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OVC BULLETIN

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Civil Legal Remedies for Crime Victims

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ACQUISITIONS

Victims of crime are now resorting to civil litigation, in addition to victim compensation and restitution, as a financial means for recovering from the ill effects of crime. Increasingly, victims are finding their way into civil courtrooms to recover from physical, psychological and financial injuries by recovering for lost wages, hospital costs, counselling expenses, property damages and all of the many other various costs incurred as a result of victimization.

To date, the victims movement has not emphasized financial remedies for crime victims. Thus, they have not been familiar complainants (*plaintiffs*) in civil courtrooms. Too many victims and civil attorneys have overlooked potential avenues for recovering damages from perpetrators and have mistakenly believed that perpetrators have no assets from which to collect judgments. Crime victims, consequently, have not been fully informed of their legal rights against perpetrators and civil recoveries have essentially remained inaccessible.

The two-fold purpose of this *Bulletin* is to: 1) introduce victims and victim service providers (providers) to factual circumstances which may give rise to civil suits (theories of *liability*), and 2) make civil attorneys available to

victims by dispelling the myth that perpetrators have no assets from which

to collect civil judgments (*the myth of uncollectability*).

FROM THE DIRECTOR

It is with great pride that the Office for Victims of Crime (OVC) is releasing the *Legal Remedies for Crime Victims Against Perpetrators Bulletin*. This publication is a summary reflection of two years of concentrated work in an important area for crime victims — first party litigation against perpetrators — an area which promises to open new avenues for the recovery of emotional and financial relief for crime victims.

The subject matter of this *Bulletin* was expertly developed and first presented nationwide by the grantee of OVC's 1990-92 *Legal Remedies for Crime Victims Against Perpetrators Manual* and Regional Conference Series Projects: the National Victim Center. This publication draws extensively from both the Manual and the Regional Conference Series curriculum.

Much of the success of these OVC training projects and, indeed, the reason OVC felt it important to fund opportunities for victim service providers to become informed about civil legal remedies, was due to the persuasive advocacy of the late Frank Carrington, Esq. Mr. Carrington was the author of the *Legal Remedies Manual* and was recognized by President Bush during

National Crime Victims Rights Week, 1991, as the "father of the victims movement." Frank recruited the conference series faculty members and assisted the National Victim Center in the development of the conference curriculum. The subject matter reflected in this *Bulletin* was the substance of his life's commitment — one of promoting public awareness regarding civil legal remedies available to crime victims.

Crime victims suffer painful and often permanent injuries at the hands of their assailants. Despite many effective advocacy efforts during this past decade, our society still does not provide adequate financial remedies to victims. Civil litigation should be viewed as an additional tool to provide such redress. Victim service providers and civil attorneys, working together, can provide victims of crime with meaningful options for recovery — options too quickly dismissed and significantly underrated by professionals in years past. We look forward to sharing our appreciation of these civil legal options with you through this publication.

Brenda G. Meister
Acting Director

This *Bulletin* was written by Victoria O. Brien, an attorney and Acting Director of the Office for Victims of Crime's Special Projects Division.

The provider's role is integral to achieving both purposes. It is always the victim's decision whether or not to undertake a civil action against a perpetrator; it is also solely the victim's decision as to the selection of a civil attorney. The provider, however, can serve as a vital information bridge between the victim and the civil attorney. He or she is in a unique position to elicit fresh facts from the victim's memory shortly after the crime occurs, to evaluate those facts and to highlight for the victim the possible value of civil litigation. A factual circumstance with the potential for a civil suit for damages should motivate the provider to suggest to the victim that he or she consider seeking legal counsel. If the victim expresses an interest in pursuing this course of action, the provider should be prepared to inform the victim about bar association referral networks, relevant factors to consider when selecting an attorney and other referral-related information. Of course, providers should also be cognizant of ethical concerns or policies of their employers in this regard.¹

During a case consultation with the civil attorney, the provider can assist the victim in presenting facts that may be relevant to *liability and collectability*—two case elements essential to a successful civil recovery. An insightful presentation of the facts may very well encourage the attorney to represent the victim. Such a presentation may also provide the attorney with significant assistance in obtaining a civil judgment for the victim.

This publication encourages victim consideration of civil remedies. It is not intended to provide legal advice nor is it intended to encourage non-attorneys to provide such advice to crime victims. The legal theories discussed do not address important legal distinctions among jurisdictions, distinctions which can best be evaluated and explained by competent local attorneys. This *Bulletin* is intended only to familiarize providers with the types of questions which can be asked to elicit relevant, factual information from victims so that the

attorney whom the victim has selected can better represent the victim-client. Attorneys with crime victim representation experience are nearly always more than willing to take the time necessary to discuss cases with potential clients, and are, of course, licensed to render legal advice.

Effects of civil litigation

The lives of crime victims and survivors of homicide victims are abruptly shattered by perpetrators. Any single crime may randomly result in physical injury, the loss of a loved one, psychological trauma and the loss of property. Regardless of the type of crime or its degree of impact, all victims experience a loss of all sense of personal control over their lives.

Many victims, as a result of crime, are also suddenly emerged in the complexities of a two-party criminal justice system that does not include them as a formal party. While service providers, State legislatures and prosecutors' offices throughout the country have made great strides during the past decade in recognizing victim needs and in protecting victim rights, the crime committed is treated by the criminal justice system as essentially one against the state. Thus, the system is designed to protect and enforce the rights of society as a whole. Traditionally, it has functioned to convict, punish and rehabilitate criminals, not to assist victims.² The victim's role, at best, is simply one of providing the prosecutor with evidence to convict the alleged perpetrator.

