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Victim-Witness Issues

In This Issue

In Honor

This issue of the United States Attorney's Bulletin is dedicated to the memory of Ann Dooley who died an untimely death on September 17, 2002. Ann was an Assistant United States Attorney and Tribal Liaison from the United States Attorney's Office for the Northern District of Oklahoma and a former member of the Counsel to the Director's staff in the Executive Office for United States Attorneys. Ann's support and dedication for law enforcement in Indian country was immense, and her expertise was sought by AUSAs throughout the nation. Most of all, she was a friend who will be missed by many.

Automated Victim Notification Project

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I. History of the Automated Victim Notification Project

In 1982, the *Victim and Witness Protection Act* (VWPA) (Pub.L. No. 97-291), legislated the first Federal crime victims' rights

> to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of defendants; and to provide a model for legislation for state and local governments.

This legislation was the first notable effort to focus on crime victims along with the rights of defendants. Further expansion of VWPA by Congress resulted in subsequent legislation, primarily the *Victims of Crime Act of 1984*, the *Crime Control Act of 1990*, the *Victims' Rights and Restitution Act of 1990*, the *Violent Crime Control and Law Enforcement Act of 1994*, the *Antiterrorism and Effective Death Penalty Act of 1996*, and the *Clarification Act of 1997*.

On April 14, 1997, a memorandum was issued by the United States Attorney General's office. The memorandum states,

> EOUSA, in consultation with Federal Bureau of Investigations (FBI), Justice Management Division (JMD), Bureau of Prisons (BOP), and other components, will implement a comprehensive automated victim information and notification system as soon as possible. This system will be available for use by the investigative components, prosecutorial components, and, to the extent feasible, BOP.

As a result of this action, the Department of Justice appointed the Executive Office for the United States Attorneys (EOUSA) to develop a national victim notification system to better meet the needs of victims of federal crimes. To fulfill this mandate, EOUSA entered into a Memorandum of Understanding (MOU) with the Office for Victims of Crime (OVC) and subsequently selected a consultant, PricewaterhouseCoopers (PwC), to conduct a requirements and alternatives analysis for the victim notification system.

To gather the appropriate data for this analysis, the consultant worked closely with EOUSA and the Executive Committee, which is comprised of representatives from the stakeholder agencies, to select key individuals to interview, and specific sites to visit, and to ensure a clear and objective understanding of the major issues regarding victim notification. The stakeholder agencies represented in this project are United States Attorneys' office (USAO), FBI, and BOP. To assist with gathering requirements, the consultant conducted four focus groups. The focus groups included participants from each of the three agencies.

An initial focus group was held in Washington, D.C., to solicit general system requirements and needs for a victim notification system. The subsequent three focus groups were conducted at the site-specific level and held in Miami, Los Angeles, and Omaha. These focus groups enabled the consultant to collect more detailed requirements from various districts. Parallel to the focus groups, key individuals were interviewed during each site visit, as were Headquarters-level representatives from EOUSA, FBI and BOP.

The focus group meetings identified requirements for a victim notification system

which were consistent with the statutory notification requirements found in 42 U.S.C. §§ 10606, 10607 and the Attorney General Guidelines for Victim and Witness Assistance.

Regarding the role of U. S. Attorneys' office personnel, the consultant's study noted the AUSA's main responsibility involved the prosecution of cases. The AUSA's role in the pre-VNS notification process was to provide information regarding the status of the case, generally to the Victim-Witness Coordinator (VWC). The Victim-Witness Coordinator at the U.S. Attorney's Office is most often the primary point of contact for the victims.

The study also found the emphasis placed on victims was not uniform across districts. In some districts, victims were tracked and notified only when they were needed to provide witness testimony or give an impact statement during sentencing. Notification to those victims who are not instrumental in building a case was sometimes seen as a secondary priority. The presence of a VWC in every district provided some consistency. However, the role associated with this position differs from district to district. For example, in some districts, notification of victims was performed by a full-time VWC; in others, it was a function performed by the attorneys' secretaries; and in still others, it was done by the attorneys themselves. In addition, districts differ in the types of notifications they perform. FBI field offices and USAO districts do not regularly correspond with each other. One FBI field office may overlap three USAO districts, and vice versa. Consequently, the lack of uniformity among districts in terms of policy, roles, or procedures complicates the exchange of information between the FBI and the USAO.

The adoption of a standard notification process within each component and between components was easily identified as the key to improving the Department's notification efforts. In addition, the following goals were established for the new automated system:

- Standardize capture of victim information;
- Eliminate duplicate data entry between agencies;
- Provide a mechanism to provide information to many victims; and
- Maintain a record of notification activities.

II. Development and implementation of the Victim Notification System (VNS)

Upon completion of the consultant's reports, the Department sought and received proposals to develop the new notification system. A contract was awarded to GRC International, Vienna, Virginia (now a division of AT&T) and development of the program began on August 1, 2000. Following various stages of testing in a controlled environment, VNS was pilot tested beginning in late May 2001, with the FBI field offices in Tampa and Jacksonville, Florida; in the U. S. Attorney's Office for the Middle District of Florida; and with all Bureau of Prison facilities in the state of Florida. Based on the results of the pilot testing, additional design work was undertaken to improve the functionality of the system and September 2001 was targeted to begin deployment to each component, FBI, USAO and BOP. Actual deployment to the field commenced in early October 2001 and was completed in early January 2002. Once deployed to each component VNS is the official record of victim notification activities.

III. Criminal fines fund of the VNS

The Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10603, as amended, (VOCA) established the Crime Victims Fund (CVF) and authorized the Director, Office of Victims of Crime (OVC), to contract for and to reimburse other agencies of the Federal Government for the performance of the Director's Crime Victim Assistance Functions. Pursuant to an agreement between OVC and EOUSA, the CVF is currently the source of funds used to operate the Victim Notification System. With respect to the Crime Victims Fund, the funding is derived from all criminal fines, with certain exceptions already provided for in other statutes. (42 U.S.C. § 10601(c)). As a result, this new system to notify victims is operated with funds derived from criminal fines imposed on convicted defendants.

IV. Features of the new notification system

VNS uses a central database of victim information with shared access to that information by each of the participating components. Access to information is generally restricted based on the users component and office in which they are assigned. VNS is a Web-based system. Using the Web browser provided on a computer (either Netscape or Internet Explorer), the user accesses the central database through their agency *Intranet*; VNS is not accessible through the Internet. From this Web-based application, Department users not only can view, add, and update victim data, they also can view and create notifications for victims.

USAO VNS users may select various methods to use when notifying victims. VNS provides the following notification methods:

- Automated letter generation;
- Email;
- Fax;
- Automated outbound telephone call to the victim;
- Call Center - toll free telephone number for victim to receive the latest update regarding the status of the case.

For cases involving large numbers of victims and primarily where the victim information is available in some type of electronic format, the data can be submitted to the VNS project manager with a request to load the information to VNS. Once loaded, the VNS project will, if requested, generate and mail a notification letter to the victims. The only cost to the District is providing VNS approved windowed envelopes with the District return address. Generally, the VNS project will pay for mailing one letter to a victim per case (this letter would include the victims VNS ID and PIN number required to access information from the Call Center). Once the victim has received a notification letter from VNS, the VNS Call Center is available to victims for future information regarding the case.

V. Case management system (LIONS) and VNS

The United States Attorneys' Offices are responsible for notifications to victims once charges have been filed and made public through the disposition of the case. The actions which give rise to notifications are expected to be docketed in the U.S. Attorney case management system, LIONS. Once docketed in LIONS, the information regarding the event is transferred to VNS to allow USAO VNS users to create and generate a notification to the victim. VNS does *not* send a notification to the victim once the information is received from LIONS until a USAO user approves dissemination of the information to the victim. LIONS docketing which would create potential notifications include:

- List of each charge contained in the filing instrument;
- Future court hearing dates, such as a change of plea, trial or sentencing;
- Outcome of each charge filed (whether by guilty plea or trial);
- Sentencing outcome.

There are many additional occurrences which, when properly docketed in LIONS, will create potential notifications to victims. The critical element in each instance is developing within the USAO a procedure to communicate the information so that it can be *timely and accurately* entered in LIONS. The districts which have experienced the greatest success regarding docketing issues and VNS are those which use a more centralized form of docketing.

VI. Successful implementation requires a team effort

As the consultant's study revealed, prior to VNS there was a general lack of communication, not only between the components, but also within U.S. Attorneys' Offices, regarding victim notification matters. This presented a significant obstacle to creating an effective notification program. The implementation of VNS has further defined the areas where increased communication between the components and USAO staff

members is required, especially once litigation has commenced.

Certain key elements are critical in order for notification to victims of crime to be successful using VNS:

- Management support to insure the appropriate policies and procedures have been established to support VNS;
- AUSA communication of basic information regarding the status of the case to the docketing staff in a timely manner;
- Accurate and timely LIONS docketing of case information;
- Accurate VNS data entry of victim information;
- Routine communication with investigative agencies, especially the FBI.

The use of a central database by all of the components participating in the VNS project standardizes the capture of victim data and eliminates the duplication of data as responsibility for notification to victims passes from each component. However, the central database design also requires each component to supply the necessary information to VNS (FBI - investigative file number and victim information for each case; USAO - case status information, defendant information, and Marshal number; BOP - inmate custody status, location, and release date). If one component fails to provide the information to VNS, victims will not receive notification by that component *and* the next component that has the notification responsibility may also be prevented from notifying the victims. Consequently, if the FBI does not enter a victim case in VNS, neither the USAO nor BOP will be able to fulfill their notification responsibilities. If the USAO fails to provide VNS the appropriate information for victim cases, BOP will be unable to complete their notification responsibilities. Routine communication between the USAO and the local FBI office regarding victim cases is critical for the effective operation of VNS.

When all of the elements are in place, VNS will permit the U. S. Attorneys' Offices to notify more victims with more information than ever before. While VNS is still in the early stages since implementation, the initial figures indicate a significant number of notifications have been provided to victims using VNS. VNS will provide even more notifications to victims in the future as the process for identifying victim cases and docketing the significant events is further refined in each office.

VII. More VNS information

VNS maintains a Web page on USANET with current information regarding the Victim Notification System, including:

- VNS User's Manual;
- Release Notes which contain updates to the User's Manual;
- LIONS Docketing for VNS User's Manual;
- Request for VNS Contractor Assistance Form;
- Text of email messages to USAO's regarding VNS matters.

The Web page can be accessed at: http://www.usa.doj.gov/it/proj/vns/.❖

ABOUT THE AUTHOR

❑**Kurt Shernuk** has been an Assistant U. S. Attorney in the District of Kansas since 1982. He has been on detail to the EOUSA's LECC Victim/Witness Staff to serve as Project Manager for VNS from 1999 to the present.✠

Witness Intimidation

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I. Introduction

This article will discuss different situations which make victims and witnesses eligible for the Emergency Witness Assistance Program as well as other security programs. This article will first define the tactics used to intimidate witnesses as well as explain why relocation is an effective tool to address witness intimidation.

II. Types of intimidation

Most people perceive witness intimidation as the defendant threatening or actually inflicting some form of violence on the victim or a key witness. In reality, the problem of witness intimidation is far more complex. A report on Preventing Gang- and Drug-Related Witness Intimidation, prepared by the National Institute of Justice (NIJ), describes two different kinds of intimidation: overt and implicit.

Overt intimidation occurs when someone does something explicitly to intimidate a witness into withholding, changing, or falsifying testimony:

> The sister of a defendant slaps a witness outside the courtroom and says she will kill her if she testifies;
>
> An incarcerated defendant puts the word out on the street through fellow gang members that a murder witness will be killed if he cooperates with the prosecution.

Implicit intimidation involves a situation in which there is a real but unexpressed (or indirectly expressed) threat of harm to an individual who may testify. Implicit intimidation is sometimes generated by a history of violent gang retaliation against cooperating witnesses:

> A drug-related shooting occurs at a softball game. Three players are killed in full view of spectators, but no cooperative witnesses can be found;
>
> Two individuals suspected of stealing money from the homes of Vietnamese immigrants are arrested, but the victims all claim they did not see the faces of the perpetrators.

III. Forms of intimidation

Witness intimidation may also take many different forms. The report by NIJ on Preventing Gang- and Drug-Related Witness Intimidation explained how intimidation--whether of an individual or a community--may involve the following tactics:

- *physical violence* which involves violent acts of intimidation--including homicides, drive-by shootings, and physical assaults;
- *explicit threat of physical violence* is intimidation that is clearly expressed and directed towards a specific individual;
- *implicit threat* is indirect intimidation that is implied or understood, but not directly expressed, such as gang members parked outside a victim's or witness's house, nuisance phone calls, and vague verbal warnings by the defendant or his associates;
- *property damage* involves the destruction of property: drive-by shooting into a witness's house, fire-bombing of cars, burning of houses, hurling bricks through the window of a car or home, and other types of violence; and
- *courtroom intimidation* occurs when friends or relatives of the defendant direct threatening looks or gestures at a witness in the courtroom or courthouse, stare intently at the witness, or use threatening hand signals.

Other forms of intimidation include economic threats (in domestic violence or fraud cases) and threats concerning the custody of children,

deportation, or the withholding of drugs from an addicted victim or witness or from addicted members of his or her family.

A. When witness intimidation is most likely to occur

The NIJ report on Preventing Gang- and Drug-Related Witness Intimidation explained that prosecutors and police agree that the most dangerous time for a victim or witness is between the arrest and the trial of a defendant. As the trial approaches, the victim or witness becomes more of a target, and the long trial delays allow ample opportunity for intimidation. The second most dangerous period for victims and witnesses is during the trial. Very few intimidation attempts are made at the scene of the crime (although violent crime is, in itself, intimidating) or at the time of arrest. However, in cases involving community-wide intimidation, the victim or witness may feel endangered from the moment they are aware that the crime is gang-related or drug-related:

> A prosecutor reported that a resident where a homicide occurred was shot and killed by gang members who saw her simply speaking with police (in fact, the witness had refused to cooperate in the investigation).

B. Preventing witness intimidation

Prosecutors may use different methods to prevent witness intimidation including requesting the judge to set high bail, prosecuting those who intimidate witnesses, filing temporary restraining orders, and relocating witnesses. Careful consideration should be given whenever a witness expresses fear. An active response to witness intimidation makes a statement that the criminal justice system considers witness intimidation a serious matter and will take action to prevent intimidation and prosecute those that commit these acts.

