



NOVEMBER 2001

THE CRIME VICTIM'S RIGHT TO BE PRESENT

LEGAL SERIES



Message From THE DIRECTOR

Over the past three decades, the criminal justice field has witnessed an astounding proliferation of statutory enhancements benefiting people who are most directly and intimately affected by crime. To date, all states have passed some form of legislation to benefit victims. In addition, 32 states have recognized the supreme importance of fundamental and express rights for crime victims by raising those protections to the constitutional level.

Of course, the nature, scope, and enforcement of victims' rights vary from state to state, and it is a complex and often frustrating matter for victims to determine what those rights mean for them. To help victims, victim advocates, and victim service providers understand the relevance of the myriad laws and constitutional guarantees, the Office for Victims of Crime awarded funding to the National Center for Victims of Crime to produce a series of bulletins addressing salient legal issues affecting crime victims.

The Crime Victim's Right To Be Present, the third in the series, provides an overview of state laws addressing the rights of victims to attend criminal justice proceedings, particularly trials, and how their presence might affect the rights of defendants. This bulletin and the others in the Legal Series highlight

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Introduction

For crime victims and their families, the right to be present during criminal justice proceedings is an important one. Victims want to see justice at work. They want to hear counsel's arguments and view the reactions of the judge, jury, and defendant. Most state victims' rights constitutional amendments and statutory victims' bills of rights give victims the right to be present during proceedings.

Status of the Law

Thirty-nine states give crime victims the right to attend criminal justice proceedings, including trials. However, most of these states impose limitations on that right. The restrictions stem from concern that a victim's right to attend proceedings may conflict with the rights of the accused. Thus, victims are often given a right to be present only "to the extent that it does not interfere with the rights of the accused" or is "consistent with the rules of evidence."²

The "rule on witnesses," generally Rule 615 of a state's Rules of Evidence, was developed to limit the possibility that a witness might be influenced by hearing the testimony of other witnesses or the arguments of counsel. Thus, to ensure a fair trial, witnesses are excluded—sequestered—from the criminal trial except during their testimony. This rule does not apply to a defendant, who is exempted as a party to the case.

Judges often apply the rule on witnesses by looking only at one side of the equation—protecting the interests of the defendant by excluding the prosecution's witnesses. They fail to consider the legitimate interest of the victim of an offense—who often is also a witness in the case—in attending and observing the proceedings. In practice, defense counsel need only list victims and/or their family members as potential witnesses to have them excluded from the trial. As a result, this rule often allows victims and family members to be excluded even when they have little, or no, relevant testimony to offer.

Eight states—Alabama, Alaska, Arizona, Arkansas, New Hampshire, Oregon, South Carolina, and Utah—generally exempt crime victims from sequestration as witnesses. However, Arkansas, New Hampshire, South Carolina, and Utah still permit the court to



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various circumstances in which relevant laws are applied, emphasizing their successful implementation.

We hope that victims, victim advocates, victim service providers, criminal justice professionals, and policymakers in states across the Nation will find the bulletins in this series helpful in making sense of the criminal justice process and in identifying areas in which rights could be strengthened or more clearly defined. We encourage you to use these bulletins not simply as informational resources but as tools to support victims in their involvement with the criminal justice system.

John W. Gillis
Director

exclude a victim when “necessary to protect the defendant’s right to a fair trial”³ or where “inconsistent with the constitutional and statutory rights of the accused”⁴ or similar language is used. Utah only exempts victims from the rule “where the prosecutor agrees with the victim’s presence.”⁵ Other states, including Idaho⁶ and New Mexico,⁷ do not exempt victims from the rule on witnesses despite a general right to be present as indicated by their statutes and constitutions.

Six other states—Louisiana, Maryland, Michigan, Nevada, South Dakota, and Washington—give crime victims a right to be present only after they have testified.⁸ Washington also gives victims a right to be scheduled to testify as early as possible to maximize their attendance at the trial.⁹

A few states in their statutes clearly give victims of crime a right to be present during proceedings and provide a specific exemption from the rule on witnesses. For example, Alaska provides victims with a clear statutory right “to be present during any proceeding in . . . the prosecution and sentencing of a defendant if the defendant has the right to be present, including being present during testimony even if the victim is likely to be called as a witness.”¹⁰ Alaska’s rule on witnesses, however, also allows victims choice when the court exempts “the victim of the alleged crime . . . during criminal . . . proceedings when the accused has the right to be present.”¹¹