In the criminal case, the prosecutor makes all decisions. He or she decides whether to file charges against an alleged perpetrator (*defendant*) based on an assessment of the legal adequacy of available evidence. Even though in some states the victims have a right to be consulted on plea agreements, it is largely within the prosecutor's discretion to decide whether to forgo a trial by accepting a plea on lesser charges in exchange for an admission of guilt. The prosecutor is responsible for *proving*

beyond a reasonable doubt that an alleged perpetrator is guilty of the crimes charged (*i.e.*, proving at least to a moral certainty). Failure to carry this burden of proof results in acquittal. A myriad of considerations, unrelated to the crime victim's victimization, may and often do affect the consequences faced by a perpetrator as a result of committing a crime.

Civil litigation is important because it provides the victim with an opportunity to vindicate his or her individual rights and, in so doing, it provides empowerment. The victim decides whether or not to bring a civil suit. The victim decides whether to accept a settlement offer. It is up to the victim to carry the burden of proving liability by a *preponderance of the evidence* (*i.e.*, proving by evidence which is more convincing than that presented by the other side). In a civil court, the victim controls essential decisions affecting the case against the perpetrator (the first party) and negligent third parties—parties who do not commit the crime but whose negligence may have facilitated the occurrence of the crime.

Successful civil suits also have an important deterrent effect. First party suits let perpetrators know that crime does not pay, and that they must account to those whom they victimize. Suits involving negligent third parties promote enhanced safety practices and encourage the exercise of greater caution, thereby reducing the occurrence of crime.

¹A "system" provider, one who provides victims with services through a prosecutor's office or law enforcement agency, may be prohibited from making referrals to local civil attorneys. Such a provider should consider referring victims to a non-system based provider who may, in turn, refer the victim to a bar association or a list of civil attorneys.

²Villmoare, Edwin and Benvenuti, Jeane. *California Victims of Crime Handbook, A Guide to Legal Rights and Benefits for California Crime Victims*, (Sacramento, California: McGeorge School of Law, University of the Pacific, 1988), p. 94.

Victim law suits against third parties can be credited for society's widespread concern over crime prevention and the implementation of standard security measures such as the installation of door

peepholes in hotel doors, the provision of adequate lighting in apartment common areas, and the employment of security guards on college campuses. Civil suits brought by victims serve both

to exact damages from perpetrators and to encourage potential third parties to adopt adequate crime prevention measures. These effects combine to deter potential crime, thereby contributing greatly to a safer society.

Criminal and civil litigation scenario

A fifty year old woman was held captive in her home, raped, stabbed repeatedly and left by two perpetrators to die. She recovered physically from her wounds but due to the psychological trauma she endured, all memory of the incident was blocked out. The only evidence available to potentially place the alleged perpetrators at the scene of the crime were inconclusive DNA semen samples and the testimony of a five year-old neighbor who claimed that he saw one of the alleged perpetrators leave the premises.

The prosecutor filed and prosecuted charges of kidnapping, rape and attempted murder against the alleged perpetrators. At trial, Perpetrator 1, the one who had not been seen by the five year-old witness, asserted his Fifth Amendment Right against self-incrimination and declined to take the stand. The jury subsequently found that the state had failed to prove beyond a reasonable doubt that he had committed the crimes charged. The other perpetrator, Perpetrator 2, was found not guilty by reason of insanity. Thus, they were both acquitted of all criminal charges.

Subsequently, and upon the suggestion of a provider, the victim brought civil suits against both perpetrators. Her complaints against both perpetrators alleged assault, battery, false imprisonment, trespass and intentional infliction of emotional distress. During discovery, the victim's attorney took the perpetrators' depositions or sworn statements. At that time, Perpetrator 1 testified that he had previously been charged and convicted of three similar rapes. This evidence, evidence that was not elicited or admitted during the criminal trial, was subsequently used by the victim's attorney to establish proof by a preponderance of the evidence that Perpetrator 1 had committed the torts alleged in the complaint. The jury also found that Perpetrator 2 had committed the torts alleged, and since civil courts do not generally relieve defendants of civil liability "by reason of insanity," both perpetrators were held accountable and were required to pay damages to the plaintiff-victim for the torts alleged.

The civil protection available to defendants are less stringent than criminal procedural protection because the civil defendant does not risk loss of liberty through incarceration. Thus, in civil courtrooms, the defendant cannot take the Fifth Amendment; he must testify if called upon to do so. Rules allowing for the discovery and admission of evidence are more flexible; prior similar acts are often admitted if relevant. And, as was illustrated with respect to Perpetrator 2, in the civil court process, a perpetrator cannot escape liability by reason of insanity.

The plaintiff-victim has far greater control over civil court proceedings because he or she is a formal party to the case, the burden of proof is only a preponderance of the evidence verses proof beyond a reasonable doubt, and because of less stringent rules of evidence and courtroom procedures.³

The overriding goal of both first and third party civil suits is to make the victim "whole" again. Although this goal may never be fully accomplished, a successful civil suit can help a victim in many important ways such as in paying expenses directly incurred as a result of the crime, encouraging the adoption of societal safety practices, and restoring confidence in the victim's ability to control his or her own destiny. Civil remedies provide unique opportunities for victims to recover for both economic and non-economic losses. At a minimum, if a victim is dissatisfied with the results of a criminal prosecution, if the perpetrator fails to meet restitution obligations, or if State compensation does not cover all costs incurred as a result of the crime, then civil litigation is a course of action worthy of victim consideration.