IV. Witness Relocation

The most reliable and effective option prosecutors have to assist intimidated witnesses is relocation. There are three types of witness relocation:

- *immediate relocation* which may require quickly moving the witness from his or her residence to a shelter, hotel, motel, or other facility;
- *short-term assistance* which may require placing the witness in a rental facility for a few months or providing the witness with funds to leave the danger area to reside with relatives or friends; and
- *long-term assistance* which may require placing the witness in another city or state for a long period of time, permanently placing the witness in a rental facility, placing the witness in Section 8 housing, or entering the witness into the Federal Witness Security Program.

The appropriate type of relocation depends on the kind of case involved. If it is a high profile case or a case involving an organized gang or organization, long-term assistance in another city or state should be considered. If the case involves a small gang, a hotel stay outside of the danger area may be sufficient. How long relocation should last after a trial depends upon the circumstances of each individual case. Some prosecutors feel relocation should end when the trial concludes and others feel the witness should be permanently relocated. Even if relocation services are provided, there are situations when the witness may still be harmed. This often occurs when the witness returns to his or her neighborhood after the trial.

A. Challenges of witness relocation

Regardless of which type of relocation is chosen, there are many challenges in relocating witnesses. These challenges include:

- *medical ailments* may require transferring the witness's prescription medicines as well as medical benefits, HMOs, Medicare, Medicaid, etc. If a witness does not have medical benefits, medical treatment can cost in the thousands of dollars. In some states, doctors may refuse to treat patients with preexisting medical conditions;
- *children* may require finding schools and daycare centers near the witness's new location, which can be difficult if the child has special needs. Also, you must ensure that the

the child's school records and other information must be transferred, and child custody issues must be settled;

- *drug addiction* may require placing the witness in drug rehabilitation, which can be costly, as well as locating housing;
- *financial instability* may require large sums of money to assist the witness with food, clothing, housing, and other needs until the witness becomes financially independent or until he or she receives assistance from social services; and
- *criminal records* sometimes make a witness ineligible for certain witness assistance programs because of the fear that the witness will pose a risk to the new community.

B. Locating witnesses through modern technology

One of the greatest challenges in relocating witnesses is the use of technology by defendants to locate the witness. If a witness does not change his or her name, often they can be easily found through the computer. Defendants can easily find their prey by researching the databases of hospitals, libraries, motor vehicle agencies, department stores, credit card companies, utility companies, loan agencies, and others. For example:

> When Carol ended her relationship with David, he vowed to kill her, stating that if he couldn't have Carol, no one would. The restraining orders did not hinder David from contacting Carol, so she moved to another part of the city. David reported to the Department of Motor Vehicles that his car was damaged and he only had the vehicle license number. David was provided Carol's new address as well as her phone number.

Each time a victim-witness uses a credit card or a debit card they leave a trail to their location. Many companies not only computerize information about their clients, but they also maintain information about the client's relatives and friends. This information is often shared without the client's permission. Even if a witness changes his or her name, if the perpetrator is familiar with their family and friends, this information can be used to locate the witness.

The Internet provides numerous companies who employ investigators and attorneys to conduct thorough searches to find individuals. Perpetrators may employ these agencies to search for the witness. Investigators and attorneys often receive access to telephone records. When the witness calls his or her relatives or friends, the number is recorded and provided to whomever wants it. In addition to these companies, there are web sites that provide step-by-step instructions on how to conduct a thorough search to find people, and internet companies that provide information on postal addresses, phone numbers, and email addresses. For example:

> After years of abuse, Sarah and her three children relocated to another state. She worked the night shift to be home with the children during the day. Her husband knew this routine and used this information to his advantage. When Sarah disappeared, her husband searched the Internet for new employees at nearby hospitals. One day when leaving the hospital, Sarah was met by her estranged husband.

In addition to relocation, witnesses are encouraged to change their work schedules, telephone numbers, and install security systems. They are advised to use cash whenever possible. Bank accounts and debit cards should be opened in the name of a friend or family members that are unknown or unfamiliar to the perpetrator. Some have created false trails by opening an account in another city containing the resources of another person. Victims may want to consider changing their own name and social security number and the names and social security numbers of their children. Also, witnesses may want to obtain telephone services that include caller id and blocked numbers. These methods can serve as a deterrent for harassment and intimidation.

V. Witness security programs

If the United States Attorneys' Offices want to relocate or provide other assistance to

intimidated witnesses, there are three programs available to assist these witnesses:

- the Federal Witness Security Program;
- the Emergency Witness Assistance Program; and
- the Department of Housing and Urban Development's Operation Safe Home

A. Federal Witness Security Program

The Federal Witness Security Program (FWSP), which is overseen by the Criminal Division's Office of Enforcement Operations (OEO), was created by Congress as part of the Organized Crime Control Act of 1970 and revised by the Witness Security Reform Act of 1984, 18 U.S.C. Section 3521. The FWSP's mission is the protection of government witnesses, and their families, who are endangered due to their cooperation with the government in very significant cases.

Eligibility

A witness may be considered for the FWSP only if the person is an essential witness in a case involving organized crime and racketeering, federal drug trafficking offenses, any serious federal felony for which a witness may provide testimony that may subject them to retaliation by violence or threats of violence, any state offense that is similar in nature to those mentioned above, and certain civil and administrative proceedings. Strict criteria determine who will enter the program and include the following:

- The conviction of the defendant against whom charges are brought must be of such significance that it will further the administration of criminal justice and help meet the overall goals of the Attorney General.
- There must be a clear indication that the witness's life is, or will be, in jeopardy as a result of his or her testimony, such that there are no alternatives to using this program.
- The witness must be able to provide significant and unique testimony.
- The need for the testimony of the witness must outweigh the risk of danger to the public.

Services

Witnesses accepted into the FWSP are relocated away from their danger area by the United States Marshals Service (USMS). The USMS is responsible not only for the safety and security of these relocated witnesses, but also for providing them with start-up funding for subsistence and housing until they can become self-supporting. The USMS also assists relocated witnesses in finding civilian employment in their new location. Witnesses and family members are given new legal identities and appropriate supporting documentation, including birth records and driver's licenses. The program provides witnesses and their families with temporary lodging expenses, and free medical and psychological care, until a permanent residence in another jurisdiction has been arranged.

Prisoners are also accepted into the FWSP. The Federal Bureau of Prisons (BOP) is responsible for the security of these prisoner-witnesses. This protection includes separation from individuals and organizations known to be a threat, nondisclosure of their place of incarceration, and secure transportation to and from the court to testify.

Application process

Entry into the FWSP begins with the submission of a detailed application, which includes information on the case, the witness, the witness's anticipated or completed testimony, and the defendants and their criminal organization. The application must be endorsed and signed by the United States Attorney for the district in which the witness has testified or will testify. Upon OEO's receipt of the application, an initial review and analysis is conducted to ensure compliance with all of the statutory and administrative requirements.

Program limitations

The transition from private citizen to relocated witness is a difficult process. Before making an application for a witness, the prosecutor should ensure that the witness

understands that relocated participants are required to completely relinquish their identity and lifestyle, and must cut all ties with their family and friends.

B. Emergency Witness Assistance Program

The Emergency Witness Assistance Program (EWAP) was designed to give the United States Attorneys' Offices (USAOs) the flexibility to address a critical need: assistance to witnesses on an emergency basis to ensure their well-being and that they will be available for trial, other court proceedings, or activities related to an ongoing case. The program also addresses a witness's or prospective witness's physical, mental, or emotional reservations about participating in a specific matter before or after she or he agrees to cooperate with, testify, or be available for the government.

Eligibility

EWAP assistance may be provided to witnesses and victims where the more formal protection and security programs, administered under the provisions of the Witness Security Reform Act, are not available or appropriate. Assistance is only available for witnesses with fears, reservations, or concerns about being a government witness. Its purpose is not to provide physical protection for witnesses. It addresses a witness's fears about assisting the government. It seeks to promote the peace of mind of witnesses when they have relevant information to contribute, thereby enhancing their ability to testify.

Services

Each individual USAO has its own protocol outlining permissible uses of EWAP funds, and each USAO has its own allocation of EWAP funding. The decision as to how, when, and whether EWAP funds are used is entirely within the discretion of the United States Attorney. Generally, however, EWAP funds are used to provide the following services: transportation to enable a witness to leave his or her neighborhood, town, city, or state temporarily; temporary housing or moving expenses; temporary subsistence (a reasonable portion of federal per diem standard); emergency telephone service to assist the witness to keep in contact with the USAO; child or elder care; other transportation costs, as reasonably necessary for school or immediate medical or counseling needs.

Application process

The process of obtaining assistance begins with an interview of the witness to ascertain his or her needs and to determine if the EWAP is the appropriate method. Interviews are conducted by the Victim-Witness Coordinator (VWC), the Assistant United States Attorney (AUSA), and the investigative agent. After determining that EWAP is an appropriate course, the VWC or the AUSA prepares a Request Form outlining key information about the witness, the circumstances justifying EWAP assistance, and the proposed use of EWAP funds. All requests are accompanied by the Acknowledgment Form which is signed by the witness and appropriate USAO personnel. The Acknowledgment Form outlines to the witness that EWAP is not a protection program and that they must continue all other obligations and responsibilities while receiving assistance.

Program limitations

There are some restrictions on the use of EWAP. This assistance does not include any protective services, custody arrangements, or law enforcement presence and does not relieve a recipient of any responsibility with regard to debt, custody, child support, court, or other obligations. The program only provides emergency financial and other assistance to witnesses for the purposes stated above. Such assistance will not exceed one month, unless there are extenuating circumstances. EWAP is considered a fund of last resort for witness assistance, and does not replace available case funds. The assistance funds are limited to frightened or endangered witnesses only and cannot be used simply because the witness is indigent or requires services. In addition, EWAP, like other kinds of government assistance provided to witnesses, must be disclosed to the defense as part of the discovery process.

C. Operation Safe Home

Since 1994, the Inspector General's Office (OIG) of the U.S. Department of Housing and Urban Development (HUD) has managed an initiative called "Operation Safe Home." This program is designed to assist in the relocation, at the request of the investigative agencies and the United States Attorneys' Offices, of threatened witnesses in violent crime cases in and around public and assisted housing.

Eligibility

The HUD initiative requires witnesses to qualify financially, and applicants may not be eligible for the program due to extensive criminal records. The initiative has limited resources and is reserved for cases involving violent crime committed in and around HUD housing. The decision to assist in relocation is within the discretion of the responsible HUD OIG Special Agent in Charge (SAC). Other restrictions apply, including the responsibility of the tenant to maintain the property. Parties may also be evicted from properties for criminal involvement.

Services

The initiative makes three separate HUD resources available to assist in the relocation of a threatened witness, including: providing up to 250 Section 8 vouchers annually that allow the witness to rent appropriate private housing; finding a unit in a public housing authority (PHA) outside of the danger area (the PHA has the right to reject the witness if he/she has a serious criminal record); and permitting the temporary use of property (ranging from six months to a year) as safe houses, with no rent required (up to 100 single family homes in HUD's nationwide inventory of foreclosed properties).

Most of the relocations in the HUD initiative are accomplished through PHAs absorbing the costs of the units used for the relocation. If the PHA does not have adequate funding, the OIG authorizes reimbursement of the PHA receiving the witness. If PHA units are not available, the OIG will turn to section 8 vouchers and then to safe houses as alternative resources to assist in the witness relocation.

Application process

Entry into the HUD program is made by application from the USAO or the law enforcement investigative agency to the SAC for the Regional HUD OIG. Since requests for witness relocation assistance may exceed the supply of premises available in a geographical area, applications must be coordinated and prioritized. Therefore, the USAOs serve as the point of contact for applications for admission into the HUD program. The SAC of the regional offices of HUD's OIG will administer the selection and entry into the program. While not all witnesses will qualify for entry into the HUD Operation Safe Home initiative, it serves as a valuable alternative or supplemental resource for those witnesses who do qualify and who may not meet the criteria for, or are awaiting placement in, an existing DOJ program.

VI. Conclusion

Witness intimidation is a pervasive and insidious problem. No part of the country is spared, and no witness can feel entirely free or safe. While the severity of the problem may seem discouraging, there are methods to help prevent intimidation. Prosecutors who have used these approaches have made it possible for key witnesses to testify and have, as a result, convicted thousands of violent felons who might otherwise have gone free.❖

Information for this article was taken from the National Institute of Justice, Issues and Practices, Preventing Gang- and Drug-Related Witness Intimidation.

ABOUT THE AUTHOR

❑**Crystal Gaines** has worked with the Executive Office for United States Attorneys' Law Enforcement Coordination/Victim-Witness Assistance Staff since April 1990. She works with several victim-witness committees and working groups which focus attention on witness intimidation, domestic violence, crisis response, and expert and fact witness issues. She is the administrator of the Emergency Witness Assistance Program.✠

The Federal Crime Victim Assistance Fund

Pam Press
Program Manager
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In an international parental kidnapping case, a three-year old, the youngest of three sisters, was kidnapped by her father and taken to Palestine. As a result of the crime, the family was emotionally devastated and left in near financial ruin. When the child was finally located by the FBI, the United States Attorney's Office (USAO) handling the case was able to help. They arranged and paid for the mother to fly to New York City to meet her child as she returned to the United States after being missing for six months. This tearful reunion was made possible by the Federal Crime Victim Assistance Fund.

The Federal Crime Victim Assistance Fund (FCVAF) is a valuable means by which United States Attorneys' Offices help federal victims. The FCVAF is derived from the Victims of Crime Act, or VOCA, funds. The passage of VOCA in 1984 established the Crime Victims Fund, in which fines, forfeited bail bonds, penalties, and special assessments collected from federal criminal offenders, are deposited. A large portion of this money is collected through the efforts of Assistant United States Attorneys and the United States Attorneys' Financial Litigation Units. The Crime Victims Fund serves as a major financial resource for victim services nationwide and is the primary funding resource for federally-supported victim programs.

The Executive Office for United States Attorneys' LECC/Victim-Witness Staff assumed management of the FCVAF in Fiscal Year 1998, via a reimbursable agreement with the Office for Victims of Crime. The Fund enables the USAOs' Victim-Witness Coordinators to assist victims with services of an immediate nature, such as transportation costs, emergency shelter, and crisis intervention. The FCVAF is a limited funding resource, and as such is intended to be used when no other resources are available–the funding source of last resort. State victim compensation and other victim assistance programs must be contacted to determine if they can provide services prior to requesting funding from the FCVAF.

