initially and primarily be his or her responsibility. In federal courts private prosecution is not allowed. Only the United States attorney has the authority to pursue a criminal case to trial, even though a private citizen may file a sworn complaint with a federal magistrate. See United States v. Bryson, 434 F. Supp. 986 (W.D. Okla. 1977), and cases cited there. Some state jurisdictions have held that private prosecution is not permitted because the state statute or constitution has vested the prosecutorial function exclusively with the public prosecutor. People v. Municipal Court, 103 Cal. Rptr. 645, (Cal. Ct. App. 1972); Annot., 66 A.L.R. 3d 732. In other jurisdictions private prosecution has not been allowed for policy reasons similar to those expressed in the commentary to the above ABA Standards. State ex rel. Koppers Co., Inc. v. International Union of Oil,Chemical and Atomic Workers, 298 S.E.2d 827 (W. Va. 1982); State ex rel. Wild v. Otis, 257 N.W.2d 361 (Minn. 1977). In a few jurisdictions private prosecution is permitted, at least in the case of misdemeanors. This is justified in New York, for example, because the public prosecutors may not have the time or resources to try all cases. People ex rel. Luceno v. Cuozzo, 412 N.Y.S. 2d 748 (City Ct., Westchester County 1978).

In most jurisdictions, although not in all, the prosecution must seek the permission of the court to dismiss a complaint, information or indictment. It would not seem to be inappropriate, in the case of disagreement between the victim and the prosecutor, for the victim to be given an opportunity to appear and present his or her views when a motion is made by the prosecution to dismiss the charge. If such procedure is not permitted it is noted in the cases referred to above that the victim may have other ways of seeking prosecution, such as applying to the grand jury or seeking the appointment of a special prosecutor. In any event, ABA Standard for Criminal Justice, 3-4.3 provides that whenever felony criminal charges are dismissed by way of nolle prosequi (or its equivalent), the prosecutor should make a record of the reasons for the action.

Neither the President's Task Force on Victims of Crime nor The Victims and Witnesses Protection Act of 1982 suggest that private prosecution should be allowed.

§ 3.8 Should the court issue temporary restraining orders limiting the access of the defendant to the victim/witness or admonish defendants of the severe consequences of any efforts to intimidate victims?

Comment

§ 3.9 Defendants often find intimidation of complaining witnesses an effective and often riskless tool for thwarting prosecution. This is especially effective when the victim or witness is either a family member or lives in the defendant's neighborhood. The fact that such intimidation is a separate crime is often not even impressed on defendants, much less charged by prosecutors. Further, judges may tend to merely regard such intimidating behavior by defendants or their associates in aggravation of the sentence imposed, thus not sending any signal to criminals of a specific punishment for their attempts at intimidation.

Most defendants are free pending trial and thus have the opportunity to threaten victims to discourage their testimony. According to a 1981 Victim Services Agency study of intimidated witnesses in Brooklyn Criminal Court, 57% of the threatened witnesses interviewed were threatened in their homes, neighborhoods, schools or workplaces (plus 25% in these places by telephone or mail). Witnesses who knew the defendant prior to the crime were found more likely to experience threats in their personal domains (82%) than those who did not know the defendant, though intimidation of the latter group was "strikingly high" (60%). Removing defendant access to the victim or witness would undoubtedly reduce such incidents of intimidation.

The same study found that the most frequent response of the criminal justice system to reported threats was admonishment by judges (usually on the record, sometimes accompanied by formal restraining orders prohibiting the defendant from verbally or physically assaulting the witness, harassing the witness by telephone, or visiting the witness' home or place of business). It reported this response resulted in a reduction in problems, both in cases involving strangers and in cases involving acquaintances. In noting the power of trial judges to regulate those persons who come before them as parties or witnesses, the commentary to an ABA recommendation on court orders notes that "as is the case with much of the intimidation problem and its remedies, the visible willingness of the court to confront the issue will, in itself, cure a great deal of the problem."