Relationship between civil and criminal litigation

It is likely that a victim wishing to vindicate his or her rights against a perpetrator or third party will find the civil court to be a much more agreeable forum than the criminal court. With respect to the weight of the evidence, a civil court plaintiff needs only to prove his or her case by a *preponderance of the evidence*; that is to say, he or she needs only to prove that it is more likely than not that the defendant is liable for the claims set forth in the complaint. This burden is less demanding than the one which must be carried by the criminal

³This hypothetical is intended only to illustrate generalized differences between the civil and criminal court systems. The results of any given fact scenario may vary from jurisdiction to jurisdiction just as substantive and procedural laws so vary.

prosecutor — the burden of *proving beyond a reasonable doubt* that the defendant is guilty of the crimes charged.

While the victim has the option of proceeding with a civil action wholly independent from the criminal prosecution, there are strategic considerations which affect both the criminal and the civil actions.⁴ For example, an early filing of a civil action may cause the criminal defense attorney to attempt to undermine the victim's credibility as a witness in the criminal case. Victim cooperation with the prosecution, as a witness, may be perceived by a judge or jury as cooperation based on an apparent monetary motivation. Since a criminal conviction may be used to support or even prove liability in a civil action, it may be in the victim's best interest to cooperate with the prosecutor on such matters as the timing of filing a civil action. Yet, too long a delay could very well jeopardize the victim's right to file a civil suit; *i.e.*, the defendant may be able to raise a statute of limitations defense.⁵

Generally, criminal charges translate into somewhat parallel civil causes of action. Thus, if a prosecutor obtains a conviction, principles of collateral estoppel can often be used to establish tort liability in the civil case.⁶ Evidence proving criminal guilt ordinarily provides most of the evidence needed to prove that a tort occurred.⁷ If, however, the prosecution chooses not to prosecute or fails to convict a perpetrator, the victim should not be discouraged from considering a civil action. Since the civil burden of proof is less than the criminal burden, the victim may very well win his or her civil suit even though criminal charges are never filed; or even if the defendant is found innocent of the criminal charges. Plaintiffs in civil suits are assisted in their efforts to meet this lower burden of proof by flexible discovery rules allowing for a broad, pre-trial inquiry into facts surrounding the event.

Tort liability

Most criminal acts are also torts, or civil wrongs which have resulted in

personal injury and loss of property. Thus, providers should be generally familiar with the various types of civil actions (civil causes of action) so that they can inform victims about the possible availability of civil remedies and monetary relief. Causes of action in tort — *i.e.*, assault and battery, wrongful death, negligent or the intentional infliction of emotional distress, false imprisonment, among other specific actions — provide the legal framework for civil actions brought by victims against perpetrators.

A tort may be the result of either an *intentional* act or inaction, or the result of *negligence*. Both types of torts have several common legal elements.⁸

- First, the defendant must have had an intent to harm the plaintiff or the defendant must have negligently failed to perform a duty owed to the plaintiff (*negligence*).
- Second, the defendant must have committed the tortious act alleged in the civil complaint.
- Third, that act must have been the cause of the plaintiff's injury; the plaintiff would not have been injured but for the defendant's action or inaction.

The damages awarded for the injuries sustained may be compensatory (payment for expenses), punitive (punishment for a defendant's malicious actions) or pecuniary (coverage for lost wages or loss of potential income).

There are many types of intentional torts:

- An *assault* occurs when a perpetrator puts another in fear of being injured and has the capability of inflicting injury.
- A *battery* occurs when a perpetrator has intentional, offensive physical contact with a victim — an offensive, unpermitted "touching."

- A *wrongful death* action can be filed if it is alleged that a perpetrator killed another without justification or excuse.

- *False imprisonment* occurs if a perpetrator confines a victim against his or her will, such as in a rape or hostage situation.

- *Intentional, reckless infliction of emotional distress* occurs when a perpetrator, by extreme and outrageous conduct, intentionally or recklessly causes someone emotional distress.

⁴As there are important inter-relationships between the criminal and civil aspects of each case, it is always advisable for the victim to seek the counsel of a victim attorney as soon as possible. The civil attorney can help guide the victim through the prosecution in criminal court, even if a civil action has not yet commenced.

⁵"Statutes of Limitations" require that lawsuits be filed by complainants within a certain number of years after the injury was incurred or, in some instances, discovered. Most states require, for example, that actions for assault be filed within two years after the occurrence of the alleged tort. These laws are intended to ensure the availability of witnesses and the reliability of evidence; as time passes, memories of events fade and material evidence becomes lost or destroyed.

⁶"Collateral Estoppel" is a legal doctrine which provides that, in some cases, the criminal convictions of perpetrators will be considered proof of those perpetrators' legal liability in civil actions brought by the perpetrators' victims.

⁷A "tort" is a civil wrong (as opposed to a criminal offense) which results in personal injury or property damage.

⁸The definitions to legal terms found here and elsewhere in the *Bulletin* are intended only to give the layman reader an understanding of the types of acts that may constitute causes of actions vis-a-vis victim plaintiffs. The definitions are not intended to address variations among jurisdictions and may not, in all instances, comport the legal definitions. Victims should always consult with attorneys, if interested in pursuing legal remedies, to obtain professional opinions as to the viability of their cases.

Finally, the intentional torts resulting in property damage include *conversion* (an unpermitted taking of another's property) and *trespass* (a wrongful entry upon the lands of another).