The FCVAF is relatively easy to use. A written request, signed by the United States Attorney or his/her designee, is sent to the Assistant Director, LECC/Victim-Witness Staff, briefly outlining the facts of the case, impact of the crime, attempts to locate other resources, type of assistance and cost, and the relevant provision in the FCVAF Guidelines. (A sample request letter, as well as the FCVAF Guidelines, can be found on the LECC/Victim-Witness Staff's USANet web site at www.usa.doj.gov/staffs/lecc, under the Victim Resources button.) Once a request is reviewed, the district will be sent an approval letter, if appropriate, which contains the amount of funding authorized and accounting information for budgetary purposes. When making a request for funding, please refer to the FCVAF Guidelines mentioned above. The following is basic guidance for using the FCVAF.

- The request must be made for a federal victim;
- The case must be an open matter in the United States Attorney's Office (if not, refer the request to the FBI, as they have their own FCVAF);
- The victim must have suffered direct physical, emotional, or pecuniary harm as the result of the crime;
- The service requested is *not* otherwise available; and

- The service requested is short-term.

Here are a few examples of requests that are not permissible under the FCVAF Guidelines:

- A request to pay for travel of a victim who will be testifying as a witness. The FCVAF is meant to assist the victim, not the criminal justice system. It cannot be used to further the prosecution. The fact witness account should be used instead.
- A request to reimburse a victim for an expense already incurred. The FCVAF is designed to assist victims with immediate needs, and a reimbursement would not qualify as an immediate need. It cannot be used after-the-fact. Prior approval must be obtained to expend these funds.
- A request to pay for a spiritual or cultural healing ceremony. While the FCVAF does cover counseling services by a licensed mental health clinician, we understand that many Native Americans do not subscribe to modern counseling techniques. The FCVAF does not cover burial, funeral, or ceremonial expenses; however, many states with Native populations do allow payment for traditional cultural healing through VOCA funded compensation programs.

A typical FCVAF request is to pay for travel for a victim or, in the case of a minor, deceased, or incapacitated victim, his or her immediate family members, to a sentencing hearing. In other instances, the FCVAF has been used to provide short term crisis counseling, purchase food, basic clothing items and toiletries, and to pay for emergency child care for a victim attending a court proceeding. A recent modification to the reimbursable agreement with OVC added funding to support short-term services to trafficking victims (trafficking offenses include, but are not limited to, slavery, involuntary servitude, and violations of the Victims of Trafficking and Violence Protection Act of 2000), and to pay travel expenses for victims who wish to make a presentation to the Pardon Attorney in a capital case.

While there is no dollar limit for an FCVAF request, it is requested that you keep your funding request to a minimum and follow the federal per diem rates for lodging. Keep in mind there are ninety-three districts who can access the Fund, and as previously mentioned, this is a limited funding source. Additionally, while you may want to offer financial assistance to many of the victims you deal with, it is advisable to wait until the victim requests it. When you are asked for help, be sure not to make any promises of assistance to the victim until you obtain written approval from the LECC/Victim-Witness Staff. This will avoid disappointing or angering a victim who is expecting financial assistance in the event your request is denied or not approved for the full amount requested.

This Fund is another tool for USAOs to use to assist victims of federal crime when no other options are available. If you are considering making an FCVAF request, be sure to review the guidelines referenced earlier to see if it falls within the purview of the Fund. If you are not certain whether your request would be approved, feel free to contact the LECC/Victim-Witness Staff at (202) 616-6792, and we will be glad to discuss it with you.❖

ABOUT THE AUTHOR

❑**Pam Press** has been a Program Manager in EOUSA's LECC/Victim-Witness Staff since 1997. She currently administers the FCVAF and the LECC Asset Forfeiture Training Fund, publishes the LECC/V-W Program Update, and serves as the Staff's webmaster. She began working at EOUSA in 1992, as Staff Assistant for the Deputy Director of Legal Programs, and then as Staff Assistant and Writer-Editor for the Deputy Director of Operations.✠

Restitution Update

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I. The Five-Step restitution analysis

The "offense of conviction" is often different in scope for restitution than for guideline "loss" computation. This has lead to numerous reversals of restitution orders. In order to avoid some common restitution calculation errors, it is useful to utilize a Five-Step analysis when determining the amount of restitution the court is authorized to impose in any particular case.

Given that restitution is a statutory penalty, the analysis begins with the statutory offense of conviction. The first four steps retain the focus on the scope of the offense, gradually narrowing the scope of harms compensable with restitution for that offense:

Step One: Identify the *Offense of Conviction* in order to determine:

> a) whether restitution is mandatory or discretionary;
>
> b) whether restitution is authorized as a sentence, or only as a condition of supervision; and
>
> c) the scope of the offense for steps two through four.

Step Two: Identify the *victims* of the Offense of Conviction.

Step Three: Identify victims' *harms caused* by the Offense of Conviction.

Step Four: Determine which harms (and/or costs) are statutorily *compensable* as restitution.

Step Five. Look at the plea agreement to see if it specifically permits the court to impose an even broader amount of restitution than could otherwise be imposed, pursuant to certain statutory restitution provisions regarding pleas.

The steps work best in the above sequence. The sequential analysis is explained and documented with case law in Catharine Goodwin, *The Imposition of Restitution in Federal Criminal Cases,* FEDERAL PROBATION, 95-108 (Dec. 1998) (also see an update in the June 2001 issue). Imposition and enforcement restitution issues are discussed in Catharine Goodwin, *Imposition and Enforcement of Restitution,* FEDERAL PROBATION, 62-72 (June 2000).

II. Use of charging format to maximize restitution in "schemes"

In 1990, the Supreme Court held that the "loss caused by the conduct underlying the offense of conviction establishes the *outer limits of a restitution order*." *Hughey v. United States*, 495 U.S. 411, 413 (1990) (emphasis added).

Because the manner in which the prosecutor charges the offense often determines the "outer limits" of the offense, the charging format thus often determines the "outer limits of a restitution order." The traditional fraud or conspiracy charging format clarifies the existence, nature, and extent of the fraud scheme or conspiracy with which the offense is involved. However, where prosecutors merely track the statute, as is common for some "intent to defraud" or "intent to deceive" offenses, restitution orders have often been vacated or restricted.

The *Hughey* case was based on the language in the restitution statutes (substantially similar in 1990 to the current statutes, for this purpose). The statutes authorize the imposition of restitution only for victims "harmed as a result of the *commission of an offense*. . . ." 18 U.S.C. §§ 3663(a)(2) and 3663A(a)(2), emphasis added.

In response to *Hughey*, Congress enacted the "scheme provision," to ensure that restitution is imposed for all victims of a scheme, conspiracy, or pattern of criminal activity (hereinafter "scheme"), in any case that "... involves as an element a scheme, conspiracy, or pattern of criminal activity ... [where a victim is harmed] by

the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. §§ 3663(a)(2) and 3663A(a)(2). While this provision expanded the offense of conviction in certain cases, it did *not* change the fact that restitution is still only authorized for the offense of conviction. Therefore, commonly litigated issues in restitution case law are: a) When does the offense "involve" a scheme? and, where so, b) What acts are part of the scheme?

For traditional fraud offenses such as wire, mail, and bank fraud, the customary charging format makes it clear that each act alleged is "in furtherance of" a scheme (or conspiracy), which is separately described and incorporated into each substantive act alleged. As a consequence, these kinds of offenses have rarely given rise to litigation over "scheme" issues. *See, e.g., United States v. Pepper*, 51 F.3d 469, 473 (5th Cir. 1995); *United States v. Hensley*, 91 F.3d 274, 276-78 (1st Cir. 1996); *United States v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1996). This charging format was no doubt what Congress had in mind when enacting the provision that refers to "an element that involves" a scheme.

However, some other offenses are committed *"with an intent to defraud"* (e.g., 18 U.S.C. § 1029, stolen or fraudulent credit cards or other "unauthorized access devices"), or *"with an intent to deceive"* (e.g., 18 U.S.C. § 1513, counterfeit or forged documents, securities, or manufacturing equipment). Significantly, prosecutors do not customarily charge these offenses using the traditional fraud or conspiracy format - although it would be logical to do so, because the act of "defrauding" or "deceiving" are inherently understood to be carried out by means of a plan (i.e., a "scheme").

Simply tracking the statutory language for each act does not clarify *if* there was a plan (scheme) that tied various acts together in order to defraud or deceive others, or *what* acts are related in this way. As a result, "scheme" issues in restitution case law have almost always arisen in cases involving these kinds of offenses. *See, e.g., United States v. Akande*, 200 F.3d 136 (3d Cir. 1999); *United States v. Moore*, 127 F.3d 635 (7th Cir. 1997); *United States v. Cobbs*, 967 F.2d 1555 (11th Cir. 1992).

As a rule of thumb, where there is no alleged scheme tying acts together, courts have held that restitution cannot be imposed for one kind of act where the offense of conviction describes another kind of act, even though the acts may be related logically in purpose or intent. For example, if the offense of conviction is *possession* of stolen credit cards, courts have held restitution cannot be imposed for the victims of the *use* of the cards. *See, e.g., United States v. Blake*, 81 F.3d 498 (4th Cir. 1996); *United States v. Hayes*, 32 F.3d 171 (5th Cir. 1994). However, there appears to be some circuit variation. For example, the Eighth Circuit seems to permit the court to look at the facts alleged in the indictment, proven at trial, or admitted in the plea colloquy, to determine if there was a scheme and what acts were included in it. *See, e.g., United States v. Jackson*, 155 F.3d 942 (8th Cir. 1998); *United States v. Ramirez*, 196 F.3d 895 (8th Cir. 1999). In some circuits there appear to be cases in both categories. Compare *Hayes*, *supra*, with a literal reading, with *United States v. Hughey* (II), 147 F.3d 423, 438 (5th Cir. 1998), reversing restitution for acts the indictment *and the trial record* did not tie to the scheme. A few courts have held that the *dates* alleged for the beginning and end of a scheme determine the scope of restitution, particularly in a plea situation (see *Hughey* (II) and *Akande*, *supra*), although the details of the allegations would not ordinarily be determinative of the calculation of a sentencing factor like restitution.

Consequently, to protect restitution for all the identifiable victims of acts that are connected and committed to defraud or deceive others, and to avoid the "scheme" restitution pitfalls, prosecutors should consider charging all scheme-type offenses in the traditional fraud/conspiracy format, describing the scheme (to defraud or deceive) in detail, and alleging each substantive act to have been committed "in furtherance" of the scheme. They should also be sure that the start and end dates of the scheme include all acts within the scheme for which restitution should be imposed.

III. The Mandatory Victims Restitution Act (MVRA) and other bases of expanding restitution

A. "Reasonably foreseeable" harm

The Mandatory Victims Restitution Act of 1996 (MVRA) made sweeping changes to the restitution statutes which have not yet been thoroughly interpreted. Several of these changes may ultimately incrementally expand the analysis of how much restitution is authorized for federal criminal offenses. For example, it changed the definition of a victim in the primary restitution statutes from *"the victim of such offense..."* to *"a person directly and proximately harmed as a result of the commission of an offense . . . ."* 18 U.S.C. §§ 3663(a) and 3663A(a), emphasis added. "Proximately" was copied from the first mandatory restitution statutes, passed in 1994, that authorize restitution for all "losses suffered by the victim as a *proximate* result of the offense." 18 U.S.C. §§ 2248, 2259, 2264 and 2327. Broad restitution orders have been upheld under these statutes. *See, e.g., United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999); *United States v. Hayes*, 135 F.3d 133 (2d Cir. 1998).

"Proximately" also implies "proximate cause," the customary causation standard used to determine liability for defendants under tort, contract, and criminal law. "Proximate cause" analysis holds a defendant liable for harms that are not only in the chain of "factual causation," in that they would not have occurred *but for* the defendant's conduct, but also within a narrower subcategory of harms that are within "legal causation," i.e. those for which it is socially and pragmatically reasonable to hold the defendant responsible. The most commonly used standard for defining this subcategory includes only those harms (within the "but for" category) that were "reasonably foreseeable" to the defendant at the time of the act at issue. A minority view is to hold the defendant responsible for any harms that were a "natural consequence" of defendant's acts. Both views are explained in the famous case of *Palsgraf v. Long Island Railway Co.*, 162 N.E. 99 (N.Y. 1928). A "reasonably foreseeable" standard is most suitable for criminal law because it focuses on the defendant's state of mind. It is also the standard used by the sentencing guidelines for two analyses closely related to restitution: to determine which acts by others a defendant should be held responsible for under "relevant conduct" principles in USSG §1B1.3(a)(2), and the scope of economic "loss" the defendant should be held responsible for under USSG §2B1.1, n.2.

A second change made by the MVRA was to copy a phrase from the 1994 mandatory restitution statutes into 18 U.S.C. § 3664, which applies to *all* restitution orders. Section 3664(f)(1)(A) provides: "In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses. . . ." This strong provision has the potential to slightly broaden the amount of harms compensable with restitution, especially in cases where restitution might reasonably be computed in more than one way. It is also an indication of the strong legislative intent behind the MVRA to maximize rest for victims of crime.

There is some indication that courts are becoming more willing to interpret restitution (or the related concept of economic "loss") using a "reasonable foreseeability" rationale. See, e.g., *United States v. Checora,* 175 F.3d 782, 795 (10th Cir. 1999) finding that juvenile children of victims of a manslaughter offense were victims "directly and proximately" harmed by the offense (but remanding to name proper recipient of restitution on behalf of the children); and *United States v. Metzger*, 233 F.3d 1226, 1227 (10th Cir. 2000), finding that guideline "loss" should include the injury to a bystander shot by a police officer because it was a "reasonably foreseeable" result of a robbery (the same rationale would presumably apply to restitution).

B. "Integral" (or inherent) part of the offense

One way of determining what was "reasonably foreseeable" to the defendant, is to examine the harms resulting from acts that are an "integral part" of the offense, or "inherent" in the nature of the offense. For example, where the offense of conviction was 18 U.S.C. § 924(c) (not robbery), but the defendant admitted using the gun while robbing a credit union, the court

imposed restitution for the money taken in the robbery because it was "an integral part and cause of the injury" to the credit union. *United States v. Smith*, 182 F.3d 733 (10th Cir. 1999). (The court also noted that the Information identified the credit union as the victim of the charged offense, thereby illustrating the importance of the charging format in ensuring restitution, as discussed in Paragraph II, above.) Similarly, in *Metzger*, *supra*, the court found that the injury to the bystander was a "reasonably foreseeable" result of the offense *because* robbery is an "inherently dangerous" kind of offense. (Again, while this was a "loss" case, the same rationale would presumably apply to restitution.)