When defense counsel objects to the presence of the victim/witness in the courtroom on the grounds that it violates the defendant’s constitutional right to a fair trial, judges and prosecutors sometimes err on the side of caution, excluding the

victim from the courtroom or discouraging the victim from exercising his or her right to attend the trial. However, case law indicates that a defendant’s right to a fair trial is not necessarily compromised by a crime victim exercising the right to attend proceedings, even when the victim is a witness in the case. A defendant “must show more than the mere possibility that [the victim] conformed her testimony to that of the other witnesses” because the burden of proof is on the defendant to show he or she was denied a fair trial.¹²

Recently, the Arizona Supreme Court ruled that the state’s constitutional amendment on crime victims’ rights and the statutory and rule changes that implemented it “effectively removed the presumption of prejudice that we traditionally attached to a trial judge’s refusal to exclude a witness from the courtroom.”¹³ Thus, the court found that altering or limiting the defendant’s right to exclude witnesses did not violate constitutional due process.

Some courts have upheld the victim’s right to be present even where there was no explicit exemption from the rule on witnesses. For example, Wyoming law gives victims a right to remain in the courtroom unless the court rules that good cause requires exclusion. In one case, the Wyoming Supreme Court found that the trial court, after hearing the arguments of counsel, had properly balanced the defendant’s constitutional rights against the victim’s statutory rights and did not err in permitting the victim to remain in the courtroom during the testimony of another victim. During trial arguments about whether the victim should be allowed to remain in the courtroom, the prosecution noted that the victim had made a lengthy pretrial statement that was provided to the defense.¹⁴

Apart from traditional sequestration rationales, other arguments have been offered to justify the exclusion of victims/witnesses from a trial. When a victim has not previously identified the accused as the perpetrator, allowing the victim to be present in the courtroom and observe the defendant may influence in-court identification. Of course, the potential problem is substantially diminished when there is a pretrial identification.

In addition, the defense counsel may argue that the mere presence of the victim in the courtroom can prejudice the jury and interfere with the defendant’s right to a fair trial. However, courts have rejected this argument: “[T]here is nothing inherently prejudicial in the presence of the victim. The fact that a defendant may not want the reminder of the crime to be a real presence, we do not see of itself, as an interference with the defendant’s right to a fair trial.”¹⁵

Crafting a Compromise

Several states have attempted to draft statutes that encourage courts to limit the application of sequestration rules. Wisconsin's law states that exclusion of a victim to preserve a defendant's right to a fair trial must be based on something more than the fact that the victim would be present during the testimony of other witnesses.¹⁶ Florida's law requires the court to determine that the victim's presence would be prejudicial; the victim cannot be excluded merely because he or she is subpoenaed to testify.¹⁷

Delaware and Wyoming require the defendant to show good cause to exclude the victim.¹⁸ In several other states, the court cannot exclude a victim unless it determines that the victim's testimony "would be materially affected" if he or she were to hear the testimony of other witnesses.¹⁹ Virginia recently strengthened its law giving victims a right to attend, providing that a crime victim "shall not be excluded unless the court determines, in its discretion, the presence of the victim would *substantially impair* the conduct of a fair trial."²⁰ [Emphasis added by author.]

In other states, courts are encouraged to craft compromises based on the context of a particular case. For example, North Carolina requires the court to "make every effort to permit the fullest attendance possible for the victim" without interfering with the defendant's right to a fair trial.²¹ California's statute provides detailed instructions to the court in this regard, stating that any order of sequestration must allow the victim to be present whenever possible. The party moving for the victim's exclusion must demonstrate "a substantial probability that overriding interests will be prejudiced by the presence of the victim."²² The statute gives examples of such "overriding interests," including the defendant's right to a fair trial and the protection of witnesses from harassment and physical harm. The court is required to consider reasonable alternatives to excluding the victim, and the victim must be heard at any hearing regarding exclusion. The court also must make specific factual findings that support any victim exclusion.²³

In many cases, accommodating the interests of both the defendant and the crime victim may be possible. Often, a crime victim has made pretrial statements, or has even been deposed, regarding the facts of the case. Such prior statements reduce the likelihood that victims/witnesses will alter their testimony, regardless of any intervening influence. If the victim/witness does give conflicting information while on the stand, defense counsel

in the case could confront the victim with the earlier statement. The judge or jury then would have to consider any variation in such testimony when assessing the credibility of the victim. The Utah Supreme Court noted that "inconsistent statements of witnesses, whether they be by the actual victim or others, are in many cases simply a credibility factor that the finder of fact must weigh in determining the outcome."²⁴ Alternatively, a victim could testify first and then remain in the courtroom for the duration of the proceedings.