Torts based on *negligence*, rather than intent, may be brought against first party perpetrators or third parties whose negligence contributes to the commission of the crime or tort. Third parties may, for example, be held liable for the *negligent infliction of emotional distress* or *wrongful death* in instances where their conduct results in an unintentional death of another. The test for determining whether such a third party defendant is liable for such torts is whether he or she failed in his or her duty to act as a reasonable person would have acted under similar circumstances. If a reasonable person would not have foreseen injury to another person as a result of his or her actions, then the alleged third party will not be held liable for injuries that result from such actions or inaction.

When third parties are held liable for plaintiffs' injuries, they generally are not subject to punitive damages. This is because they do not intend for the victims to be injured. However, since third parties are often organizations or corporations, such actions can sometimes offer the victim alternative potential sources from which to collect other types of damages which might not be collectable against the perpetrator.

For example, in instances where there are chronic instances of disregarded security complaints brought to the attention of an innkeeper, a hotel guest rape victim may be able to allege a complaint against the innkeeper as well as the innkeeper's security company whose surveillance system failed to detect the perpetrator and prevent his gaining access to the victim. Such actions may be filed by a victim even if the rapist is never apprehended. They usually require, however, prior notice to the third party of an existing, persistent problem — a problem which the negligent third party chose not to rectify.

Facts surrounding any victimization may also suggest causes of action against parents of a young or mentally incapacitated perpetrator, co-conspirators or those who aid and abet, or against negligent entrustors. Proof of alternate party liability may be pursued under any of the following doctrines and theories:

- The *doctrine of parental liability*, available in many States, holds parents civilly liable for the torts and crimes of their children under certain circumstances.
- Actions based on a *co-conspiracy theory* allege claims against those who agree to a given crime and assist the perpetrators who actually commit the physical acts constituting the crime (co-conspirators).
- The *doctrine of negligent entrustment* extends liability to those persons who give, lend, or allow someone to use, or should have anticipated that a given person would use a dangerous instrumentality to injure another. Negligent entrustment arises, for example, when an adult allows a child access to a firearm and the child, in turn, uses the weapon to injure another.

These theories of party liability can provide victims with multiple, viable sources from which to collect judgment awards.

Party defendants may attempt to defend against tort claims by asserting legally viable defenses. For example, a defendant may be relieved of liability if he or she shows that the action causing plaintiff injury was committed in *self defense* or in *defense* of others. Liability for negligence torts may be negated or narrowed if a defendant can show that the plaintiff was responsible, in part, for his own injury (*contributory or comparative negligence*). As a defense, the perpetrator might also try to prove that the plaintiff provoked the defendant or consented to the action causing injury *i.e.*, *assumed the risk of injury*. All tort claims must be filed within a certain time period after the injury is sustained. Failure to file within the applicable time frame may also provide the perpetrator with a viable defense.

Victim service provider's role

The provider can play an important role in informing the victim about the possibility of a monetary recovery through the civil courts, providing the victim with realistic expectations regarding the likelihood of recovery, and in assisting the victim to locate an attorney responsive to a victim's unique needs. The degree to which the provider handles this role effectively depends in large part on his or her ability to identify factual relationships.

Every criminal occurrence involves sets of factual and inter-personal relationships. In the preceding section, factual relationships were defined within the context of civil causes of action. To identify possible torts committed by a perpetrator, the victim and civil attorney must fully examine the facts surrounding the crime. The victim may wish to ask the provider to assist in this process. Each crime also has an overlay of personal relationships which may affect the strength of the victim's civil case and may shed light on the probability of judgment collection. The provider, when properly trained, may be able to help both the victim and the civil attorney appreciate the significance of these relationships. Based on a familiarity with theories of civil liability and collectability, the provider can elicit relevant facts from the victim that may assist a victim's attorney in evaluating the case and in representing the victim.

The following types of data may be of help as a start in gathering pertinent information relating to liability and collectability.⁹

⁹Providers, particularly those employed by prosecutors, should proceed with caution when writing down any factual information elicited from victims. The notes could be subject to discovery and the opposing party could possibly gain access to them. The provider might suggest to the victim that he or she take notes and, if so desired, convey them to the selected civil attorney.

Sample case intake information

About the victim:

- Name, address and telephone number
- Date of birth, social security number
- Employer: name, address, telephone and work start date
- Marital Status: if married, name of spouse, spouse's history of employment
- Dependents, names and ages
- If victim is deceased, date and time of death, cause of death, names of decedent's immediate family, autopsy report (if available), death certificate, decedent's will, name of administrator or executor of estate, funeral home name and charges

About the criminal event:

- Date and time of criminal occurrence
- Location of events, addresses and description of premises
- Identification of reason why victim was at the location
- Why the perpetrator was at the location; how did the perpetrator gain access to the victim?
- What happened to the victim?
- Identification of witnesses to any stage of the occurrence
- Identification of known physical evidence
- Police-related information: identification of police department where the complaint was filed, identification of detective or officer assigned to the case, complaint or report number, identification of statements taken as part of investigation
- Prosecutor-related information: identification of prosecutor, current stage of criminal case, and description of case investigation conducted

About the perpetrator:

- If the perpetrator is known to the victim: nature of relationship with victim, perpetrator's name and aliases, address, date of birth and social security number, employment information and any information known about perpetrator assets and insurance coverage
- If the perpetrator is not known to the victim: physical description of the perpetrator, identifying features
- If the perpetrator is not known to the victim but a third party might bear some liability for the occurrence of the crime, details surrounding the crime and where it was committed become increasingly important e.g., information about where the rape occurred, description of hotel security system, hotel receipt of prior notice of security system deficiencies, occurrences of prior similar crimes, etcetera.