C. "Restoration" of the victim

There is sometimes more than one way to compute the value of the victim's lost or damaged property for restitution purposes. The restitution statutes do not indicate what measure of value a court should use for damaged or lost property. They simply provide a time frame for its valuation. See, e.g., 18 U.S.C. § 3663A(b)(1)(B): the defendant should pay "the greater of the value of the property on the date of the damage, loss, or destruction; or the value of the property on the date of sentencing. . . ." It may be helpful in such cases for prosecutors to remind the court of the underlying historical purpose of restitution, which was to "restore" the victim to his or her pre-offense condition.

For example, if the defendant destroyed some old machinery that had been "grand-fathered" in under modern specifications for the victim's commercial use, the defendant should arguably pay for replacement with newer equipment that would meet current specifications, even if it would cost more. Replacement of the old equipment, that would no longer be commercially operative, would not "restore" the victim to his or her pre-offense position, i.e. in possession of legally operative and productive equipment.

Two cases illustrate the use of a "restoration" rationale in upholding a higher computation of the victim's loss. In *U.S. v. Shugart*, 176 F.3d 1373 (11th Cir. 1999), where a 100-year old church was destroyed by arson, the court upheld the use of the (higher) *replacement* value of an identical church built on the same location, rather than the (lower) "fair market value" of the old church at the time of the arson, because replacement value came closer to "restoring" the benefits of the church (including its location) to the victim-parishioners. In another case, *United States v. Simmonds,* 235 F.3d 826 (3d Cir. 2000), a similar rationale was used to uphold the replacement value rather than the fair market value of the victim's personal furniture destroyed by arson.

D. Demonstrating these trends: inclusion of victims' attorneys fees

One group of cases that illustrates an apparent trend toward expanding restitution involves victims' attorneys' fees. The courts are increasingly willing to include attorneys' fees in restitution, either finding that such fees were "reasonably foreseeable" harm caused to the victim by the offense, and/or that such fees are necessary to fully "restore" the victim.

Courts applying pre-MVRA statutes consistently held that attorneys fees for victims were "consequential" harms caused by an offense and were thus excluded from restitution (see, e.g., *United States v. Stoddard*, 150 F.3d 1140, 1147 (9th Cir. 1998); *United States v. Diamond*, 969 F.2d 961, 968 (10th Cir. 1992); *United States v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992)). An exception was made where the fees were uniquely tied to the offense of conviction, such as in *United States v. Hand*, 863 F.2d 1100 (3d Cir. 1988). However, more recent cases have included victims' attorneys fees, either as direct and "foreseeable" results of the offense (*United States v. Cummings*, 281 F.3d 1046 (9th Cir. 2002); *United States v. Richard*, 234 F.3d 763 (1st Cir. 2000) (noting favorably, but not deciding the issue)). Nevertheless, the trend has not been universal. The Fifth Circuit decided that attorneys fees are not included in the statutory term of lost or destroyed "property" in *United States v. Onyiego*, 286 F.3d 249 (5th Cir. 2002).

E. Ascertainable future harms

Another group of cases illustrates expanded restitution orders at sentencing based on an MVRA provision, § 3664(d)(5), that allows the court to increase the restitution postsentencing, where the victim claims new losses (that were not

"ascertainable" by sentencing), upon showing cause why the losses were not initially claimed at sentencing.

In *United States v. Laney*, 189 F.3d 954, 967 (9th Cir. 1999), where the defendant was convicted of sexual exploitation of a child, the court ordered the defendant to pay restitution to the child for present and future counseling expenses, and the Ninth Circuit upheld the award. The court noted that Congress must have intended compensation for harm occurring postsentencing, because 18 U.S.C. § 3664(d)(5) allows the court to order restitution for losses not ascertainable at the time of sentencing. Also, the court found that, because the expert testimony supported the victim's need for six years of treatment, the treatment costs to the victim *were* reasonably "ascertainable" at sentencing, and, accordingly, the victim may have actually been foreclosed from raising the costs *later* under 18 U.S.C. § 3664(d)(5). Finally, the court reasoned that Congress would not have intended the "strangely unwieldy procedure" of requiring a victim to petition the court for an amended restitution order every sixty days for as long as the therapy lasted." *Id.* at 967. Similar reasoning was used to uphold restitution for future costs to the victims in *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001) and *United States v. Danser*, 270 F.3d 451 (7th Cir. 2001).

IV. Ninety-day continuance of restitution determination

The restitution statutes provide that, "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, ... the court *shall* set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing...." 18 U.S.C. § 3664(d)(5), emphasis added. There have been several cases interpreting the implementation of this provision that should be of interest to prosecutors.

In *United States v. Grimes*, 173 F.3d 634 (7th Cir. 1999), the appellate court admonished sentencing courts that they "must" use the provision where it would allow the identification of more victims or victims' harms. Other courts have determined that the ninety days can be tolled by the defendant's conduct or consent, that further delay is not error unless defendant can show prejudice, and that no hearing is required so long as the parties are given notice and an opportunity to be heard through pleadings. *See United States v. Stevens*, 211 F.3d 1 (2nd Cir. 2000); *United States v. Vandenberg*, 201 F.3d 805 (6th Cir. 2000). These courts partially rely on the fact that the legislative history of the ninety day provision indicates it was intended to benefit victims, not to shield defendants from restitution orders.

V. Restitution imposed solely as a condition of supervision

Case law and the statutes confirm that restitution may be imposed *solely* as a condition of supervision for those offenses not listed as qualifying for restitution as a separate sentence. Section 3563(b)(2) provides that the court may order, as a discretionary condition of probation, that the defendant "make restitution to a victim of the offense under section 3556 *(but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A))*." (Emphasis added.) (Section 3563(b)(2) is cross-referenced as a discretionary condition for supervised release as well at 18 U.S.C. § 3583(d) as a discretionary condition of supervised release, as well.) The provisions excepted as not applicable in § 3563(b)(2) are those that list offenses that are eligible for restitution to be imposed as a separate sentence.

Case law confirms that restitution can be imposed for *any* offense, *solely* as a condition of supervision. See, e.g., *United States v. Dahlstrom*, 180 F.3d 677 (5th Cir. 1999); *United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998). However, all other criteria of "restitution" *do* apply, such as the identification of victims of the offense, the causation of harms by the offense, and statutory compensability of harms (Steps 2-4 in Paragraph I, above; only Step one is eliminated). For example, courts cannot impose restitution for the government's "buy money" in a reverse sting drug offense, even solely as a condition of supervision, because "buy money" is a routine cost to the government and not harm *caused* to a victim as a result of an offense (i.e., it does not fit the other criteria of "restitution" in steps 2-4 of the 5-step

analysis discussed in I, above). *See, e.g.*: *United States v. Cottman*, 142 F.3d 160 (3d Cir. 1998); *United States v. Khawaja*, 118 F.3d 1454 (11th Cir. 1997); *United States v. Gall*, 21 F.3d 107 (6th Cir. 1994). However, the court in *United States v. Daddato*, 996 F.2d 903 (7th Cir. 1993), allowed an order to reimburse the "buy money," *not* as restitution, but as a discretionary condition of supervision (see also dissent in *Cottman*).

It is important to remember this manner of imposing restitution in cases that do not otherwise qualify for restitution, because there is considerable authority indicating the need to impose restitution in *any* case in which there are identifiable victims. Section 3553(c) requires that the court state a reason whenever full restitution is not ordered (see also the Statement of Reasons, Attachment to the judgment). In addition, the sentencing guidelines provide that, where there is an identifiable victim of the offense, the court *must* impose restitution at least as a condition of supervision, if it can't be imposed otherwise, for the full amount of the victim's loss. USSG § 5E1.1(a).

VI. Victims' issues

A. Discovery of changed recipient for restitution payments.

This determination should always be left to the court. Whether the new recipient is actually a successor of the victim's interest is generally a legal determination, and may be dependent on state or contract law. Only the court has the authority to specify who should receive restitution payments.

While there is no explicit authority for the court to amend a Judgment for this reason, the court has inherent authority to implement its orders. Moreover, arguably the defendant is not prejudiced by a change in beneficiary of the restitution payments, since his or her obligation is unchanged. A similar harmless error analysis is used consistently by courts to uphold restitution where the defendant was not advised of the possibility of restitution at the time of the plea, but he or she *was* advised of a possible fine of at least an equal amount. *See, e.g., Electrodyne Systems Corp.*, 147 F.3d 250, 253 (3d Cir. 1998).

B. Discovery of new losses or new victims.

Section 3664(d)(5) provides that victims can petition the court to amend restitution to include newly discovered losses upon a showing of cause why the loss was not initially part of the restitution claimed. If the government is aware of a newly discovered loss from the offense, either to a named victim or to a new victim, it should advise the victim of the above provision, and assist the victim in petitioning the court, consistent with the government's statutory duty to prove harms to victims, under 18 U.S.C. § 3664(e).

C. Different payment plans for different victims.

The court can impose restitution differently among different victims, pursuant to 18 U.S.C. § 3664(i), according to the "type and amount of each victim's loss and accounting for the economic circumstances of each victim." If the government discovers, for example, that one victim is wealthy while another has lost his or her life savings, or one victim is a corporation, while an individual victim needs urgent medical care for injuries suffered as a result of the offense, it could ask the court to amend the judgment to order payments according to the victims' needs, pursuant to 18 U.S.C. § 3664(i). The court's authority to amend the judgment results from the same rationale set forth in Paragraph VI. A. above.

D. Where the victim attempts to enforce the restitution in the criminal case.

The MVRA repealed former 18 U.S.C. § 3663(h)(2), which expressly allowed a victim to enforce an order of restitution "in the same manner as a civil judgment." However, the strong congressional intent of the MVRA to maximize enforcement of restitution orders, combined with some MVRA provisions, indicate that the victim can still civilly enforce a restitution order. MVRA provision 18 U.S.C. § 3664(m)(1)(B) entitles a victim named in a restitution order to obtain an abstract of judgment from the clerk that, upon registering, recording, docketing, or indexing in accordance with state law, is a lien on the property of the defendant located in the state to the same extent as a judgment in state court. Also, 18

U.S.C. § 3664(l), states that a defendant is estopped from denying the essential allegation of the offense in any subsequent federal civil proceeding "brought by the victim." Both of these sections affirm the victims' continued authority to enforce restitution orders.

The MVRA did not, however, change the well established fact that the victim does *not* have jurisdiction to enforce the restitution order *within the criminal case*. While the MVRA added 18 U.S.C. § 3664(d)(5) that permits a victim to petition the court within the criminal case to amend the restitution order to include newly discovered losses, such standing is no doubt restricted by its terms for that purpose. The longstanding principle that the victim does *not* have standing in the criminal case to *enforce* the restitution order should still apply. *See, e.g., Lyndonville Savings Bank & Trust Co. v. Lussier*, 211 F.3d 697 (2d Cir. 2000).

VII. Conclusion

The government is responsible for ensuring that the court imposes the maximum legally authorized amount of restitution for victims of federal offenses. It also must defend the restitution imposed if challenged on appeal. The above discussion should help the government with these responsibilities by maximizing restitution for the victims and minimizing reversals of restitution orders on appeal.

Effective restitution advocacy begins prior to charging the case, when the maximum authorized restitution for the offense can be computed using steps 1-4 of the 5-step analysis. Consideration should also be given in each case to maximizing the restitution further by means of a specific plea agreement (step 5). Scheme-type offenses should be charged in a way to ensure restitution to all victims of the scheme. Expansive rationales for restitution imposition, such as reasonably foreseeable harm and restoring the victim, can be argued and documented, to support the court's restitution imposition. Courts should be asked to impose restitution, solely as a condition of supervision, where there are identifiable victims of the offense, even where the offense does not otherwise qualify for restitution as a sentence. Finally, prosecutors should be aware of procedures and case law regarding the continuance of the restitution determination, and changing the amount or recipient of restitution.❖

ABOUT THE AUTHOR

❑**Catherine M. Goodwin**, prior to becoming an attorney-advisor for the EOUSA, was an Assistant General Counsel with the Administrative Office of the U.S. Courts for eight years. There she wrote on criminal issues, trained probation officers, and helped to staff a Judicial Conference Committee of federal judges. She developed a specialty in restitution, and has written and trained widely on restitution for the past five years. She now works primarily on restitution issues through the EOUSA. Prior to working with the courts, she was a criminal division AUSA for ten years in the Districts of Colorado and Northern California.✠

Performance-Based Management and What It Means for the Victim-Witness Program

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Executive Office for United States Attorneys

I. Introduction

A recent trend in the Federal Government has involved a shift from accountability of effort to an accounting of results. This change has been seen more and more in the victim-witness area and can be attributed to the Government Performance and Results Act (GPRA), enacted by Congress in 1993. Briefly summarized, GPRA mandates that federal agencies develop long-term strategic plans defining goals and objectives, develop annual performance plans specifying measurable performance goals, and publish annual performance reports showing actual results compared to the performance goals. Most importantly, GPRA is attempting to shift the focus from accounting of effort to accounting of results. It is therefore important to evaluate the Victim-Witness program to meet the objectives of GPRA. There are a number of different ways to evaluate the program and many different tools to help in this effort. Although this article does not delve into the intricacies of the evaluation processes, it does focus on some of the basic features of performance-based evaluations as well as some of the tools available to help with this task.

II. The Department of Justice's Performance Plan

How does GPRA affect the victim-witness program in the United States Attorney's office? Why is it important for United States Attorneys' Offices and Victim-Witness Coordinators to be aware of, and knowledgeable about, performance-based results? There are many reasons to be aware of this change in thinking (including that funding is now tied to performance results), but the main reason lies within the Department of Justice's Performance Plan. The Department's Performance Plan translates the goals and objectives of its Strategic Plan into specific annual performance goals that are then linked to its annual planning, reporting, and budgeting activities. It is important to note that one of the Department's strategic goals encompasses working with victims of crime. Strategic Objective 7.2 states that the Department will, "Protect the rights of crime victims and assist them in moving through the process of the federal justice system." In order to demonstrate to the public and to Congress that the Department is achieving this objective, goals are developed and performance is measured, which in turn requires information and input from the field. This is why it is important to be aware of the trend towards performance results. For a complete look at the Department of Justice's Performance Reports and Plans, visit http://www.usdoj.gov/05publications/05_5.html.

III. The importance of evaluating victim-witness programs

This policy shift at the Departmental level suggests that something should be done differently in regards to monitoring the victim-witness program. Although there is no specified way to monitor these programs, this might be a good time to think about evaluating and monitoring the program in a performance-based manner. Work in a victim-witness program is not as clearly defined and does not have the tangible outcomes that other programs have, thus making it more difficult to measure. However, there are some clear benefits to evaluating the victim-witness program in a performance-based manner. The most important of these benefits is the gaining of an understanding of the impact of the

work on those served by the victim-witness program.