Although a victim may have a right to be present in the courtroom and may even be exempted from the rule on witnesses, the victim's right to attend is not absolute. The court retains discretion to control courtroom decorum. The judge can order a crime victim (or even a defendant) who is disruptive or violent to be removed from the courtroom.²⁵

Unlike some other victims' rights, the right to attend criminal justice proceedings, especially the right to attend the trial, generally does not involve an administrative burden. Most often, the crime victim is a witness in the case and thus, to testify, will be notified of the date and time of proceedings. Victims generally have the right to be notified of all public court proceedings on request—even if they are not witnesses—so the right to attend proceedings does not imply an additional burden of notification. Rather, large-scale implementation of the victim's right to attend appears to have been restricted by the presumption that allowing a victim/witness to remain in the courtroom violates the right of the defendant to a fair trial. As illustrated above, such a presumption may be unwarranted.

Current Issues

Sitting at the Counsel Table

Many victims want the right to sit at the counsel table with the prosecutor during proceedings. Only Alabama's law affirmatively gives victims this right.²⁶ In contrast, Louisiana's court rule specifically prohibits the victim from sitting at the counsel table.²⁷

Case law indicates courts generally do not allow victims to sit at the counsel table. In an Arkansas case, a conviction was overturned because the court found that allowing a robbery victim to sit at the counsel table during the trial may have unfairly prejudiced the defendant.²⁸ However, that same year, a California case found that allowing the victim to sit at the counsel table did not prejudice the defendant's right to a fair trial. The court was



careful to note that it did not intend, by its ruling, to condone seating victims at the counsel table.²⁹

Incarcerated Victims

Those who oppose giving crime victims a strong right to attend court proceedings often raise the issue of incarcerated crime victims. The crime may have taken place inside a correctional facility, or the victim may become incarcerated for another matter after the offense. A concern is that giving all crime victims a right to be present during criminal proceedings poses a security risk as incarcerated victims are transported to and from court.

Most states that have addressed this issue provide that the right to attend criminal proceedings does not apply to an incarcerated crime victim.³⁰ In contrast, Wisconsin expressly provides for the participation of incarcerated victims: “The court may require the victim to exercise his or her right . . . using telephone or live audiovisual means, if available, if the victim is under arrest, incarcerated, imprisoned or otherwise detained by any law enforcement agency, or is admitted or committed on an inpatient basis to a treatment facility . . . and the victim does not have a [representative] to exercise the victim’s right [to attend court proceedings].”³¹

Support Person

Crime victims may benefit from having a support person present during proceedings. The supportive presence of a trusted advocate or family member often enables a crime victim to exercise his or her right to be present during proceedings. Recognizing this, 11 states—Arkansas, California, Colorado, Delaware, Illinois, Iowa, Kentucky, Nevada, New Hampshire, Ohio, and Wisconsin—give crime victims a right to have an advocate or support person present during proceedings.³²

In some cases, supportive advocates or family members have been put on witness lists for the apparent sole purpose of excluding them from the trial or other proceedings. As a result, some states have attempted to restrict such tactics. For example, Oklahoma law provides that “when any family member is required to be a witness by a subpoena from the defense, there must be a showing that the witness can provide relevant testimony as to the guilt or innocence of the defendant before the witness may be excluded from the proceeding by invoking the rule to remove potential witnesses.”³³ New Hampshire similarly restricts abuses of the rule on witnesses to exclude support people: “If a victim/witness advocate is called as a witness, a party opposing such action may move for an order requiring the party desiring to use such testimony to show cause why such

victim/witness advocate’s testimony is necessary. In no case shall a victim/witness advocate be sequestered unless the court finds and orders, based on the facts of the case, that failure to sequester would violate a defendant’s rights.”³⁴

Conclusion

Victim service providers consider the right to attend criminal justice proceedings one of the fundamental rights of crime victims. Although its application, especially at criminal trials, has been restricted in practice, some statutes and the limited case law suggest that the right can be applied more broadly without placing an undue burden on the criminal justice system or interfering with the constitutional rights of the accused.

Notes

1. KAN. CONST. art. XV, § 15.
2. MISS. CODE ANN. § 99-36-5 (2001).
3. For example, ARK. CODE ANN. § 16-90-1103 (Michie 2001).
4. For example, N.H. REV. STAT. ANN. § 21-M:8-k (2000).
5. UTAH R. EVID. 615.