About damages sustained by the victim:

- Medical information: degree of physical, emotional and psychological injuries sustained and extent and cost of anticipated treatment
- Identification of hospital, physician services
- Identification of property damage
- Lost amount of victim's or victim spouse's time from work; lost wages? filed for disability?
- Identification of loss of support amounts
- Sources of funds to cover damages or losses such as insurance (policy number), crime victims compensation, medicare and restitution

If, for example, a victim of domestic violence seeks assistance, an experienced provider usually reaches out by exploring the facts surrounding the victimization. Within the specific context of potential civil remedies, the provider might tap into a vein of factual relationship questions:

Did the victim's husband, other family member or boyfriend physically abuse her? If the answer is yes, the provider could consider the activity as a possible assault and battery and ask additional questions pertaining to the degree of her injuries.

Did the batterer ever allow anyone else to physically abuse her? Is there a co-conspirator from whom the victim might collect a judgment?

How severe were her injuries? The more severe the injuries, the greater the likelihood that substantial damages might be awarded.

Did the batterer threaten the victim and her children? If yes, the provider could elicit facts surrounding the threats. From a reasonable person's perspective, might the threats be considered outrageous? Did he make the threats while waving a gun at her and the children? If yes, the batterer might be found liable for intentional or reckless infliction of emotional distress.

Facts should also be elicited to flesh out possible defenses which the batterer might raise. Is it possible that the batterer may claim that the victim provoked the physical abuse? How might such a defense be countered? How long ago did the crime occur? Is there a possible statute of limitations problem? If yes, the provider should suggest to the victim that she consider consulting an attorney and caution her against developing high expectations for recovery.

In addition to asking questions in the vein of civil liability, the victim should be questioned on the possibility of collecting a jury award from the perpetrator. Victims often find it far easier to establish perpetrator liability, particularly if there is a criminal conviction, than to collect on a civil judgment from the perpetrator. While

successful proof of civil liability can represent a moral victory, victims also feel that true justice demands that judgments for damages be fully satisfied. Key factual information relating to the likelihood of collecting on a judgment can help civil attorneys provide victims with realistic expectations of recovery.

There are a variety of ways to find out about a perpetrator's assets and preserve them pending the outcomes of civil cases. Many victims know their perpetrators and can identify full names, dates of birth and social security numbers information that can facilitate the identification of assets. Pre-sentence investigations, compiled during the course of criminal proceedings, may yield clues as to a perpetrator's assets. It is also important for the victim's attorney to request precautionary attachment orders which temporarily freeze the defendant's assets to prevent the defendant from transferring, hiding or wasting such assets so as to avoid payment of civil judgments.

Finally, seemingly indigent perpetrators may have hidden assets, a wealthy family or they may earn money in the future. While civil judgments may not be collectable in the immediate future, they may be preserved until assets are obtained by the perpetrators at a later date. Other possible assets from which to satisfy judgments are listed in the next table.

The provider need not conduct a feasibility study on how likely it will be for a given victim to collect on a judgment if one is obtained. Attorneys are experts in this area and have the necessary tools at hand to obtain the information. Facts elicited by a provider pertaining to collectability can be used to highlight, for the victim, the possibility of monetary recovery. Such facts can also serve to highlight, for the civil attorney, a financial value in representing a victim's interests.

Most attorneys accept cases involving personal injuries on a contingency fee basis. The victim assigns a percentage of the collected damage award, often one-third, to the civil attorney as

Possible sources to satisfy civil judgments

Perpetrator's sources of income:

- Wages
- Benefits (pension payments and annuities)
- Unearned income (dividends, interest, gifts)
- Trust fund income
- Tax refunds
- Government entitlements

Perpetrator's property and holdings:

- Personal property (cars, jewelry, etc.)
- Real property (home, land, etc.)
- Bank accounts
- All debts owed to the perpetrator
- Financial holdings (stocks, bonds, etc.)
- Partnership interests
- Future interests in real and personal property through wills, trusts, etc.

compensation for services rendered. In some states, the percentage is set by statute. Under the contingency fee arrangement, the attorney is not paid for his or her services until or unless liability is proven and the judgment is collected. Thus, it is critical for victims to make civil attorneys aware of facts showing clear perpetrator liability and the likelihood of judgment satisfaction.

If a provider elicits relevant facts pertaining to liability and collectability, accompanies a victim to the legal consultation and assists the victim in presenting the facts, it is likely that the attorney will listen attentively and assess favorably meritorious the case facts. In effect, the provider will already have assisted the victim in determining whether it is in his or her best interest to pursue civil remedial relief. The provider can facilitate communication by the victim

who may be too personally distraught to recount facts surrounding the crime. His or her presence may also help to prevent revictimization experiences.

While civil attorneys may be sympathetic to the plight of victims, their interests, out of economic necessity, are focused on the probability of proving liability and collecting on a judgment. Attorneys are reluctant to expend their time and needlessly raise a victim's hopes if there is little or no likelihood that the victim will benefit from the process.

Collecting judgments

Even if a perpetrator does not appear to have any assets from which to collect a judgment, he might be insured. Increasingly, victims and their civil attorneys are obtaining judgment satisfaction from insured perpetrators' insurance carriers.

Insurance is a *contract* between an insurance carrier (the insurer) and the insured. The insurance company promises to protect the insured from incurring financial liability for occurrences of the events covered in the policy. Generally, in order for a victim to collect from an insurer, four conditions must be met:

- 1) The perpetrator must be insured;
- 2) The policy must provide coverage for the act committed by the perpetrator that caused the victim harm;
- 3) The insured perpetrator must be found liable to the victim or plaintiff; and
- 4) No exclusions can apply for the particular liabilities alleged unless there are applicable exceptions to the exclusions.