Routine stern admonishments by judges against victim intimidation appear to be reasonably effective, costless methods of tightening witness security. Defendants who are aware that judges will entertain separate charges for such attempts or will impose harsher sentences as a consequence are naturally more reluctant to engage in witness intimidation. Consequently such admonishments have been proposed, as a matter of course. Cf. Reducing Victim/Witness Intimidation: A Package, ABA 1980, Recommendation 1, at pages 22 and 23. See also Attorney General's Guidelines, Part V and Task Force Prosecutor Recommendation 3, which indicate the prosecutorial responsibility to counter such conduct (by bringing it to the court's attention).

§ 3.10 Should access by the press and general public to criminal trials be limited to protect sensitive victims, particularly children and victims of sexual abuse, from embarrassment and publicity?

Comment

§ 3.11 It is often reported that some sexual offenses are not reported or prosecuted because the victim, or in the case of children, the victims' parents, wish to avoid the ordeal of a public trial. Some victims find appearing in an open, crowded courtroom so embarrassing and traumatic that they are unable to testify, or if they do testify they suffer long lasting psychological harm from the experience, thus adding to the trauma of the crime itself. Apart from the anguish of testifying about intimate details in open court, victims understandably resent it when the experience that was a horror to them is given wide and scintillating publicity. Many of these problems might be alleviated if the trial of the defendant is closed to the public.

The right of the accused to a public trial has been traditionally recognized and enforced in the Anglo-American system of criminal justice, In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), although that right is not absolute; Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). It has been observed by courts and commentators that this Sixth Amendment guaranty not only protects the defendant, but serves the public interests as well. Public trials acquaint the public with the criminal justice system, give wide disclosure of public corruption, and cause all participants to perform their duties more conscientiously. Gannett Co. v. De Pasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The Supreme Court has recently determined that the press and the public have a First Amendment right that criminal trials be public. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). In Globe Newspaper v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the Supreme Court held a statute which barred the public and press from all trials of sexual offenses involving victims under the age of eighteen to be an unconstitutional abridgement of the First Amendment right of the public to access to criminal trials. The language of the opinion permits closure of the court if it is shown to be necessitated by a compelling governmental interest and the closure order is narrowly tailored to serve that interest. The court cited with seeming approval statutes of several states that give the trial courts discretion to exclude the public on a case by case basis in order to protect minor witnesses. Globe Newspaper Co. v. Superior Court: Right of Access to Criminal Trials after Richmond, 36 Ark. L. Rev., 688 (1983).

Sensitive victims have legitimate reasons to desire that access of the public to the courtroom be limited. However, these interests must be balanced against the right of the defendant and the press to a public trial. Careful legal research in making this balance will be required until the law in this area becomes more settled. Compare: United States v. Criden, 675 F.2d 550 (3d Cir. 1982) (public has right of access to pretrial supression hearing) and United States v. Chagra, 701 F.2d 354 (5th Cir. 1983) (court may close pretrial bail reduction hearing). See also Federated Publications, Inc. v. Swedberg, 633 P.2d 74 (Wash. 1981), cert. denied, 456 U.S. 984 (1982). (Court can exclude members of press who refuse to comply with carefully drawn guidelines for publicity.)

§ 3.12 Should procedures be adopted to protect sensitive victims include a privilege for communication between victims (especially victims of sexual abuse) and nonphysician counselors?

Comment

§ 3.13 Victims who require counseling to help them cope with the effects of the crime may be hesitant to seek assistance if they are aware that their confidences will be subject to discovery by the defense and made public at the trial. Victims who are not aware of this possibility and who do seek assistance can suffer psychological injury if the defense does obtain and use this information.

Although courts and the rules of evidence adopted by the states have been reluctant to expand testimonial privileges, approximately two-thirds of the states have extended the traditional physician-patient privilege to cover confidential communications between psychotherapists (psychiatric or psychologist) and patient. See Patient Privilege in Child Placement, 26 Vill. L. Rev., 955 (1981). The extension of the privilege to nonprofessionals is not widespread however. A limited extension of this privilege, has been enacted in California to cover confidential communications between a "sexual assault counselor" and the victim. (See California Evidence Code, Section 1035.4 in Appendix 4p.) This California privilege does not apply to communications which may constitute relevant evidence of the assault. The Pennsylvania Supreme Court has rejected a court mandated extension of a psychotherapist privilege to non-psychiatric or psychologist staff members of a Pittsburgh rape crisis centers. In the Matter of Pittsburgh Action Against Rape, 428 A.2d 126 (Pa. 1981). In that case the court, however, approved a subpoena for the crisis center's documents that would be limited to verbatim accounts of the complainant's statements about the alleged offense or crisis center notes approved by the complainant as accurate. Soon after In the Matter of Pittsburgh, the Pennsylvania legislature created a privilege for confidential communications to sexual assault counselors. It may be found in Appendix 4o.