About This Series

OVC Legal Series bulletins are designed to inform victim advocates and victim service providers about various legal issues relating to crime victims. The series is not meant to provide an exhaustive legal analysis of the topics presented; rather, it provides a digest of issues for professionals who work with victims of crime.

Each bulletin summarizes—

- Existing legislation.
- Important court decisions in cases where courts have addressed the issues.
- Current trends or “hot topics” relating to each legal issue.

6. IDAHO CONST. art. I, § 22; IDAHO CODE § 19-5306 (Michie 1999).
7. N.M. CONST. art. II, § 24; N.M. STAT. ANN. § 31-26-4 (Michie 2000).
8. LA. CODE EVID. ANN. 615 (West 2000); MD. ANN. CODE art. 27, § 773 (2001); MICH. STAT. ANN. §§ 28.1287(761), (789), (821) (Law. Co-op. 2000); NEV. REV. STAT. § 171.204 (2001); S.D. CODIFIED LAWS § 19-14-29 (Michie 2001); WASH. REV. CODE § 7.69.030 (2000).
9. WASH. REV. CODE § 7.69.030 (2000).
10. ALASKA STAT. § 12.61.010 (Michie 2000).
11. ALASKA R. EVID. 615.
12. *State v. Beltran-Felix*, 294 Utah Adv. Rep. 3, 12, 922 P.2d 30, 35 (Utah Ct. App. 1996).
13. *State v. Fulminante*, 195 Ariz. 485, 975 P.2d 75, 92 (1999).
14. *Gabriel v. State*, 925 P.2d 234, 236 (Wyo. 1996).
15. *People v. Ramer*, 17 Cal. App. 4th 672, 679, 21 Cal. Rptr. 2d 480 (5th Dist. 1993), *review denied, op. withdrawn by order of ct., People v. Ramer*, 24 Cal. Rptr. 2d 237, 860 P.2d 1183 (1993).
16. WIS. STAT. § 906.15 (2001).
17. FLA. STAT. § 960.001 (2000).
18. DEL. CODE ANN. tit. 11, § 9407 (2000); WYO. STAT. ANN. § 1-40-206 (Michie 2000).
19. CONN. CONST. amend. XVII(b). See also ILL. CONST. art. I, § 8.1, 725 ILL. COMP. STAT. § 120/4 (2001); MASS. GEN. LAWS ch. 258B, § 3 (2001); TEX. CONST. art. I, § 30; 42 U.S.C. § 10606 (2001).
20. VA. CODE ANN. § 19.2-265.01 (Michie 2000).
21. N.C. GEN. STAT. § 15A-832 (2000).
22. CAL. PENAL CODE § 1102.6 (Deering 2001).
23. *Id.*
24. *State v. Beltran-Felix*, 294 Utah Adv. Rep. 14 n.6, 922 P.2d 35 (quoting *State v. Rangel*, 866 P.2d 607, 612 n.6 (Utah Ct. App. 1993)).
25. For example, ALA. CODE § 15-14-54 (2000); MD. ANN. CODE art. 27, § 773 (2001); UTAH R. EVID. 615.
26. ALA. CODE § 15-14-53 (2000).
27. LA. CODE EVID. ANN. art. 615 (West 2000).
28. *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993).
29. *People v. Ramer*, *supra*, note 15.
30. For example, see UTAH CODE ANN. § 77-38-2 (2000).
31. WIS. STAT. § 950.04 (2000).
32. ARK. CODE ANN. § 16-90-1103 (Michie 1999); CAL. PENAL CODE § 1102.6 (Deering 2000); COLO. REV. STAT. § 24-4.1-303 (2001); DEL. CODE ANN. tit. 11, § 9407 (2000); 725 ILL. COMP. STAT. § 120/4.5 (2001); IOWA CODE § 915.20 (2001); KY. REV. STAT. ANN. § 421.575 (Banks-Baldwin 1999); NEV. REV. STAT. § 178.571 (2001); N.H. REV. STAT. ANN. § 516:7-a (2000); OHIO REV. CODE ANN. § 2930.09 (Anderson 2001); WIS. STAT. § 950.04 (2000).
33. OKLA. STAT. tit. 19, § 215.33 (2000).
34. N.H. REV. STAT. ANN. § 516:7-a (2000).

The OVC Legal Series bulletins were created by the National Center for Victims of Crime (NCVC) under grant number 1999-VF-GX-K007 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this bulletin are those of the author/NCVC and do not necessarily represent the official position or policies of the U.S. Department of Justice.

The Office for Victims of Crime is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Prevention.