Insurance policies are designed to protect people from the financial consequences of accidental injuries they have unintentionally caused others. They are not designed to protect people from their own willful criminal behavior. Thus, almost all policies contain

standard exclusions for injuries that are expected or intended by the person insured. These exclusions cause victims and their attorneys to greatly underrate the possibility of collection on insured perpetrators' policies. Although the policy exclusions, including *intended acts of the insured* and *expected injuries caused by acts of the insured*, are standardized, state courts are now supplying new interpretations of the boiler plate language — interpretations often based on an understanding for victims and a desire to see them compensated.

Attorneys for insurance companies urge civil courts to dismiss the insurers from victim versus perpetrator cases by raising policy exclusions from coverage. Civil attorneys for victims, on the other hand, challenge the insurers by raising exceptions to the exclusions. Victim attorneys strive to show that an insured perpetrator was unable to form the intent to harm the victim (mental deficiency), or that the victim's injuries were unexpected or unforeseen (mistake of fact or law), or that the perpetrator acted in self defense — the legal theory being that self defense is a lawful use of force which the insured never meant to bargain away when purchasing insurance. If any one of these exceptions is successfully proven, the victim can often turn to the insured perpetrator's carrier for civil judgment satisfaction.

The degree to which courts are amenable to exception arguments is dependent on the kind of factual situation giving rise to litigation. A recent Wisconsin Supreme Court case, reported in *The National Law Journal*, illustrates the extent to which some courts are willing to go in order to find insurance coverage for victims:¹⁰

Insurance coverage under a homeowners policy was sought for damages when a teenager got herpes simplex from the adult insured. The affair was a crime under Wisconsin law, but the decision hinged on the interpretation of a policy phrase critical to many of these disputes: "intended and expected."

Most liability policies include an "intentional exclusion," which says there is no coverage for any intended or expected injuries. But many interpretations of that clause were neither intended or expected by policy authors.

[In holding the insurer liable to under the policy,] Judge Louis J. Ceci of the Wisconsin Supreme Court. . .said that "a court cannot infer that an adult insured intended to injure or harm a 16- or 17-year old as a matter of law when the insured engaged in consensual sexual contact."¹¹

There is a great diversity of opinion among the states, among courts in the same state jurisdiction, and among attorneys, on insurance policy exclusion interpretations. As a response to the above described court decision, the attorney for the defendant insurance carrier said, "[i]f you told someone on the street that your homeowners insurance covered giving herpes to someone, they would have thought it ludicrous." This decision and growing numbers like it indicate that it is

becoming increasingly more difficult to delineate a line between coverage and non-coverage. This ambiguity can often work in favor of victims collecting on civil judgments from insurers. Consequently, victims, providers and civil attorneys should not discount the possibility that the perpetrator might be insured and that the victimization might be covered by the insured perpetrator's policy.

Just as victims and their attorneys sometimes underrate the viability of exclusion exceptions, they also misinterpret the extent of policy coverage by thinking that a policy title is descriptive of the extent of coverage. In fact, most policies are much broader than their titles suggest. The chart below describes the extent of coverage commonly provided by specific types of policies.

¹⁰Policzer, Milt, "Same Works, Different Meanings," *The National Law Journal*, November 25, 1991, p. 1.

¹¹*Loveridge v. Chartier*, 468 N.W. 2d 146 (1991).

Types of Insurance	
Homeowners/renters	Covers homeowners and renters. Incidents need not occur on policy holders' premises.
Automobile	Covers injuries "arising out of the use" of automobiles. Coverage extends to some instances where an automobile is "in use" but is not being driven. The insurer may also be liable for damages involving the automobile even if the tort was not committed by the owner of the automobile and policy holder.
Professional liability	Covers liability arising from "malpractice" professional capacity. Malpractice may include the abuse of a professional relationship.
General liability	Similar to homeowners insurance but usually carried by businesses.
Life	Covers loss of life. Murderers are not allowed to collect under policies covering their victims because of the resulting unjust enrichment that would benefit criminals.

Rules and protection for special victims

There is a body of civil law reflecting special rules and protection for women, children, victims of campus crime, bias crimes and others. These "special" groups of victims require specific mention because of unique, important legal rules that have evolved around each type of victim group. A comparison of the identified types of victims shows that they share several characteristics in common. They are victimized by crimes that are highly sensitive and emotionally charged. Perpetrators of crime against special victims often have jobs and assets, presumably reachable by judgment. They also often target their victims because of a perceived victim vulnerability *e.g.*, age, sex, race or physical isolation from society at large. And, in recent years, growing numbers of "special" victims have been seeking out and obtaining civil legal remedies with increasing frequency. A discussion of these "special" groups follows.

Abused children. Child abuse is often a crime that remains undetected for long periods of time and results in extensive injuries. Young victims face potentially life-long disabilities as a result of physical, emotional and sexual violence. Effective treatment is generally extended and costly. In first party litigation, the courts have been receptive to actions brought against perpetrators for assault and battery, and intentional, reckless and negligent infliction of emotional distress based on child abuse factual circumstances. Findings of liability allow victims to offset the costs of physical and psychological recovery through judgments and financial recoveries against perpetrators.¹²

Unfortunately, with respect to judgment recovery, victims of child molestation have generally not been able to overcome the "intended injury" exclusion commonly contained in their insured perpetrators' insurance policies. Courts have traditionally considered the crime of child abuse to be so deplorable that they have inferred the perpetrators' intent to injure plaintiff victims. This legal conclusion has precluded child molestation victims from

collecting on their civil judgments from their insured perpetrators' carriers — carriers who commonly exclude intentional acts of those they insure.