Commentaries on extension of the privilege have been varied. The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege, 69 N.C. L. Rev. 893 (1982), critical of the privilege, notes that even the psychotherapist privilege is not recognized in Canada or England and is generally studded with exceptions, especially in the area of criminal prosecutions. Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 Cal. L. Rev. 1050 (1973), to the contrary, strongly defends the need for the privilege, justifying its extension to social workers on grounds that only the wealthy can afford licensed psychiatrists or psychologists. See, to the same effect, The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics, 58 Wash. L. Rev. 565 (1983), and The Psychotherapist-Patient Privilege: Are Some Patients More Privileged Than Others?, 10 Pac. L.J. 801 (1979).

§ 3.14 Should more severe sentences be given those convicted of child molesting?

Comment

§ 3.15 It was noted in the President's Task Force on Victims of Crime, discussion of Judiciary Recommendation 9 at pages 81-2, the sentences imposed by some courts indicate they do not fully comprehend the harm inflicted by child molesters on their victims. Thus there may be evidence to indicate that the sexual abusers of children are treated less severely than those who sexually abuse adults, though the harm to the victim is at least as great.

Most judges attending the conference did not agree with the premise suggested by this issue that lenient sentences are given to child molesters.

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APPENDICES

Appendix I

Final Report of the President's Task Force on Victims of Crime

Recommendations for the Judiciary
(See pages 72 - 73)

1. It should be mandatory that judges at both the trial and appellate level participating in a training program addressing the needs and legal interests of crime victims.

2. Judges should allow victims and witnesses to be on call for court proceedings.

3. Judges or their court administrators should establish separate waiting rooms for prosecution and defense witnesses.

4. When ruling on requests for continuances, judges should give the same weight to the interests of victims and witnesses as that given to the interests of defendants. Further, judges should explain the basis for such rulings on the record.

5. Judges should bear their share of responsibility for reducing court congestions by ensuring that all participants fully and responsibly utilize court time.

6. Judges should allow for, and give appropriate weight to, input at sentencing from victims of violent crime.

7. Judges should order restitution to the victim in all cases in which the victim has suffered financial loss, unless they state compelling reasons for a contrary ruling on the record.

8. Judges should allow the victim and a member of the victim's family to attend the trial, even if identified as witnesses, absent a compelling need to the contrary.

9. Judges should give substantial weight to the victims' interest in speedy return of property before trial in ruling on the admissability of photographs of that property.

10. Judges should recognize the profound impact that sexual molestation of children has on victims and their families and treat it as a crime that should result in punishment, with treatment available when appropriate.

Appendix 2

VICTIMS' RIGHTS QUESTIONNAIRE
(Pre-conference Questionnaire)

And

CONFERENCE ISSUE LIST

_____
NAME

Victims' Rights Questionnaire

This survey has three important purposes. First, completing it will familiarize participants with practices used in their own state to protect victims' rights. Second, the data received will give a current state-by-state treatment of victims' rights. The request for judicial practices is therefore meant to elicit the manner in which state laws and practices dealing with victim issues are implemented by courts in your jurisdiction. Third, we hope your work on this questionnaire will suggest judicial reforms.