The role of the Victim-Witness Coordinator is a complex one, and involves serving many different individuals. Coordinators serve victims, witnesses, attorneys, communities, and many others. It is important to understand what impact the victim-witness program has on all of these groups in order to avoid wasting time and effort in areas that are not helpful, or that have unintended negative consequences. According to a guidebook produced by the Tennessee Office of Criminal Justice Programs entitled *Managing for Results*, *(Performance Vistas, Inc. 2001, page 5)* evaluating a program in turn strengthens the program. "By participating in evaluation, you can have a hand in shaping the information through which someone can come to understand your program's purpose and accomplishments. You can also provide yourself with a powerful tool for improving and expanding your program and its activities in fruitful ways." *Id.* at 5

IV. Develop a plan for evaluating your program

In order to properly evaluate the Victim-Witness program, appropriate measures need to be implemented to determine if the program is accomplishing its objectives. This requires developing an overall plan for the program that ties goals, activities/outputs, and outcomes, together in a logical manner. When developing this plan, specific objectives need to be determined that specify what the program will achieve. The next step is to identify strategies that make those objectives achievable. Finally, appropriate measures are determined. It is with this rationale that the importance of developing a plan becomes apparent. If a program is measured without having a plan with objectives and strategies in place, you might end up not having an appropriate measure. For example, if you randomly decide to measure the number of victims the program provides with mental health services information, but the real objective of the program is to provide information about the criminal justice system, then the measure is not aligned with your goal.

Measurements will naturally evolve as it becomes apparent what measures accurately indicate if program objectives are being met. With the trend towards performance-based results, it is important not only to gather quantitative information, but it is also necessary to develop some qualitative measures as well. For example, you may have noticed recently that information is being compiled reflecting the purpose or benefit of training courses, rather than the quantity of trainings conducted. This holds true with regard to gathering information on victims and witnesses. Although it is important to measure the number of victims and witnesses the program assists, another measurement to consider is how this assistance is received. In order to help capture this information, it is important to develop both output measures and outcome measures.

V. Output versus outcome measures

In order to ensure that a meaningful evaluation of the program is conducted, both output and outcome measures should be used. Outputs represent the types and amounts of services provided or how much work was performed. Outcomes denote the extent to which a program meets its stated purpose.

The following are sample output measures:

- Number of victims identified;
- Number of notifications sent out;
- Number of victims receiving initial notification;
- Number of training sessions taught;
- Number of witnesses receiving assistance.

The following are sample outcome measures:

- Number of victims who better understand the criminal justice process;
- Number of people attending a training who have used a skill learned at the training to improve services to victims;
- Number of witnesses who felt more comfortable testifying after receiving assistance.

Although identifying these two measures can be confusing, here is an example from the *Managing for Results* guidebook that might help clarify the situation:

> **Output:** Number of meetings of a community's victim services, social services, and mental health agencies.
>
> **Outcome:** Number of agency partners that identify specific incidents in which collaboration has improved the service to, or condition of, a common client or victim.

There are other types of measures that can help determine the success of a program. The information provided above is only intended to help you start thinking about evaluating the victim-witness program in a different manner.

VI. Tools to assist with evaluation

Another point to remember is that tools exist, both at the United States Attorney's office and at the Executive Office for United States Attorneys, that can help with this endeavor. Recently, the Victim Notification System was introduced and although its primary purpose is to assist with the notification of victims, it can also be a great resource for gathering information about the victim-witness program. The Victim Notification System has a feature which captures information on the number of notifications the office has provided over a specified time frame, how many victims have been added per month to the system, the total number of cases in the system, and much more. Additionally, a local college or university might be able to assist in developing not only performance measures, but also the tools necessary to capture data, such as victim appropriate surveys and internal questionnaires. Lastly, the Executive Office for United States Attorney's Resource Management and Planning Staff's Formulation Section is another resource that is available.

VII. Conclusion

It is important to remember that performance-based management is a tool that can help you better understand how the victim-witness program is working to achieve its goals. Working with victims and witnesses of crimes can be challenging, but performance-based management can help enhance the office's ability to provide quality service to victims and witnesses who come in contact with the United States Attorney's office.❖

ABOUT THE AUTHOR

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Professionalizing the Victim Service Field

Shari Konarske
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She never got to say goodbye to her murdered daughter. The police department said that she could not see her daughter. The doctor at the hospital said that she should not see her daughter. The funeral home director said it was a bad idea for her to see her daughter. She started to hear rumors...she had nightmares about what had happened to her daughter. Finally, a trained victim service provider helped her gain access to crime scene photos and the horrible reality was no where near the horror of the unknown.

I. Introduction

Higher expectations for everyone who works with crime victims and the need for expanded victim services have lead to recent efforts to professionalize the victim service field across the United States. This movement toward professionalism for service providers is the outgrowth of the national crime victims' rights movement that started in the 1970s. Increased public awareness of victim issues has led to the expectation not only that services will be provided, but that *quality* services will be provided. Services must benefit the victim, which means that providers must offer appropriate support, referrals, information, and assistance to victims of crime. Programs used to professionalize the field create a common base of knowledge that provides benefits for the victim and the provider.

The primary benefit is to victims. Unfortunately, there are many horror stories about victim service providers failing to discharge their duties in a skilled manner. Training enables providers to deliver quality services to victims. Consequently, victims receive appropriate information, support, and referrals. Victims would perceive the service providers as professionals who can help them when needed.

Professionalizing the field provides benefits to the service provider. Those who provide funding to victim service agencies will become more convinced that the agency is committed to providing quality services and have confidence in the services that are provided. This will increase the credibility of providers with the community, which, in turn, will lead to more support for victims and the agencies that provide services. Increased credibility for providers will lead to better pay for service providers as training and education typically correlate with compensation. Better salaries for service providers will increase the length of time an employee dedicates to the profession. Longevity and experience in the field have the added advantage of helping increase the quality of services to victims.

Professionalizing the field increases the confidence in the service provider's ability to help victims. It also increases the provider's accountability to the victim to provide quality services. It helps providers establish boundaries with victims, which will, in turn, keep the provider mentally and emotionally healthy. Healthy providers will likely lead to longevity in the field.

Professionalizing the field encourages providers to work together. If providers have confidence in each other, they are more likely to make referrals and work together. This will ensure that victims receive comprehensive services.

II. Methods through which the victim service field can be professionalized

Professionalizing the field can be accomplished in a variety of ways depending on the needs of the group involved. Agencies can design programs in which participation in training is voluntary or can require completion of a training program before employment. Some states have training programs because of legislative mandates while other states have designed voluntary programs created by coalitions of victim service providers. Programs to professionalize the field are being called "credentialing programs," "training academies "or "certification programs." Many organizations have chosen to require either a specific training course or selected courses from different venues. Programs use education, work experience, training courses, codes of ethics, or any combination of these, to accomplish the goal of professionalizing service providers. Some programs are strictly academic. The following are some examples of ways that the victim service field is being professionalized in the United States.

A. Voluntary programs

Training academies. One of the most common ways that professionalism is being accomplished is by the use of training academies. Since 1995, the Victim Assistance Legal Organization (VALOR), with support from the Office for Victims of Crime (OVC) and with assistance from universities such as Washburn University, California State University at Fresno, the University of New Haven, and the Medical University of South Carolina, have conducted the National Victim Assistance Academy (NVAA) annually at sites across the United States. Many states have created their own academies similar to the NVAA. States that have initiated such academies include: Vermont; Utah; Wisconsin; Michigan; Colorado; New Mexico; Pennsylvania; Texas; Connecticut; Delaware; South Carolina; Maine; and New Hampshire. These academies are typically designed with an educational and research format. The academy sponsors provide participants with "Certificates of Completion." College credit is offered at some academies.

The North Carolina Victim Assistance Network (NC-VAN) also offers a "certificate program." The main training tool at NC-VAN is an academy, and the first NC-VAN academy was conducted in March of 2002. NC-VAN's stated purpose for training is to unite all people in North Carolina who currently have experience in crime victims service. For more information on the North Carolina program, see the NC-VAN website at www.nc-van.org/Certification.htm.

Educational institutions. A growing number of educational institutions are offering curriculums in victim services. Schools that offer such programs include: Washburn University; California State University at Fresno (Fresno State); University of South Carolina; Sam Houston State University; University of New Haven; University of Colorado at Denver; Housatonic Community College; and Red Rocks Community College. These schools offer a "certificate" in victim services. Most commonly they also offer an Associates degree. Some institutions, such as Washburn University and Fresno State University, offer Bachelors degrees in victim services.

Formal programs. Formalized "credentialing" programs have been developed in South Carolina, Ohio, North Carolina, and Oregon. These states have developed programs to encompass training for all types of victim service providers. The programs were developed by a coalition of victim service providers to ensure that all providers had a basic knowledge of how to provide services. These programs have a governing board, require training hours or work experience, and are open to anyone working with victims of crime. Although most programs are only offered to service providers who work in their respective state, South Carolina's program is open to even those who work outside of South Carolina. Information on South Carolina's program can be found on the internet at www.scvan.org.

Many state domestic violence and sexual assault coalitions have also developed formalized credentialing programs. The groups offer or require credentialing for their members. Typically, they offer credentialing only to advocates who work within their organizations. Delaware, Iowa, and Kentucky are examples of states that have developed such programs. For victim advocates in Iowa to have a confidential

communication privilege with a victim, advocates must receive specific training as mandated by Iowa law. The Iowa Coalition Against Domestic Violence (ICADV) and the Iowa Coalition Against Sexual Assault (ICASA) developed credentialing programs for their advocates to assist in meeting this mandate.

The Florida Attorney General's office established a Victim Service Professional Development Program. This training is offered to professionals working in the field of victim services. Training is offered in the areas of Victim Services Practitioner Designation and Advanced Advocate Training. The program also offers training for law enforcement officers who are first responders. For a more detailed description of the programs offered by the Florida Attorney General's Office, see http://legal.firn.edu/victims/programs.html.

B. Mandated programs

Wyoming and California each have state laws requiring training for employees who provide services to victims. California law requires training for any victim services provider paid with state funds. Wyoming's statute requires training for any program receiving funding from the state. The full text of Wyoming's statute can be found at http://vssi.state.wy.us/documents/standardsvw.html. Each state's respective Attorney General's office oversees these programs.

C. Other types of programs

There are nationwide organizations which offer certification programs for work with crime victims. Such organizations include the Association of Traumatic Stress Specialists and the National Government Management Association. While these programs are not specifically designed for victim service providers, they do provide training that may be beneficial to service providers.

As evidenced by the different types of training opportunities available across the nation, there are many different ways to approach professionalizing the victim service field. There are many more training programs and educational opportunities beyond those mentioned here. There is no right or wrong way to provide training. The goal of professionalizing the field can be achieved through any of these means. Program designers should strive to address the needs of the group and the community they serve.

III. Concerns for creating new programs

There is concern among members of the field about what effect professionalizing the victim service field could have on current providers. The main concern is that professionalization would eliminate providers who have not completed advanced education such as an Associate of Arts or Bachelor of Arts degree. In each program established to professionalize the field thus far, the program designers have addressed this concern in some way. Some programs contain a "grandparenting" clause omitting the requirement of formal education. In some programs the reverse is true and formal education can be used as a substitute for work experience. Since victims' rights was a grass roots movement and many original workers were victims, there is a wealth of knowledge that is important to incorporate into any training program to ensure that seasoned advocates continue working in the field. Developing such a program should build on the assets of those that have worked in the field for years. Formal education is often used as a component to professionalize the field, but it does not have to be a requirement.

IV. Models for creating new programs

Many existing training programs or credentialing programs have adapted and built upon existing models. For example, the National Organization of Victim Assistance (NOVA) has developed a proposed Code of Ethics. This code of ethics was then adopted by, and incorporated into, the Ohio Advocate Network's credentialing program. The South Carolina program also acknowledges the use of models from NOVA, in addition to models from the International Association of Trauma Counselors and the National Association of Social Workers. These models are beneficial because they can be adapted easily when new programs are developed.

The OVC awarded a grant to the University of South Carolina (USC) to study, evaluate, and

make recommendations on how to professionalize the victim service field. USC brought together a cross section of experts in the victim service field to examine the barriers and the benefits of creating standards for victim service providers. This core group became the National Victim Assistance Standards Consortium (Consortium). The Consortium's discussions led to the conclusion that it would be best to assist states and organizations in developing their own standards. Consequently, the Consortium developed a model kit for groups to use. This kit, entitled "Standards for Victim Assistance Programs and Providers," written by Dr. Dana DeHart of USC, provides a framework for use in establishing standards. The kit sets out different ways that the field can achieve professionalization. OVC extended the grant to USC to allow them to field test the model kit. Three pilot sites were chosen, one of them being Iowa. For more information on the Consortium and draft standards see www.sc.edu/cosw/center/consortium.html. With the help of the consortium, victim service providers in Iowa are creating a program to help professionalize service providers in the state.

V. Iowa's experience

The Iowa Coalition Against Sexual Assault (ICASA) and the Iowa Coalition Against Domestic Violence (ICADV) created their own formal credentialing program for advocates who work in crisis centers. At this time, these are the only programs in Iowa that require training.

There has been an increase in the number of Victim Witness Coordinators (VWCs) working in County Attorney's offices in Iowa, but no standard training has been available to teach them how to do their job or how to provide victim services. There also has been an increase in the number of other service providers, such as those working in law enforcement, corrections, and homicide survivor programs. The VWCs were interested in looking into ways to increase professionalism because the increase in the number of providers raised concerns over the lack of uniformity in training, education, and job performance. In response to these concerns, the U.S. Attorney's Office for the Northern District of Iowa offered its assistance.

The U.S. Attorney's Office first surveyed members of the field to determine how to improve professionalism. The office sent the survey to all victim service agencies, including government agencies that had dedicated victim service positions, asking if they felt professionalizing the victim service field was a priority. The survey also asked providers if they would be willing to attend a workshop to discuss what direction, if any, should be taken. There was an overwhelming response to proceed with a workshop, and ICASA and ICADV offered to share their experiences in developing their programs.

On January 23, 2002, members of the Consortium, including Janis Harris-Lord, Barbara Paradiso, and Dr. Dana DeHart, conducted a day long workshop. Victim Witness Coordinators, homicide survivor advocates, and victim advocates working in corrections and law enforcement attended. ICASA and ICADV presented information on their programs. Dr. Dana DeHart wrote the "Summary Report" for the workshop, and she noted that the most immediate concern was the pursuit of a basic, standard education program for current providers. The report also sets out short range plans for action, including the formation of a working group.

Prior to the formation of the working group, the role that the Iowa County Attorney's Association (ICAA) would take in the project needed to be determined. There are ninety-nine counties in Iowa, and each has an elected County Attorney. Some County Attorneys work part-time with no staff while others have a staff of thirty or more. Although the ICAA is an organization created to assist in training County Attorneys, it has no oversight function. Since each County Attorney is independent, the ICAA decided that it should not be involved in creating any type of formal program for VWCs nor could it support any standards for training or a code of ethics at this time. The ICAA's decision was based on the fact that it could not ensure that each County Attorney would comply with required standards, nor would ICAA be able to mandate such a program to each County Attorney.

The first working group meeting took place in June, 2002. ICASA and ICADV agreed to share resources and offer advice on the process. All

agreed that a long range goal for the working group would be to hold a state training academy. The group established short-term goals of creating a code of ethics and training standards. The short-term goals were seen as the building blocks for a future formalized credentialing program. More and more agencies are buying into the mission of the working group, and support for professionalizing the field in Iowa continues to increase.

VI. Conclusion

Ensuring that victims of crime receive quality services is dependent upon having quality service providers. To provide quality services, it is imperative that all providers have a basic knowledge of how to provide services, help victims, and eliminate further harm. It is also important that all individuals who work in the victim service field work together. Victim service providers are all in this for the same simple reason - to help victims of crime. There is no better way to help than to ensure that quality services are provided to all victims of crime. Professionalizing the victim service field is a big step toward ensuring quality services are provided.❖

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Shattered Worlds: The Impact of Terrorism on Children

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I. Introduction

One of the primary goals of terrorism is to cause suffering and instill fear in the minds of a particular population. Everyone is impacted but children may have the most difficulty coping in the aftermath. Research conducted with children after the attacks on September 11 found that more than one-fourth of school children in New York City were suffering from at least one trauma-related disorder months after the attack. These disorders included chronic nightmares, severe anxiety, and fear of public places. Children who had a family member escape, suffer from injuries, or die, had high rates of Post-Traumatic Stress Disorder (School of Public Health, Columbia University and Applied Research & Consulting, 2002). Christine Haughney, *N.Y. Students Still Distressed From Sept. 11*, WASHINGTON POST, May 3, 2002. *See also,* Abby Goodnough, *Post 9-11 Pain Found to Linger in Young*, THE NEW YORK TIMES, May 2, 2002. Studies conducted with children following the bombing of the Murrah Building in Oklahoma City found similar effects.

Other studies indicate that the mental health impact of acts of terrorism are more severe and long-lasting than those following natural disasters. The intentionality of terrorism exacerbates the horror and loss experienced by victims and other individuals who were significantly exposed to the attack and the aftermath. An act of terrorism, like a disaster, is not normal or routine and disrupts our daily lives. It shatters our sense of security and safety. Typical ways of coping and interacting with each other are strained. Everyone is trying to cope with what has happened and, as a result, focus less on supporting each other. It is within this context that children experience the aftermath

of terrorism. In addition, children interpret life events within the context of their current stage of psychological development.

II. Children's reaction to terrorism

Children are one of the most vulnerable groups during and following an act of terrorism. They feel frightened, confused, and insecure. Developmentally, most children have had less exposure to human cruelty and loss and less time to develop coping skills than adults. A child whose family member was killed or seriously injured will have to deal with severe grief and loss. Witnessing the event or the immediate aftermath can also be devastating to a child. Even children who did not personally experience the terrorist act, but have merely seen the event on television or heard it discussed by adults, can be impacted. Seeing distressing and horrifying scenes replayed on television or other media can prolong and increase the sense of loss and insecurity experienced by children.

A child's reaction to an act of terrorism depends upon how much destruction is experienced during or after the event. There appears to be a direct relationship between the degree of exposure to the terrorist event and difficulty in emotional adjustment. The death of family members or friends is the most traumatic, but the injury of a family member or the direct exposure of a family member to the event can also be very traumatic for children. Children who have experienced prior traumas tend to have greater difficulty coping. Children who are physically injured or disfigured in traumatic events are often forced into making significant character changes or using numbing tricks to minimize their emotional pain. They may experience self-revulsion, unremitting guilt and shame, helpless rage at peers who shun and tease them, and sadness. Suicide attempts are not uncommon in this group. Many children recognize profound vulnerability in themselves and develop a sense of a severely limited future. In addition to their own trauma, children may have to cope with the loss of a functioning parent(s). Other factors that influence a child's reaction include:

- the child's understanding of the event and beliefs about who caused it;
- pre-existing characteristics of the child, including mental health;
- occurrence of other major life stressors (divorce, unemployment, death of family member);
- reaction of significant adults;
- availability of social and family support; and
- coping skills of the child.

Severe childhood trauma appears to be a crucial factor in the development of a number of serious disorders both in childhood and in adulthood. Dr. Lenore Terr suggested four characteristics related to childhood trauma that appear to last for long periods of life: visualized and repeatedly perceived memories of the traumatic event; repetitive behaviors that reenact the trauma; trauma-specific fears; and changed attitudes about people, life, and the future. A percentage of children will develop symptoms of Post Traumatic Stress Disorder (PTSD) and will need mental health treatment.

Children respond to trauma and communicate their distress in different ways. Some have demonstrable reactions very soon after the event. Others may appear to be fine for weeks or months and then begin to exhibit troubling behavior. Some children report feeling irritable, alone, and having difficulty communicating with their parents. Many children experience guilt that they were not the one killed or injured. Girls tend to experience greater stress than boys and bright children seem to return to pre-trauma functioning in school more rapidly. Children who are part of families who have difficulty sharing their feelings tend to find it harder to cope. Their reactions will be determined, to some degree, by their stage of development. Teenagers are prone to anxiety and periods of depression, while younger children exhibit regressive behaviors associated with earlier stages of development. Symptoms may appear immediately after the event or after the passage of days or weeks, and will usually disappear after a brief period of time for most children. Symptoms that persist for more than four to six weeks indicate a more serious emotional problem requiring mental health assessment and treatment.

A. Pre-school (ages one to five)

Children under the age of five find it particularly difficult to adjust to change and loss. Young children are not capable of abstract reasoning, so their ability to understand the terrorist event and the trauma is very limited. Also, children in this age group have not yet developed their own coping skills, so they depend on parents, other family members, and teachers, to help them navigate difficult events. Most of the symptoms seen in this age group are nonverbal fears and anxieties stemming from the disruption of the child's secure world. They may regress to an earlier behavioral stage. Very young children may cry a great deal, resume thumb sucking or bed wetting, or may become afraid of strangers, animals, darkness, or "monsters." Sleep terrors and nightmares are common. They may cling to a parent or become unusually attached to a particular place in which they feel safe. They may become fussy or difficult to soothe. Changes in sleeping and eating habits are common, and many children relate unexplainable aches and pains. They may be confused or sad. Other symptoms include disobedience, speech difficulties, and hyperactivity. Some children may become aggressive or withdrawn. Preschool children may repeatedly talk about the terrorist event, reenact it in their play, or tell exaggerated stories about it.

B. Latency (ages six to eleven)

Children in this age group may have some of the same reactions as younger girls and boys. Fears and anxieties continue to predominate, but the fears demonstrate an increasing awareness of real danger to self and loved ones. Imaginary fears that seem unrelated to the terrorist event may appear, such as safety of buildings or transportation. They may return to more childish behaviors, such as asking to be dressed or fed. They may experience sleep problems, nightmares, and night terrors. In addition, they may withdraw from normal play and friends or become aggressive. They may compete more for the attention of parents and fight frequently with siblings and friends. Children may be afraid to go to school, let their school performance drop, or behave badly in class. They may find it difficult to concentrate and become frequently irritable. Children in this age group may experience depression, headaches, nausea, and vision or hearing problems.

C. Adolescence (ages twelve to fourteen)

Children in this age group are more prone to depression and may have vague physical complaints when under stress. They may abandon schoolwork, household chores, and other responsibilities they previously handled. In addition, they may discontinue activities and hobbies they once found enjoyable. They may withdraw, resist authority, and become disruptive while at the same time competing for attention from parents and teachers. They may begin to experiment with high-risk behaviors such as drinking or drug abuse. Adolescents have great need to appear competent to the world around them, especially to their family and friends. They are at a stage of development in which the opinions of peers are very important, and they want to be thought "normal" by their friends. Older teens may experience feelings of helplessness and guilt in the face of the loss and grief experienced by other family members. They may deny the extent of their emotional reactions to the traumatic event in order to present a "normal" front to the world or to avoid burdening other family members with their grief.

III. Grief in children

Grief is a normal, natural process following a loss. One form of traumatic grief generally occurs when a death is sudden, unexpected, and/or violent, and is caused by the actions of another person. The process of coping with a traumatic loss is more complicated and can last longer than the process following a "normal death." A traumatic death shatters the world of the survivor. It is a loss that doesn't make sense as family and friends try to create meaning from a terrible event. The family searches for answers, confronting the fact that life is not fair and bad things do happen to good people. This shattering of belief about the world and how it functions compounds the task of grieving. The role the loved one held in the family is lost. It takes time for the family to reorganize.

How children experience loss and grief depends, in large part, on their concept of death,

which develops along a continuum. Infants have no concept of death, but they feel physical separation and loss. Preschool children do not differentiate between thoughts and deeds and cannot comprehend the irreversibility of death. Responses to death are responses to the immediate loss. Even when the child has witnessed a burial, he may not realize that the dead body in the casket will no longer feel anything or perform its usual activities. He may wonder about and ask when the dead parent is coming home. The latency-age child (six to eleven) comes to a progressive realization that death is permanent and that everyone will die, but this realization is impersonal and in the remote future. Children of this age believe that death happens mainly to the elderly and weak who cannot run fast enough to escape the pursuing "ghost, angel, or monster" who will cause their death. By nine or ten years of age, children develop a more realistic perception. By pre-adolescence (nine to twelve) and adolescence, children understand that death is irreversible, universal, and personal. They realize that death has natural and physical causes and can be intentionally caused by other human beings.

Children grieve but they perceive and experience loss in different ways depending on their developmental stage. Children may feel sadness, rage, and longing. Young children actively remember the deceased person and may be very aware of missing that person. They may still think that the loved one is coming back one day. Older children may find it hard to believe that their loved one really died but still want to know details about why and how it happened. They may be protective of parents and hesitant to ask questions for fear of causing parents any pain. Grief changes as children learn to distinguish between temporary absence and permanent loss, and may continue as children understand the significance of the loss in their lives. They may manifest grief on an intermittent basis for many years.

The closeness of the relationship and the perception of the preventability or intentionality of the death will have an impact on the intensity and duration of grief. Children have limited ability to verbalize their feelings, as well as a limited capacity to tolerate pain generated by open recognition of their loss. Older children fear being "different" from their peers, and may feel uncomfortable talking with other kids about their loss. They may have little interest in memorials, the criminal justice process, and other public reminders of the death of their loved ones. Other children may feel rage at the perpetrators and fantasize about revenge.

IV. The children of Pan Am 103

Professional experience has brought me in contact with many acts of terrorism, including working closely with families of Pan Am 103 victims for several years, beginning in 1999. Two hundred seventy people were killed when Pan Am 103 was blown up in the skies over Scotland in 1988. More than a quarter of the victims were under the age of twenty. The victims included entire families, business travelers, and college students returning to the United States for the holidays. I became aware of a large “second generation” of family members who were children or teenagers when Pan Am 103 exploded. Over the next few years, I had the opportunity to hear from them how the impact of terrorism had influenced their lives over an eleven year period.

The beginning of the trial, so many years after the crime, led many of the second generation to learn more about the bombing and the criminal case, and to try to understand and articulate the impact of grief and loss. A young woman who lost her sister refused for years to talk about her grief or to read or hear anything about Pan Am 103. At the start of the trial, she had recently married and had a child and felt she was ready to face what she had avoided for so many years. Some of these young adults made their first emotional trips to Lockerbie to see where their loved ones died and meet with police officers and private citizens involved in the response. Enduring friendships developed among families who shared the common bond of Pan Am 103. Opportunities for the second generation to connect with other family members increased when they attended pretrial briefings and traveled to the trial. I listened to a conversation among a group of young adults from different countries who lost siblings as they described the emotional dilemma they faced when asked the simple question, "How many brothers and sisters do you have?"

The Pan Am 103 second generation told their own stories of how the death of a loved one or loved ones changed their lives and families in permanent and significant ways. Some had coped very well, and their ability to cope seemed linked to the ability of parents and other significant family members to deal with the tragedy in positive ways. Others struggled with depression, alcohol and drug abuse, and problems maintaining school work, relationships, and jobs. Some received large financial settlements in a civil suit against Pan Am but found that access to large sums of money tended to make existing problems larger. Parents lost or changed jobs due to debilitating depression, while others changed careers to focus on something they felt was more important. Some parents remarried and tried to move on, while others remained mired in unrelenting grief and anger. Some parents divorced or terminated relationships with friends and family. Many developed stress-related health problems. Some parents became depressed and withdrew from family and friends. Deep rifts developed in some families over money. Some family members became deeply involved in efforts to fight terrorism, improve aviation security, and to hold Libya accountable, while others found different ways to find meaning in a senseless tragedy.

No one was unaffected. A 13-year-old boy is a striking physical reminder of the father who died a few months before he was born. One young woman who lost her father, brother, and pregnant sister, spoke of how she hid her own grief in order to be strong for her mother and her young niece and to be the perfect daughter and aunt. A young man who perished on Pan Am 103 as he flew home for Christmas is still deeply missed by his severely disabled sister who will have no one to care for her when her grieving and chronically-ill parents die. Another young man who had prior mental health problems developed a serious disorder after his brother was killed and continues to live with his elderly parents. Caring for him is exhausting for his caretakers and can be frightening and dangerous when he becomes aggressive and violent. Two other young men, who lost their parents and younger siblings when the burning fuselage incinerated their home in Lockerbie, are believed to have committed suicide. One brother took a drug overdose in 1995, and the other brother, dubbed the "Lockerbie orphan" by British tabloids, laid down on railroad tracks in front of an oncoming train one night during the trial in 2000.

The second generation of Pan Am 103 survivors are going off to college, choosing careers, marrying, and having their own children. These milestones and choices are at least partially shaped by their losses. One young man who lost two older brothers on Pan Am 103 grew up to become a highly regarded federal investigator. A girl who lost her sister became a child psychologist and works with troubled adolescents. The marriage ceremony of one young woman was performed by a Scottish minister from Lockerbie who helped her family in the days and months after her brother was killed. A young girl who lost her father when she was eight years old described her feelings about going off to college, an anticipated event which they talked about and planned for when she was a child. She wistfully recalled how her father promised to accompany her and help her get settled in her dormitory when the big day came. Instead, she made that trip alone. I was asked by a father to write a letter to the admissions office of a major university on behalf of his son, explaining the impact of losing his mother on Pan Am 103. The young man overcame significant emotional problems as a child and teenager but those victories were not readily apparent simply from looking at school records.

In the aftermath of September 11, many of these young survivors reached out to friends and strangers who lost people they cared about in those terrorist attacks. Many of the second generation survivors of Pan Am are naming their children after family members who died on Pan Am 103, or for people they met and came to care for as a result of the bombing that altered their lives. The Pan Am 103 survivors will tell their children and their nieces and nephews about the people who died. The legacy they pass on to the next generation, and share with children of other terrorist acts, is one of great sorrow, damaged lives, and unfulfilled promise, intertwined with

profound resiliency and the capacity to create meaning and goodness in the face of unimaginable evil and suffering.

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On the Front Line: the Fight Against Compassion Fatigue

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No one would contest the fact that working in a United States Attorney's Office can be a stressful, as well as a gratifying, endeavor. Attorneys and support staff alike place themselves on the front lines of justice on a daily basis. While playing a role in the nation's law enforcement effort is challenging, exhilarating, and even noble, it can also be demanding, exhausting, and sometimes unforgiving. USAO employees may be at increased risk for developing burnout, due to chronic levels of elevated stress. In addition, the horrific stories they sometimes hear from victims and defendants can result in what has been termed vicarious traumatization, and in something recently defined as compassion fatigue. Charles R. Figley, *Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview*, COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED, 1-20 (C.R. Figley, ed., 1995). This article will clarify the meanings of each, help employees to identify whether they may be at risk for these stress-related conditions, and outline strategies both for defending against and recovering from the stress we face daily.

Burnout at work may cause extreme dissatisfaction with one's work, which results in distancing from the work itself as well as from coworkers. Someone who is burnt out may have low energy and high irritability, coupled with other signs of impairment (depression, substance abuse, relationship problems). The person suffering burnout is more than just stressed or depressed. He or she may experience diminishing feelings of reward about their work, and this sense of "why bother" may permeate the home life as well as the office setting.

Vicarious traumatization is the cumulative effects of involvement with traumatized victims over time. People suffering from vicarious traumatization often lose their sense of boundaries with clients. They may go from working above and beyond the call-of-duty to becoming cynical and sarcastic about their clients. Often, especially during emotionally, physically and spiritually exhausting trials, USAO employees may start to lose faith in people in general, the system they have sworn to uphold, and themselves.

Compassion fatigue is vicarious traumatization in a more chronic and pervasive form. You may be suffering from compassion fatigue if assisting others is starting to affect your own well-being. It is more than just burnout and it occurs over time as a result of repetitive exposure to multiple traumas. In other words, what is essential to the case, reliving with your clients their descriptions of their brutal victimizations, takes a toll on the attorney, support staff working on the case, and especially the Victim-Witness Coordinator. People absorb the residue of the traumas shared by their clients. This emotional residue or increased trauma load can leave one tense, preoccupied with the crimes, and unable to relax.

This state of tension may be manifested by: 1) feelings of reliving the crimes being investigated/prosecuted; 2) avoidance/numbing of reminders of the crimes; and 3) persistent arousal. Members of the trial team may continue to carry around the emotional suffering of those involved in the case. The effects of such a burden can be

felt cognitively (decreased concentration and self-esteem, apathy, and rigidity), emotionally (anxiety, guilt, anger, shame, powerlessness, numbness, hypersensitivity, an overwhelming sense of burden), behaviorally (irritability, withdrawal, sleep disturbances, hyper-vigilance, accident proneness, social isolation), physically (rapid heartbeat, aches and pains, inexplicable somatic complaints, difficulty breathing, dizziness), and spiritually (loss of faith or purpose, skepticism). Work performance may also be affected, resulting in increased conflicts with coworkers, absenteeism (due to increased illness, substance abuse and somatic complaints), and negativity.

Compassion fatigue may occur in a wide range of individuals working with trauma survivors. John Jay, *Terrible Knowledge.* FAMILY THERAPY NETWORKER, 15, 18-29, (1991); I. Lisa McCann & Laurie Ann Pearlman. Vicarious Traumatization: *A Framework for Understanding the Psychological Effects of Working with Victims.* JOURNAL OF TRAUMATIC STRESS, 3, 131-49, (1990). Lawyers have been included in the list of those professionals most susceptible. Why? Lawyers frequently deny or minimize the tremendous impact their work with victims may have on their emotional health. Victim-Witness Coordinators may also be particularly susceptible to compassion fatigue. Although they do not provide counseling, they repeatedly bear witness to the horror the victims and witnesses have suffered and they are expected to provide both emotional and logistical support for days, weeks, months, even years. This support role, crucial to the healing of the victims and witnesses and pivotal to a successful prosecution, can leave one with a feeling of exhaustion and of never being able to do enough. Further, victims and witnesses need a safe place to express their acute feelings of grief, loss, anger, and trauma, and Victim-Witness Coordinators can become the repositories for these feelings. All of these are risk factors which must be recognized and openly discussed. Ongoing training and supervision concerning roles and boundaries, as well as the effects of trauma, may help protect these staff from developing compassion fatigue.

Staff in United States Attorney's Offices are passionate about what they do. Their work is so much more than a job. This is the irony -- being passionate, committed, and focused, are qualities that draw many people to this setting and this work. They are the same qualities that can lead to burnout and to compassion fatigue. This kind of self-selection and these inherent risks make self-monitoring, self-regulation, and effective supervision crucial to maintaining professional and emotional wellness.

As with many other health-related issues, prevention is key. Start with fundamental self-care. Eat a well-balanced diet, drink lots of water, limit intake of alcohol, caffeine, nicotine, and other harmful substances. Sleep eight hours a night in a cool, dark room. Exercise at least three times a week. (Run, walk, bike, swim, play tennis, practice pilates, yoga, kick boxing, aerobics, tai chi. Find something that works for you and make it part of your routine). Spend time with friends and family. Talk about things other than work. Talk to friends, family, clergy, your Employee Assistance Program (EAP), or a mental health professional. Laugh as humor provides both a physiological and emotional release. Decompress. Take a vacation every year (you don't have to go to Paris - take a week off and spend it at home). The goal is to expand your world so that your job is part of you rather than all of you. Put yourself in situations where you see the positive in life.

"Debrief" horrific cases with colleagues afterward. The mind is designed to heal itself when injured. Talking about your stressors and traumatic images helps start that healing process. EAP is a valuable resource here as well. Contacting EAP doesn't mean you need to enter long-term psychotherapy. Talk about the case so you don't internalize the horror of what you vicariously witnessed. In addition, keep an eye on yourself - check your emotional pulse daily. Do you enjoy your work, colleagues, friends and family the way you used to? Are you able to relax? You know when you're reaching your limit. Ask yourself what rules and assumptions you're operating under. Think about what you value about your work. How has it changed during your career? Go to http://www.isu.edu/~bhstamm/tests/satfat_english.

htm to take a self-administered Compassion Fatigue and Satisfaction Test. (Authors, B Hudnall Stamm and Charles R. Figley). This test will help you gauge whether you are at risk for developing burnout or compassion fatigue, and whether you continue to derive satisfaction from your role in helping others.

If you are concerned that you may have compassion fatigue, help is available. The Executive Office for U.S. Attorneys developed the Employee Assistance Program (EAP) because of its belief that it is incumbent on our organization to provide support for our employees. The EAP provides confidential crisis response, assessment, short-term counseling, referral, and follow up for employees and their family members who may be impacted by personal and/or work-related stresses. In addition, staff are available for supervisors who would like to consult about employees they believe may be suffering from burnout, vicarious traumatization, or compassion fatigue. Call EAP at (202)514-1036 or 888-271-0381 to talk with EAP staff.

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Victim Rights in Indian Country - an Assistant United States Attorney Perspective

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> It is Monday and there are 381 miles from the federal courthouse in Salt Lake City to Monument Valley, Utah. This morning's initial appearance was uneventful, the suspect was detained pending tomorrow's detention hearing. I left the courthouse at 10:00 a.m. and immediately hit the road. I have been driving for three hours now. It is a beautiful day and visibility is limited only by the topography of the surrounding terrain. The contrast between the red cliffs and the azure sky is striking. I am almost half-way there and I have time to think about this past weekend's events. (This hypothetical is fictional; the names used are also fictional).

As an Indian country violent crime prosecutor for the United States Attorney's Office in the District of Utah, I have had to constantly think about the implications of various laws and prosecution principles and how they affect my cases. There are jurisdictional principles that govern Indian country criminal prosecutions. For example, the Major Crimes Act (18 U.S.C. § 1153) and the Indian Country General Crimes Act (18 U.S.C. § 1152) provide the jurisdictional basis for most federal prosecutions of criminal offenses which occur in Indian country (18 U.S.C. § 1151). There are evidentiary principles and constitutional principles that govern all federal criminal prosecutions. In addition to all of this, there are established principles which apply when dealing with victims and witnesses of federal crime. Two tools which are extremely valuable to the Assistant United States Attorney (AUSA) prosecuting Indian country crimes are The Attorney General Guidelines For Victim And Witness Assistance (2000) (hereinafter, "Guidelines" or "Guideline") and Victim And Witness Rights: United States Attorneys' Responsibilities (2002).

> Actually, it all started at 2:32 a.m. this past Sunday morning. That's when FBI Special Agent Toddman called me at home. "We just had an aggravated assault on the Navajo Nation reservation...in Monument Valley". Agent Toddman told me that someone had broken into Samantha Yazzie's home at about 10:45 p.m. and attacked her. Agent Toddman said that she had not been sexually assaulted nor seriously harmed. The attacker had placed a large, cold knife to her throat. As he pressed the blade down on her neck, he said that it was all because she "told someone about the other day". Ms. Yazzie's 9-year-old daughter then walked into the room and screamed when she saw what was happening. The attacker ran from the mobile home. Fortunately, the victim received only a minor cut on her neck; however, she could not identify the suspect because the room was dark when it happened. Two 19-year-old boys who were driving by saw a man run out of the Yazzie home. When the man ran under a streetlight, they recognized him as John Atakai, a local trouble-maker. When Navajo Nation police showed up and began securing the crime scene, the boys told tribal police Officer Leroy Hanks about Atakai. Tribal police found Atakai hiding nearby behind an abandoned schoolhouse. They arrested him without incident for the tribal law offense of assault and took him to the local tribal police holding cell. A search incident to arrest produced a fisherman's fillet knife. Knowing that tribal courts are limited to misdemeanor punishment (per 25 U.S.C. § 1302(7)), the

tribal officers contacted the FBI right away. After getting clearance from me for an arrest, Agent Toddman took Atakai into custody for Assault With A Dangerous Weapon in violation of 18 U.S.C. § 113(a)(3). Jurisdiction was based on the Major Crimes Act, 18 U.S.C. § 1153 for offenses committed in Indian country.

Pursuant to 42 U.S.C. § 10607(a), Congress requires the Attorney General (AG) to designate an official who is responsible for identifying victims of crime and for the provision of services. The AG did this in Guidelines I.F.1.a. and IV.A.1.a. which provide that during the investigatory stage of a case, the FBI Special Agent-in-Charge is the "responsible official". A "victim" is defined as "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime. . . ." Guideline I.E.2. In this case, Samantha Yazzie, as a direct "victim" of violent crime is a victim as defined by the Guidelines.

One of the first tasks that the responsible official must do is to identify the victims. 42 U.S.C. § 10607(b)(1); Guideline IV.A.2. During the investigatory stage, (per 42 U.S.C. § 10607(b)-(c) and Guideline IV.A.3.a.1.) the FBI is also required to notify the victim of various information including:

- that she has a right to receive services;
- where and how to request such services;
- where she can obtain emergency medical and/or social services;
- restitution programs to which she may be entitled to receive assistance; and
- programs available for counseling, treatment, and other support.

In addition, other information must be provided in certain cases involving domestic violence or sexual assault. It is also noteworthy that the FBI is responsible for arranging for reasonable protection from the offender. 42 U.S.C. § 10607(c)(2); Guideline IV.A.3.b.

I need to get to Monument Valley before sundown so that I can see the area around the Yazzie home in daylight. If I get there after sundown, then at least I'll see what the lighting situation was like when the teenagers saw Atakai. Inadequate lighting for a visual identification is likely to be claimed by the defense. FBI Agent Toddman and Lieutenant Nakai of the Navajo Police will meet me at the mobile home at 5:00 p.m. -- I'm running on time. My thoughts turn to the 9-year old daughter. She is apparently taking it very hard and has not spoken since the attack. I'm glad that Atakai is in custody. I filed the Complaint this morning (the Grand Jury does not meet until Wednesday and will not be able to consider indictment until then).

After charges are filed, the U.S. Attorney takes over as the "responsible official" per Guidelines I.F.2.a. and IV.B.1. The United States Attorney's Office (USAO) is now responsible for providing the victim with a variety of services. For starters, a victim of federal crime has "The right to be notified of court proceedings," 42 U.S.C. § 10606(b)(3), Guideline III.B.3. and, subject to certain exceptions, the right to be present at "public court proceedings related to the offense." 42 U.S.C. 10606(b)(4); Guideline III.B.4. The USAO must provide the victim with the "earliest possible notice" of such things as release or detention status of the suspect, filing of charges, scheduling of hearings (including notice of continuances), acceptance of pleas, and sentencing. Guideline IV.B.2.a.(1). The USAO should provide information concerning the criminal justice process, including what to expect as well as what the USAO expects of the victim. Guideline IV.B.2.a.(3). The USAO also must refer the victim to local service providers. Guideline IV.B.2.a.(4). Although the investigative agency is responsible for providing protection for victims and witnesses, Assistant U.S. Attorneys can use civil remedies to help prevent the intimidation of witnesses. For example, 18 U.S.C. § 1514 authorizes the bringing of civil actions to restrain harassment of victims or witnesses. Remedies under this statute include temporary restraining orders (18 U.S.C. § 1514(a)) and protective orders (18 U.S.C. § 1514(b)).

> I drive onto the Navajo Nation reservation at 4:14 p.m. The Navajo reservation is the largest reservation in the U.S. and roughly the size of West Virginia. "The Rez", as it is called locally, hangs down from southeast Utah, covers the northeast quarter of Arizona and then swings over into northwest New Mexico. Most of it consists of high altitude desert terrain. The Monument Valley community lies in Utah a few miles north of the Arizona state line. I arrive at the Yazzie residence. She lives in a thirty-year-old double-wide mobile home. It's now 5:17 p.m. and still light outside. I check out the vantage point of the teenage boys when they saw Atakai. From the road there is a clear view of the Yazzie's front door and the streetlight. Ms. Yazzie allows us in to see the back door which had been jimmied open with a screwdriver, the bedroom where the attack occurred, and the front door through which Atakai fled. When I ask how her daughter is doing, Ms.Yazzie begins crying. She is afraid that her daughter will never be the same. Since the incident she just sits... and stares out the window.

Whether the 9-year-old daughter is a "victim" under the Guidelines is not immediately clear. At the very least, she is entitled to services as a potential witness; however, it appears that she was emotionally traumatized as a direct result of the attack. While mere bystanders are typically not considered to be victims under the guidelines, U.S. Attorney's Office personnel have discretion to treat bystanders as victims after evaluating the facts and circumstances of a case. One of the factors to consider is whether the bystander is unusually vulnerable. *See* commentary to Guideline I.E. The Guidelines recognize the special needs of child victims and child witnesses. "A primary goal . . . shall be to reduce the trauma to child victims and witnesses caused by their contact with the criminal justice system . . . Justice Department personnel are required to provide child victims with referrals for services, and should provide child witnesses with services referrals." Guideline, VI.A. Whether a child is a victim or a witness, 18 U.S.C. § 3509(d)(1) requires that the child's name or other identifying information not be publicly disclosed. *See also*, Guidelines VI.B.1. and VI.D.2. For example, the name of the child should not be used in unsealed charging documents or in unsealed affidavits submitted in support of warrants. *See*, *United States v. Broussard*, 767 F.Supp. 1545 (D. Or. 1991). If it is necessary to identify the child in court documents, then those documents can be submitted under seal pursuant to 18 U.S.C. § 3509(d)(2). *See also*, Guideline VI.B.1.b. In some circumstances, it may be advisable to have the court appoint a guardian ad litem to protect the best interests of the child. 18 U.S.C. § 3509(h); Guideline VI.B.2. Should the child need to testify in court at some point, 18 U.S.C. § 3509(e) authorizes the courtroom to be closed from the public during that testimony. *See also*, Guideline VI.D.3. Other safeguards for child witnesses who are required to testify are also available. *See generally*, 18 U.S.C. § 3509; Guideline VI.D.

> During my interview of Ms. Yazzie, I try to be cognizant of Navajo cultural norms so as to win her trust - I avoid looking her in the eye. I ask her about what she thought the perpetrator meant when he said that it was because she "told someone about the other day." She says that she has no idea what he was talking about. The FBI conducts a photo spread, but she did not see the perpetrator's face. She did not recognize his voice either. Ms. Yazzie can not identify the suspect at all and her daughter is not responsive. I advised Ms. Yazzie of how the federal criminal justice process will likely proceed in her case and of the pending detention hearing. I give her my business card with my office's toll-free number written on it. Agent Toddman informs me that Atakai has no state or federal criminal history. I am now worried that the magistrate may not detain Atakai pending trial. This case is not going to be easy, but few violent crime cases are.

A victim of federal crime has a right "to be treated with fairness and with respect for the victim's dignity and privacy." 42 U.S.C. § 10606(b)(1); Guideline III.B.1. In most American cultures, looking someone in the eye is a sign of confidence, sincerity, and honesty. However, among traditional Navajo people,

looking someone in the eye is considered to be offensive, an affront, even a challenge to the other person. There are over 550 federally recognized tribes in the United States and most have unique cultural practices and beliefs. An AUSA can unwittingly damage a prosecution by innocently offending a victim or witness. Just as many litigators feel it is important to know your jury and tailor their approach to that panel, it is also important to know your witnesses so that you can tailor your approach to their beliefs, needs, and practices. By showing respect to native people and their unique sensibilities, an AUSA may be able to gain, not lose, an important witness. A caveat to all this is that many Native Americans do not follow the traditional practices of their ancestors and this may also affect your approach to a particular person. Know your victims and your witnesses. For more information, *see*, *Focus VW: Victim and Witness Issues in Indian Country* (Justice Television Network, Nov. 2001).

> It is now Tuesday, and the detention hearing is scheduled for 3:00 p.m. All I have to support a request for detention pending trial is the violent nature of the offense coupled with an obscure statement to the victim of unknown significance. If the magistrate releases Atakai, I am afraid that by this time tomorrow he will be back on the reservation terrorizing Ms. Yazzie and her daughter again. I call Frank Denetsosie of the Navajo Nation Prosecutor's Office. I ask him to run a tribal court criminal history on Atakai. Within two hours Frank discovers that even though Atakai has no state or federal criminal history, his tribal court history shows twenty-seven convictions, including seven convictions for assault, four for battery, and two convictions for contempt of court. Mr. Denetsosie tells me that he will check the tribal court files, to determine if the contempt of court charges were possibly for violation of a protective order.

Working with tribal law enforcement officials is critical in Indian country cases. Tribal police are often the first responders, the first to initiate arrest, and the first to hear statements made by witnesses and suspects. Working with tribal prosecutors should not be overlooked either. Depending on the tribe, tribal prosecutors may be able to provide you with access to tribal court criminal histories, tribal police reports, copies of tribal court pleadings, and copies of tribal laws that might otherwise be difficult to obtain. Transcripts of tribal court hearings can be very important. For example, a suspect who pleads guilty in tribal court to an offense, may be subject to cross-examination on that point in a subsequent federal prosecution if he then takes the stand and denies having committed the offense. *See*, *United States v. Denetclaw*, 96 F.3d 454 (10th Cir. 1996); *United States v. Tsinnijinnie*, 91 F.3d 1285 (9th Cir. 1996). Tribal criminal histories can be used to provide a basis for pretrial detention. Tribal court criminal histories can also be used in some situations as evidence of prior bad acts, *United States v. Tan*, 254 F.3d 1204 (10th Cir. 2001), or as a basis for an upward departure at sentencing where the federal/state criminal history does not adequately reflect the seriousness of the defendant's past criminal conduct. United States Sentencing Guidelines Manual § 4A1.3(a). Working well with the local tribal police and prosecutors pays big dividends.

> The cross-country scrambling has paid off. After I showed the federal pretrial services officer Atakai's tribal court criminal history, it was quickly adopted into the report. The magistrate did not hesitate to order Atakai detained pending trial. The trial date has been set and the Victim/Witness Coordinator from my office sent out a notice to Ms. Yazzie informing her of the date. Two weeks later, I received a fax from Frank Denetsosie, stating that the two tribal contempt of court convictions were for violations of a domestic violence protective order. The tribal court file showed that the victim in those cases was a Samantha Yazzie of Monument Valley, Utah! I cannot believe it - the victim in my case should have known who the attacker was! The voice mail indicator on my phone is blinking. I check it. There is a message from a sobbing Samantha Yazzie. "Please have that FBI guy meet me at my trailer tonight at 8:00. There is something important that I have to tell him."

When working on a violent crime case that may involve domestic violence in Indian country, it is important to find out whether or not there is a protective order in place. A domestic violence protective order that meets certain qualifications is valid nationwide both on- and off-reservation, whether or not it is issued by a state or tribal court. 18 U.S.C. § 2265(a). If a defendant is convicted of committing certain offenses while subject to a protective order, he may be subject to receiving a sentencing enhancement. These offenses include Aggravated Assault (United States Sentencing Guidelines Manual § 2A2.2(b)(5)), Threatening or Harassing Communications (United States Sentencing Guidelines Manual § 2A6.1(b)(3)), and Domestic Violence or Stalking (United States Sentencing Guidelines Manual § 2A6.2(b)(1)(A)).

> Ms. Yazzie confided to Agent Toddman that she really did know who the suspect was. A victim-witness coordinator for the Navajo Nation had encouraged her to tell the rest of the story to the FBI. She told Agent Toddman that she originally said that she could not identify the attacker because, given his violent nature and past threats, she thought he would kill her if she identified him. She then said that Atakai was her ex-boyfriend. After they had broken up three years earlier, he became jealous, angry, and violent. He started drinking and moved off-reservation. She eventually went to tribal court and obtained a domestic violence protective order against him. The court order did not stop him and he was arrested by tribal police three times. He pled guilty the first two times, but the charges from the third case were still pending. On the night of the "big incident", she had received a phone call from him stating that he was coming to Monument Valley to beat her up for testifying against him in tribal court and to teach her a lesson so she would not "talk to that judge" anymore.

Many tribes run their own victim-witness programs. Where these tribal programs exist, they are an extremely valuable resource because they are usually located in the local community close to the victims and witnesses. While the USAO victim-witness coordinators are often only a telephone call away, this may be of little consolation to someone located hundreds of miles away in a rural area that may have no telephone service. Victim-witness coordinators from the USAOs should coordinate their efforts with their tribal counterparts. United States Attorneys' Manual (USAM) 3-7.330(D). For a good example of a tribal victim services program and it's interaction with the USAO, *see*, *Crime Victim Rights Week: Indian Country* (Justice Television Network, April 2002). During judicial proceedings, victims and witnesses should be given information and assistance regarding transportation, parking, child care, translation services, etc., Guideline IV.B.2.f., and must be provided a separate waiting area from the defendant and the defendant's witnesses. 42 U.S.C. § 10607(c)(4); Guideline, IV.B.2.c.

It cannot be overstated that developing good rapport with victims and witnesses is essential. If there is something that is damaging to your case, it is better to find out about it before trial - not during an aggressive cross-examination. While it is apparent that Ms. Yazzie's original statement that she did not know who the suspect was will be useful for the defense during cross-examination, at least now the prosecution has forewarning of the inaccuracy and appropriate measures can be taken to prepare for trial. In addition, it now appears that there may be grounds to include one or more counts in the indictment for violation of the Violence Against Women Act (VAWA). VAWA prohibits such things entering Indian country to commit domestic violence (18 U.S.C. § 2261(a)(1)), entering Indian country to stalk (18 U.S.C. § 2261A), and entering Indian country in order to violate a tribal court (or state court) protection order (18 U.S.C. § 2262(a)(1)). In other words, good rapport with victims and witnesses can help prosecutors develop the information needed to develop a solid case and also to prepare to counter arguments that are likely to be raised by defense counsel.

> I presented the case to the Grand Jury on Wednesday. A True Bill was entered for aggravated assault and for violations of the VAWA. Cecelia Foster, the Victim/Witness Coordinator for the United States Attorneys Office, did a great job making sure that all of

> the appropriate notices were sent to Ms. Yazzie. As the trial date approached, Cecelia made sure that Ms. Yazzie and the trial witnesses had transportation to Salt Lake City and a place to stay at a local hotel. The United States Attorney's Office's witness waiting room at the courthouse was readied. One of the 19-year-old boys who had identified Atakai on the night of the attack, stated that he felt more comfortable speaking in Navajo and so arrangements were made for a Navajo/English language translator. Ten days before trial, a tentative plea agreement was worked out. I called Ms. Yazzie for her input on the arrangement. She whole-heartedly agreed with the terms. She stated that she was relieved that her daughter would not have to testify; however, she had a strong desire to make a statement herself at the sentencing hearing. After informing Ms. Yazzie of my intention to accept the guilty pleas, I told her how to contact the probation officer in order to file a victim impact statement for the pre-sentence report.

A victim of federal crime has "The right to confer with [an] attorney for the Government in the case." 42 U.S.C. § 10606(b)(5); Guideline III.B.5. The AUSA should make reasonable efforts to obtain victim views on proposed or contemplated plea agreements. Guideline IV.B.2.b.(2). In plea agreements, Federal prosecutors must also consider "requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the count to which the defendant actually plead[s]." Pub .L. No. 104-132 § 209; *see also*, Guideline V.C., and United States Attorneys Manual § 9-16.320.

After plea or conviction, the victim should be notified how to contact the probation officer and how to prepare a victim impact statement (Fed R. Crim. P. 32(b)(4)(D)) for inclusion in the pre-sentence report (Guideline IV.B.3.a.1.) and shall be notified of the right to mandatory restitution and how to obtain it. 18 U.S.C. §§ 3663-3664; 42 U.S.C. § 10607(c)(1)(B); Guideline V.A. The victim impact statement should be submitted to the United States Probation office for inclusion in the pre-sentence report (it should not be submitted directly to the judge, *United States v. Curran*, 926 F.2d 59 (1st Cir. 1991)). In appropriate cases, the victim impact statement must contain information sufficient to support a restitution order. Fed. R. Crim. P. 32(b)(4)(F). In cases involving crimes of violence or sexual abuse, the victim has a right to make a statement at the sentencing hearing. Fed .R. Crim. P. 32(c)(3)(E); Guideline IV.B.3.b.2. If a defendant is incarcerated, the victim has a right to information concerning the imprisonment and release of the offender from the Bureau of Prisons. 42 U.S.C. § 10606(b)(7) and 10607(c); Guideline III.B.7; *See also*, Guidelines IV.B.2.a.5. and IV.C.2.a.

Conclusion

The Assistant United States Attorney working cases from Indian country needs to take into consideration the Attorney General Guidelines for Victim and Witness Assistance (2000), and the statutes and court rules that impact the relationship between prosecutors, victims, and witnesses. At first glance, the guidelines may seem confusing and overwhelming; however, most of the guidelines merely put in writing the things that we would be doing for victims and witnesses even if there were no formal guidelines. After all, taking up the cause of crime victims is what we do on a daily basis.❖

ABOUT THE AUTHOR

❑**Christopher B. Chaney** is an Assistant United States Attorney in the District of Utah where he prosecutes violent crime from Indian reservations and serves as a liaison to the eight tribes located in Utah. He is currently on detail to the Executive Office for U.S. Attorneys' Counsel to the Director's Office working on Indian country and other criminal law issues. Chris is an enrolled member of the Seneca-Cayuga Tribe of Oklahoma. Prior to working with the United States Attorney's Office in Salt Lake City, he served as prosecuting attorney for the Jicarilla Apache Tribe, in Dulce, New Mexico, and as prosecuting attorney for the Southern Ute Tribe, in Ignacio, Colorado.✠

NOTES

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