While victims of child abuse are limited in their ability to pursue their perpetrators' insurers for judgment satisfaction, they can often consider seeking civil remedial relief against negligent third parties who knew or should have known that the abuse was taking place and did nothing to identify it or stop it. Common negligent third parties include schools, child care facilities, youth groups, camps, churches — those who employ authority figures who victimize children.

Finally, with regard to victims who were sexually abused as children, civil attorneys should never presume that the victim lost the opportunity to file a civil action just because the victimization occurred long ago. Special statutes and court rules have evolved to toll (suspend) statutes of limitations for filing such actions. The so-called *delayed discovery rule*, adopted in many jurisdictions, allows victims to file suit many years after the victimization if: 1) the victim repressed all recollection of the abuse until a later event triggered the memory and, 2) the victim recollected the abuse but did not know that current psychological problems were caused by the abuse until a later date. All such victims who are disposed toward filing a civil action should be encouraged to consult with an attorney regarding statute of limitations implications and the *delayed discovery rule*.¹³

Women as victims. Increasing numbers of women are suffering severe victimizations as a result of rape and domestic violence. These victims should be informed that the rules of evidence in civil cases are far more flexible and favorable to victims than are those in criminal cases. For example, Rape Trauma Syndrome, Battered Women's Syndrome and Post Traumatic Stress Disorder have been successfully used in civil cases to establish damages and liability. Providers who usually have a thorough understanding of such injuries

can offer civil attorneys and the courts a unique insight as to whether victims are experiencing the syndromes.

Victims of perpetrators who work in a professional capacity. Victims of "professional" perpetrators *i.e.*, physicians, dentists and psychologists, may have a good chance of collecting both from their perpetrators and their perpetrators' malpractice insurance carriers. The victims need only show that the victimization took place during the course of or as part of the perpetrators' professional employment. In this regard, the location of the crime scene might be important *i.e.*, was the victim raped by her doctor at his office?

Victims of campus crime. Victims of campus crime and date or acquaintance rape are commonly stonewalled; they are discouraged from reporting criminal activity through the suggestion that they were responsible for the crime or assumed the risk of its occurrence *i.e.*, they were drinking when the rape occurred or they consented to go to the rapist's room.

Until recently, few statistics were compiled and little case law had evolved on campus victimization matters. This may have occurred because schools covered up the crimes by failing to make students aware of the dangers of campus violence and by dissuading or preventing students from tarnishing the schools' reputations by reporting the crimes.

¹²Parents of abused children have generally not been allowed to recover for intentional or reckless infliction of emotional distress except in instances where the "distress" alleged is due to actually having witnessed the abuse of their child take place.

¹³Often state statutes extend the statute of limitations in child abuse cases from the typical two year limit in personal injury cases to some period of time after the victim reaches the age of 18 (10, 15, or 20 years after reaching the age of majority). Another approach is to allow cases for a specific period of years after a repressed memory has been recalled, regardless of the age of the victim.

There are, however, a few legal routes available to student victims. These victims may often be able to bring successful *failure of security* actions against their schools. Courts may hold third parties liable for failing to protect foreseeable victims from criminal activity and even public institutions have been successfully sued for failure to protect and negligence in certain cases. Most colleges and universities also carry general liability insurance which may be relied upon to satisfy judgments.

Victims of bias crime. Like campus crime suits, the filing of civil suits based on bias crime is a relatively new phenomenon. Federal Civil Rights Acts, however, have been used for years to provide civil remedies for hate crime victims.

Most cases are brought as civil rights violations based on race, religion, sexual preference, gender, and age for injuries sustained as a result of assault and battery, wrongful death, intentional infliction of emotional distress, false imprisonment or violations of federally protected civil rights.

Making effective referrals

Providers have an important role to play in informing victims about the possible availability of civil legal remedies, but that role is a limited one. Providers are not licensed to practice law and would be exposed to liability if they attempted to offer legal advice. Thus, it is incumbent on them to offer victims guidance in selecting a civil attorney. In the next column is a list of suggested criteria for victims to consider when selecting an attorney.

When discussing the possible availability of civil legal remedies with a crime victim, it is important that he or she have realistic expectations about the civil court process. Caution should be exercised so as not to create unrealistic optimism for the victim concerning the possible outcome of a civil suit. The victim should also not assume the worst regarding potential

civil relief. Attorneys can best explain the likelihood of proving civil liability and recovering on a judgment with regard to individual case scenarios.¹⁴

If a victim decides to investigate civil legal remedies by consulting an attorney, he or she would benefit from information about the practices of local attorneys and attorney selection criteria. To develop a referral protocol, applicable state laws or rules should be followed and local bar associations should be consulted regarding standard referral practices in the area. Many providers make it a habit to offer victims the names of at least three

competent attorneys with experience in victim litigation.

As previously mentioned, it may be helpful to both the civil attorney and the victim if the provider accompanies the victim to the initial legal consultation. If this is not possible or desirable, the provider should later elicit feedback from the victim in order to assess victim satisfaction with the attorney. Such feedback ensures the maintenance of an

¹⁴Civil attorneys often provide potential clients with free or low cost initial consultations.

Attorney selection considerations

- Look for attorneys who have experience handling personal injury, wrongful death and/or professional malpractice claims on behalf of plaintiffs. Attorneys who have experience working with crime victims are preferable.
- A productive attorney-client relationship is based upon the ability of both sides to communicate fully and effectively with each other. Victims should feel comfortable fully disclosing all details and information to their attorneys. Attorneys should be able to explain effectively all aspects of legal proceedings to victims and they should be responsive to victims' needs and requests.
- Victims should fully understand all details of any retainer agreement prior to signing it. If victims have questions, they should feel comfortable in discussing them with the attorney. If questions persist, they may call local bar associations about laws and regulations pertaining to contingency fee arrangements, retainers, etcetera.
- Victims should be clear about what they expect their attorneys to do, and attorneys should be clear about what services they are rendering and the likelihood of obtaining desired results. For example, a civil attorney may be retained on a contingency fee basis to sue a perpetrator, but not retained to handle a State crime victim compensation claim or to accompany the client victim to criminal court. These services may be available but may entail an additional charge. Reasonable expectations on both sides can avoid later disappointment and frustration.
- Victims should feel free to consult with several lawyers before selecting one. Lawyers are professionals and good consumer practice with respect to selecting a professional is to obtain a second opinion.
- Victims should cooperate, as fully as possible with their attorneys; such cooperation is necessary for successful representation of their interests. Victims have the right to expect their attorneys to be understanding, respectful, and responsive to their needs. Attorneys have the right to expect their clients to be honest and willing to participate in the building of their own cases.



Frank Carrington, Project Founder, receiving award from President Bush, National Crime Victims Rights Week 1991.

effective referral list. It is also important for providers to elicit feedback from the attorneys to whom the victims are referred. This type of follow-up will be helpful in determining whether the right types of cases are being referred to the civil attorneys.

Finally, for information on a nationwide scale, victims and providers should be aware of the National Victim Center's Coalition of Victims' Attorneys and Consultants (COVAC). COVAC is a professional membership network created to serve crime victims. Its former director, the late Frank Carrington, was a champion for victims legal rights for decades and in April 1991, during National Crime Victims Rights Week, he was honored by President Bush for his significant work in the area of civil legal rights for crime victims.

The design of effective referral protocols can be facilitated by providers working

to build network relationships among victims, other providers, and civil attorneys. Local bar associations are often receptive to learning about victims' needs and to providing general legal advice. There are other possible sources for network building listed in the next column.

Advantages and disadvantages of civil litigation

To make an informed decision as to whether civil litigation is an appropriate course of action, victims need to be fully informed both of the advantages and disadvantages of filing a civil suit.

The disadvantages are various, and depending on the factual scenario, they may be numerous, and perhaps overwhelming. Some of the disadvantages are as follows:

- 1) If the perpetrator has no assets, is not likely to come into any assets, and is not insured, then there may be limited prospects for a victim to collect on a judgment.

Attorney networking sources

Local:

- City or County Bar Association
- Lawyer referral services
- Law schools
- Young lawyers association
- Social service agencies
- Victim service organizations
 - Domestic violence shelters
 - Sexual assault centers
 - Anti-drunk driving groups
 - Parents of Murdered Children
 - Other private non-profit groups serving victims

State:

- Statewide Bar Association (Personal Injury Section)
- Statewide Trial Lawyers Association (Personal Injury Section)

National:

- COVAC — The National Coalition of Victims' Attorneys and Consultants (through the National Victim Center)
- American Trial Lawyers Association (Personal Injury Section)
- American Bar Association (Victims Committee)
- Trial Lawyers for Public Justice
- Other national organizations specializing in women's, children's, and other crime victims' legal rights

- 2) While some evidence, such as transcripts or depositions, may be transferable from the criminal court to the civil court, the victim may still have to offer testimony and confront the perpetrator during civil proceedings. He or she may have to repeat details pertaining to the victimization, and cope with the resulting psychological stress.
- 3) Because many jurisdictions have case backlogs, civil cases may be in litigation for years before a decision is rendered. Moreover, the civil justice system is full of the failings of any human-designed system and can be wrought with frustration and disappointment.
- 4) Victims may enter into contingency fee arrangements with civil attorneys to pay for services but most often such arrangements do not relieve the victims from having to pay for other litigation costs such as filing fees, depositions, costs for obtaining expert testimony, etcetera.

- 5) If a judgment is obtained and collected, the victim will usually have to pay a percentage of the judgment to his or her attorney and may also have to reimburse the State for any crime victims compensation amounts received.
- 6) Victims can lose their civil suits, or receive minimal compensation.

If providers and civil attorneys fail to inform victims of such disadvantages, the victim may become revictimized, as a result.¹⁵

Victims, civil attorneys and providers have, however for too long, underrated the possible value of civil relief. The purpose of this *Bulletin* has been to highlight the advantages of civil litigation so that this remedial option is no longer overlooked or dismissed. Civil litigation can offer victims monetary recovery essential to their physical and mental recovery. It can serve to further punish the perpetrator through the device of

punitive damages. It encourages potential third parties to take measures to prevent crime. Most importantly, civil litigation offers victims an opportunity to take control over legal matters pertaining to perpetrators and is an opportunity to make those perpetrators personally accountable to them.

The victim needs to weigh carefully the advantages of civil litigation, such as empowerment and financial relief, as well as the above-cited disadvantages, so that an informed decision can be made as to whether the costs of pursuing this type of remedial relief are worth the potential gains.¹⁶

¹⁵Villmoare, Edwin and Benvenuti, Jeanne. *California Victims of Crime Handbook, A Guide to Legal Rights and Benefits for California Crime Victims*, (Sacramento, California: McGeorge School of Law, University of the Pacific, 1988), p. 100.

¹⁶*Ibid.*, p. 100.

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