VICTIM SERVICES

1. A. (1) Does your local jurisdiction have victim assistance program(s) available for victims of all types of crimes?
Yes ___ No ___

(2) If yes, do you know how it began?
Yes ___ No ___
Comments:

(3) If no, are there victim assistance programs for specific types of crimes?
Yes ___ No ___
Comments:

B. Regardless of your answer to 1.A.(1), are the following services provided to victims:

(1) Child care during court appearances?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(2) Paid parking for witnesses and victims?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(3) Intervention with employers or creditors on behalf of the victim and witnesses?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(4) Brochure describing court procedures.
Yes ___ No ___
Comments:

(5) If yes, does the brochure include a diagram of the courthouse and a map showing its location?
Yes ___ No ___

Please include a copy of the brochure.
Comments:

(6) Victim counseling?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(7) Crisis intervention on a 24 hour basis?
Yes ___ No ___
Comments:

(8) Routine notification to victims of the progress (including outcome) of their case?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(9) Emergency financial aid to victims?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

C. Do judges have regular contact with local victims' assistance organizations?
Yes ___ No ___
Comments:

D. How do your assess your local victims' assistance programs?
Excellent ___ Very Good ___ Good ___ Fair ___ Poor ___
Comments:

VICTIM PARTICIPATION

2. A. To the best of your knowledge, do judges in your jurisdiction encourage or require the prosecutor to give the victim an opportunity to express an opinion on the following:

1. The specific offense with which the defendant is to be charged?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

2. A decision by the prosecutor not to prosecute?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

3. The propriety of diversion?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

B. Do judges in your jurisdiction give the victim an opportunity to express an opinion on:

1. The conditions imposed on pretrial release or bail?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

2. The scheduling of court proceedings?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

3. Requests for continuances or delays?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

4. The necessity of sequestration of the victim or relatives?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

5. Plea negotiations?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

6. Prior to sentencing, the impact of the offense on the victim or relatives, either by testimony or a victim impact statement?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

7. The sentence to be imposed?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

VICTIM/WITNESS INTIMIDATION

3. A. Are there any local judicial practices to prevent intimidation of or retaliation against victims or witnesses?
Yes ___ No ___
Comments:

If yes, how often are:

(1) Separate waiting areas provided for victims and prosecution witnesses?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(2) Limits placed on access to names and addresses of victims or witnesses?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(3) Neutral locations made available for interviews of victims or prosecution witnesses by the defense attorney?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(4) Judicial warnings given to defendants at pretrial release hearings of penalties for victim or witness intimidation?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(5) Conditions of defendant's release established which require there be no intimidation of the victims or witnesses?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(6) Temporary restraining orders used to limit access to victims or witnesses?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(7) Victims notified of the defendant's release from custody, whenever that might occur?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

B. What is your assessment of how often intimidation of or retaliation against victims or witnesses occurs in your jurisdiction for the following types of crimes:

(1) Stranger-to-stranger violent crime?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(2) Non-stranger violent crime?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

(3) Non-violent property crimes?
Always ___ Frequently ___ Seldom ___ Never ___
Comments:

PROTECTION OF SENSITIVE VICTIMS

4. A. Are there any judicial practices designed to protect sensitive victims (minors, victims of sexual assaults, survivors of homicide victims, the elderly, or the handicapped)?
Yes ___ No ___ If yes, are there any provisions for:

(1) Expedited trial?
Always ___ Frequently ___ Seldom ___ Never ___
For which class(es) of sensitive victims?

Comments:

(2) Specially designed courtrooms?
Always ___ Frequently ___ Seldom ___ Never___
Please describe the courtroom.

For which class(es) of sensitive victims?

Comments:

(3) Videotaped depositions?
Always ___ Frequently ___ Seldom ___ Never ___
For which class(es) of sensitive victims?

Comments:

(4) Limited access by spectators and media to courtrooms?
Always ___ Frequently ___ Seldom ___ Never ___
For which class(es) of sensitive victims?

Comments:

B. Is there any privilege for communications between victims (especially of sexual offenses) and non-physician counselors in your state?
Yes ___ No ___
Comments:

VICTIM COMPENSATION AND RESTITUTION

5. A. Does your jurisdiction have a state crime victims compensation system?
Yes ___ No ___

If yes, what is your opinion of the adequacy of the program?
Excellent ___ Very Good ___ Good ___ Fair ___ Poor ___
Comments:

B. Does state law permit an order for restitution as a part of the sentence?
Yes ___ No ___
Comments:

If yes:
(1) Is such order for restitution limited to easily determined losses, such as out-of-pocket, or medical expenses?
Yes ___ No ___
Comments:

(2) Is the order for restitution restricted to the specific offense of which the defendant is convicted?
Yes ___ No ___
Comments: