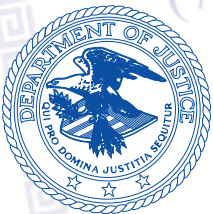


CRIME VICTIMS' BILL OF RIGHTS



Attorney General Guidelines for Victim and Witness Assistance 2000



Victims' Rights and Restitution Act of 1990

ATTORNEY GENERAL GUIDELINES FOR
VICTIM AND WITNESS ASSISTANCE


FOREWORD

Becoming a crime victim or witness is a life-shattering event that affects millions of Americans. The experience can destroy a person's sense of safety and security and cause devastating harm that is often difficult to heal. Criminal justice system personnel have a special responsibility to treat crime victims and witnesses fairly by enforcing their rights, properly including them in criminal justice system processes, making referrals to appropriate services, and holding perpetrators accountable.

For too long, the criminal justice system has overlooked the rights and needs of crime victims and witnesses. In recent years, however, new Federal and State laws have sought to improve the treatment of crime victims and address their concerns.

We are constantly learning about better ways to assist crime victims and witnesses. This new version of the *Attorney General Guidelines for Victim and Witness Assistance* incorporates that knowledge, includes recent legislative changes, and addresses a new opinion by the Office of Legal Counsel regarding the mandatory nature of some provisions.

The *Guidelines* reflect my strong belief that victims should play a central role in the criminal justice system and my commitment that all components of the United States Department of Justice respond to crime victims with compassion, fairness, and respect, in accordance with the letter and spirit of the law.


Janet Reno
Attorney General of the United States

ACKNOWLEDGMENTS

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ARTICLE I.

GENERAL CONSIDERATIONS

A. Statement of Purpose

The purpose of this document is to establish guidelines to be followed by officers and employees of Department of Justice investigative, prosecutorial, and correctional agencies in the treatment of victims of and witnesses to crime.

These guidelines supersede the 1995 *Attorney General Guidelines for Victim and Witness Assistance*.

B. Background

The first Federal victims' rights legislation was the *Victim and Witness Protection Act of 1982* (VWPA). Congress amended and expanded upon the provisions of the 1982 Act in subsequent legislation, primarily the *Victims of Crime Act of 1984*, 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 *Victim Rights Clarification Act of 1997*.

In the VWPA, Congress made findings about the criminal justice system's treatment of crime victims. Congress recognized that without the cooperation of victims and witnesses, the criminal justice system would cease to function. Yet, often those individuals were either ignored by the system or simply used as "tools" to identify and punish offenders. Congress found that all too often a victim suffers additional hardship as a result of contact with the system. The VWPA was enacted "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."

Also, in the VWPA Congress instructed the Attorney General to develop and implement guidelines for the Department of Justice consistent with the purposes of the Act. Congress set forth the objectives of the guidelines, which include the provision of services to victims; notification about protection, services, and major case events; consultation with the Government attorney; a separate waiting area at court; the return of property; notification of employers; and training for law enforcement and others. Congress also instructed the Attorney General to assure that all Federal law enforcement agencies outside the Department of Justice adopt guidelines consistent with the purposes of the VWPA. (*see* 18 U.S.C. § 1512, Historical and Statutory Notes, *Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System*). In conformance with the Congressional directive,

the Attorney General promulgated the *Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines)*. Periodically, the *AG Guidelines* have been revised to incorporate new legislative provisions.

Starting with the VWPA and continuing through the later legislation, Congress established a list of victims' rights and directed the Justice Department and other departments and agencies of the Federal Government engaged in the detection, investigation, or prosecution of crime to make their "best efforts" to see that crime victims are accorded the rights. The list of rights, commonly referred to as the "victims' bill of rights," appears in 42 U.S.C. § 10606. Congress also defined a group of services that Federal agencies have the responsibility to provide to crime victims. The basic list of responsibilities appears in 42 U.S.C. § 10607. The VWPA provided that services be accorded only "where possible"; however, the *Crime Control Act of 1990* stated that those services "shall" be provided. Thus, the statute, as modified, mandates that Federal personnel provide victims with the described services, although it appears to allow for individual judgment in determining how, when, and in some cases, whether to provide the services. Specialized provisions dealing with certain types of victims and crimes appear elsewhere in Titles 42 and 18. For example, provisions specifically dealing with child victims and witnesses appear in 18 U.S.C. § 3509.

More recent legislative provisions continue to expand victims' rights in a variety of ways. The *Violent Crime Control and Law Enforcement Act of 1994* established mandatory restitution for four categories of crime victims: (1) domestic violence; (2) sexual assault; (3) sexually exploited children and other abused children; and (4) telemarketing fraud victims. The *Antiterrorism and Effective Death Penalty Act of 1996* expanded mandatory restitution to virtually all crimes committed in violation of Title 18 of the United States Code. The *Clarification Act of 1997* gives victims the right to attend a trial even though they may testify during the sentencing portion of the trial. (18 U.S.C. § 3510)

C. Construction of These *AG Guidelines*

The foundation for the *AG Guidelines* is the Federal victims' rights laws. The core statute is 42 U.S.C. § 10607, but additional rights and requirements exist in other statutes and rules of criminal procedure. In the text of the guidelines, all statutory requirements or rules of criminal procedure are followed by a direct citation to the applicable statute or rule. Guidelines that are purely Justice Department policy, as opposed to statutory law, will not be followed by a citation. Guidelines that are policy intended to implement a statutory right, provision, or procedural rule will be followed by a citation referring to the statute or rule, as in "see statute." Some guidelines are followed by a *Commentary* that is intended to provide additional clarification, guidance, and suggestions on how to implement the law and policy that appear in the *AG Guidelines*.

D. Reliance on the Sound Judgment of DOJ Officers and Employees

The Attorney General and the Department of Justice are firmly committed to providing crime victims the rights and services required under Federal law. The Department recognizes, however, that it is extremely difficult to anticipate and provide direction for the myriad of situations that may arise in the course of the investigation and prosecution of crime and in the incarceration of offenders. DOJ employees are consequently expected to use their sound judgment and discretion in deciding how best to accord victims and witnesses the rights and services required under Federal law and these *AG Guidelines*. Thus, decisions about such matters as when, where, and how to provide services must be addressed by the responsible officials, keeping in mind the overall spirit and intent of the laws and guidelines.

The *AG Guidelines* use the word “shall” where “shall” appears in a statute. Employees are reminded that the statutory provisions are mandatory as explained in section B, “Background.” When the *AG Guidelines* use the word “should,” the employee is expected to take the action or provide the service described unless there is an appropriate, articulable reason not to do so. In all matters there is a presumption in favor of providing rather than withholding assistance and services to victims and witnesses of crime.

E. Application

1. Providers of Rights and Services. These *AG Guidelines* apply only to those components of the Department of Justice engaged in criminal investigative, prosecutorial, or correctional functions. The *AG Guidelines* are intended to serve as a model for guidelines on the fair treatment of crime victims and witnesses for other State and Federal law enforcement agencies.

Justice Department components should encourage non-Department personnel specially assigned or deputized to work with Department components to become aware of and comply with the victims’ rights laws and these guidelines.

2. Recipients of Rights and Services. The majority of the rights and services in these *AG Guidelines* are applicable to victims of crime. Some provisions apply to witnesses to crime.

For purposes of these *AG Guidelines*, the term “victim” means a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including

- a. In the case of a victim that is an institutional entity, an authorized representative of the entity; and
- b. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference):
 - (1) A spouse;
 - (2) A legal guardian;

- (3) A parent;
- (4) A child;
- (5) A sibling;
- (6) Another family member; or
- (7) Another person designated by the court.

(42 U.S.C. § 10607(e)(2))

Further, a person who is culpable for the crime being investigated or prosecuted should not be considered a victim for purposes of the rights and services provided under the *AG Guidelines*. A person who may be culpable for violations or crimes other than the crime being investigated or prosecuted may be considered a victim under this policy.

Commentary

This definition of victim comes from the statutory definition found in 42 U.S.C. § 10607(e)(2). The statute neither explicitly covers nor explicitly excludes culpable persons in its definition. The Justice Department believes that there is a basis to infer from the statute a tacit congressional intent to distinguish between persons who are culpable in some way for the crime and those who are not. First, a literal application of the words of the statute to include injured participants in a crime would in some cases lead to absurd results, which we seek to avoid. Moreover, legislative silence on the issue, in light of the Department's practices prior to the passage of the statute, may be indicative of an intent to protect only those who did not participate in committing a crime.

Accordingly, as a policy matter, the Department excludes from the definition of "victim" any person who is culpable for the crime being investigated or prosecuted. This exclusion does not encompass persons who may be culpable for some other crime, even if the crimes may be related. Thus, a victim who may have committed some crime other than the one under investigation or prosecution is considered a victim for purposes of the AG Guidelines rights and services. A person's status as an inmate, an illegal alien, etc., does not disqualify that person from being considered a victim. Examples of such persons include, but are not limited to, the following:

1. *Illegal aliens who are involuntary servitude victims. The illegal aliens may have some civil deportation exposure for voluntarily agreeing to be smuggled into the United States. Once in the country, however, the aliens are held against their will in conditions of involuntary servitude. The illegal aliens qualify as victims under this definition because they are not culpable for the involuntary servitude crime.*

2. *Transportation and trafficking victims.* In some cases, a person may engage in prostitution as part of an interstate transportation for illegal sexual activity or in aid of racketeering or other trafficking crime. That person should not be disqualified from being considered a victim if the person otherwise fits the definition of victim and is not culpable for the trafficking offense.
3. *Inmates victimized in prison.* Inmates who are assaulted in prison should be considered victims of an assault crime being investigated or prosecuted even though they may be culpable for some other crime that resulted in their incarceration. (*Note:* Even where a detainee (for example, an inmate or illegal alien) is considered a victim under this definition, the detainee may not be able to take advantage of some victims' rights and services because of the detention. For example, while Department employees must use their "best efforts" to see that victims are accorded their qualified right to be present at public court proceedings related to the offense, an inmate's detention may prevent the inmate from taking advantage of the right. Department employees are not required to transport the inmate to court for hearings as part of their "best efforts.")
4. *Victims of witness intimidation.* A witness who is threatened or injured as the result of an attempt by another person to prevent the witness from testifying should be treated as a victim of the intimidation crime even though the witness may have some culpability in the matter about which he or she was testifying.
5. *Victims of excessive force.* A person may be the victim of excessive force by law enforcement authorities while the person is being lawfully arrested for some offense. The person is a victim of the excessive force charges even though the person may have committed some other criminal offense that predicated the arrest.

This list is not intended to be exhaustive.

The definition of victim also makes it clear that only those persons suffering direct physical, emotional, or pecuniary harm are considered victims for purposes of the AG Guidelines rights and services. Thus, persons whose injuries are indirectly caused by the crime are not entitled to the mandated services. Bystanders are generally not considered victims although there may be circumstances when a bystander does suffer an unusually direct injury, and Department personnel have the discretion to treat this bystander as a victim. This does not prohibit Department personnel in their discretion from assisting indirect victims to the extent staff deem appropriate.

For example, assume that a drug dealer sold methamphetamine (in violation of 21 U.S.C. § 841) to 20 high school students who, as a result, became addicted to methamphetamine. The students require expensive drug rehabilitation, only part of which was covered by health insurance. The parents are emotionally traumatized and some took time off work and lost wages. The students and parents would not be considered victims for purposes of AG Guidelines rights and services such as notice

of the drug dealer's court dates. Their injuries (the addiction and resultant expenses) were caused in large part by the students' own decisions to engage in illegal drug use and the connection to the drug dealer's crime is attenuated.

A much more difficult definitional issue arises in a bank robbery case. Typically, the bank, which suffers the pecuniary harm, is considered the primary victim. The question presented is whether the tellers, bank employees, and customers present in the bank at the time of the robbery are also "direct" victims of the crime. The answer to this question will depend to a great extent on the facts of each specific case. If, for example, a robber points a gun at a teller as part of the robbery and as a result the teller is a trial witness and suffers psychological trauma, the harm is a direct result of the crime and the teller should qualify as a victim under the AG Guidelines definition (the teller is actually the direct victim of an armed assault which may not be separately charged). In comparison, a bank employee who was in another room and only heard people talking about the robbery may also suffer some trauma, but is much more indirectly harmed and should not be considered a victim for purposes of the AG Guidelines. In between these two examples are a variety of different factual situations requiring Department personnel to use their judgment and draw lines just as they do in other contexts. Bystanders are normally not considered direct victims absent some unusual injury or vulnerability. For example, in the bank robbery scenario, a pregnant woman in the restroom at the bank who overhears the robbery and is traumatized to the extent that it causes a miscarriage may be treated as a direct victim.

Under this definition of victim, there may be cases that involve hundreds or even thousands of victims. For example, in a terrorist bombing or a mass violence shooting, there may be a large number of persons who are killed, injured, or suffer extreme emotional harm such that they would be considered direct victims. Indeed, in a terrorist incident, the terrorist targets a large number of people with the intent of inducing fear and other emotional harm. Department personnel should refer to the guidelines on providing services in cases with large numbers of victims for guidance on how to provide services in those circumstances. (Art. I.G.)

Department personnel should consider the types of services mandated by the AG Guidelines—referral, notice of case proceedings, opportunity to be heard at sentencing, etc.—and make reasonable decisions about who should be included as a direct victim. Department personnel are expected to use their sound judgment and discretion in applying the definition of victim, keeping in mind that there is a presumption in favor of providing rather than withholding services. Even if a particular person does not qualify as a victim under the AG Guidelines definition, in their discretion Department personnel can provide services, such as referrals, as they deem appropriate.

Federal departments and State and local agencies, as entities, should not be considered "victims" for purposes of Article IV of the AG Guidelines. Thus, in cases in which the United States, State or local agencies, or the public at large are harmed (for example: tax evasion, public corruption, and certain regulatory offenses), victim services generally will be inapplicable; but in virtually all cases, there will be

witnesses who will be entitled to the witness services of employer or creditor intercession/notification and court attendance information like parking and transportation. The definition of “witness” appears in Appendix A, Definitions.

Commentary

Victims of Juvenile Offenders

*Victims of juvenile offenders (being proceeded against as Federal juvenile delinquents) are not necessarily entitled to all of the rights specified by the victims’ rights statutes. Because juvenile proceedings are not technically prosecutions of crimes, but rather civil adjudications of status, the provisions of the victims’ rights statutes must be harmonized with the statutory restrictions that govern the juvenile proceedings. Prior to a finding of delinquency, the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031, *et. seq.* (“the Act”), curtails the type of information which may be publicly disclosed to victims regarding juvenile proceedings. The Act presumes that the proceedings will be closed, that the records will be sealed, and that no information about the proceedings and the accused will be publicly disclosed. During the investigative stage, a general statement about the progress of the investigation may be disclosed to the victim prior to the time that an information or complaint charging an act of juvenile delinquency is filed. Investigators are cautioned, however, that the name or other identifying data about a suspect who is known or believed by investigators to have been younger than 18 when the crime occurred should not be disclosed.*

Prosecutors in juvenile cases can solicit and receive victims’ views on appropriate disposition (not only whether the prosecutor should move to detain, dismiss, defer prosecution, or accept a plea, but also how severe a sentence is warranted), but the substantive communications must remain a one-way discussion. Prosecutors are not permitted to convey any prosecutorial information about the ongoing progress of the juvenile case to the victim.

After a finding of delinquency, an exception in 18 U.S.C. § 5038(a)(6) explicitly permits disclosure to the victims, or if they are deceased, their immediate family, “related to the final disposition of such juvenile.” Federal prosecutors should be aware that they may make disclosures to victims about the case under this section. In particular, prosecutors should make reasonable efforts to provide victims with relevant information about the result of the juvenile adjudicatory hearing to assist the victim in preparing an accurate Victim Impact Statement for presentation to the court at the dispositional hearing. Prosecutors should tell victims that presentence reports and victim impact statements are not mandated at dispositional hearings, although a victim may prepare such a statement which the prosecutor can offer to the court. The prosecutor could also request the court to order the probation office to prepare a victim impact statement.

The exception in 18 U.S.C. § 5038(a)(6) also allows the corrections agency to respond to a victim's inquiry about the final judicial disposition and projected release date as computed on the date when the juvenile sentence is imposed. A victim should not be routinely notified when the juvenile offender in his or her case has actually been released from custody. (18 U.S.C. § 5038(c))

These privacy protections are not afforded to juveniles who are transferred to adult status.

F. Responsible Officials

Pursuant to 42 U.S.C. § 10607(a), the Attorney General is required to designate persons in each Justice Department component engaged in the detection, investigation, or prosecution of crime who will be responsible for identifying the victims of crime and performing the services described in that section. These persons are referred to as “responsible officials.” (42 U.S.C. § 10607(a)) In these *AG Guidelines*, the designation of responsible officials for each component appear below and at the beginning of the sections indicating the stage in the process where the component operates.

The Attorney General designates the following responsible officials:

1. Investigators
 - a. *FBI*—the Special Agent-in-Charge of the division having primary responsibility for conducting the investigation.
 - b. *DEA*—the Special Agent-in-Charge of the division having primary responsibility for conducting the investigation.
 - c. *INS*—the District Director or Chief Patrol Agent of the office having primary responsibility for conducting the investigation.
 - d. *U.S. Marshals Service*—the U.S. Marshal in whose district the case is being conducted.
 - e. *Office of the Inspector General*—the Inspector General.
2. Prosecutors
 - a. *For cases in which charges have been filed*—the U.S. Attorney in whose district the prosecution is pending.
 - b. *For cases in which a litigating division of the Justice Department is solely responsible*—the chief of the section having responsibility for the case. The Department attorney handling the case is responsible for performing the same duties under these *AG Guidelines* as are required of an Assistant U.S. Attorney. By agreement between the Criminal Division and the Executive Office for United States Attorneys (EOUSA), the responsible official from the Criminal Division may delegate some responsibilities to the U.S. Attorney in whose district the prosecution is pending.
 - c. *For cases in which the U.S. Marshals Service is the custodial agency*—the U.S. Attorney in whose district the prosecution is pending.

3. Corrections Officials

- a. *For cases in which the U.S. Marshals Service is the custodial agency—the U.S. Attorney in whose district the prosecution is pending.*
- b. *For cases in which the Bureau of Prisons has become involved—the Director or Warden of each Bureau of Prisons (BOP) facility where the defendant is incarcerated.*
- c. *For cases in which the Immigration and Naturalization Service is the custodial agency—the Executive Associate Commissioner for Field Operations.*

The responsible official shall designate the individual or individuals to carry out victim-witness services in each Department of Justice investigating field office, corrections facility, U.S. Attorney’s Office, and Justice Department litigating division. The individual or individuals shall be delegated authority by the responsible official to carry out the activities enumerated in these *AG Guidelines*.

It is incumbent upon responsible officials to foster cooperation among all components of the Department of Justice to the maximum extent possible in providing victims the services defined under Federal law. In many instances where certain duties and responsibilities overlap, duplicative services are not required, although the responsible officials should promote coordination and interagency teamwork between State and local or Tribal officials and Federal officials. At each stage in the performance of services, the transition of responsibility from one component of the Department of Justice to the next must, of necessity, include a sharing of information (in many cases prior to the actual turning over of responsibility). In this way, gaps in notification and other services are eliminated and crime victims receive uniform rather than fragmented treatment, starting from the initial investigation and continuing throughout their entire involvement with the Federal criminal justice system.

All components should work with appropriate components of other Federal agencies that investigate and prosecute violations of Federal law to assist them in providing these services to victims. Justice Department components should also coordinate their victim-witness service efforts with State and local law enforcement officials who may be involved in the investigation, including Tribal police officials in Indian Country, and victim assistance and compensation service providers.

G. Victims’ Rights and Services in Cases with Large Numbers of Victims

Individual and, whenever possible, personal contact with victims is recommended. While the methods for implementing *AG Guidelines* provisions are relatively straightforward in cases where the number of victims is limited, they can present challenges as the number of victims grows into the hundreds and thousands. In carrying out their obligations under the *AG Guidelines* in cases with large numbers of victims, responsible officials should use the means, given the circumstances, most likely to achieve actual contact with and notice to victims.

Commentary

What constitutes a sufficient effort to identify, notify, and assist crime victims will necessarily vary with the facts of a particular violation, and a variety of techniques are available to enable Department personnel to effectuate appropriate notice and assistance to victims in a wide range of circumstances. The determination of what comprises sufficient efforts and appropriate types of notice and assistance depends largely on the anticipated needs of the crime victims and the selection of techniques most likely to provide actual notice to these victims, and much less on the absolute amount of effort or level of resources needed to provide this notice and assistance by Department personnel. Moreover, Department personnel should carefully evaluate the type of information relayed and the method of communicating the information to see that investigations are not compromised and victims' privacy is not inadvertently invaded.

Identifying the nature of the harm suffered by crime victims is essential to determining the appropriate method of effectuating notice and providing assistance. Victims of violent crimes, for example, may have a high level of need for a wide range of victim services in almost every instance, and so in almost every instance a substantial effort to identify and personally contact victims of violent crime will be warranted, regardless of the number of victims involved. Indeed, FBI and United States Attorneys' Offices should consider assessing the possibility of a large scale violent crime occurring within their jurisdictions, identifying the resources currently available to provide victim assistance (DOJ resources, other Federal agencies such as the Federal Emergency Management Agency (FEMA), State and local agencies, volunteer groups such as the Red Cross) and those resources needed but not available, and developing contingency plans for contacting and providing assistance to mass crime victims should the need arise. As another example, victims of financial crimes such as telemarketing fraud often suffer significant (to them) harm and have a high degree of need for notice and referral services. Names and addresses of victims of financial crimes can often be obtained from defendants' records, and even in situations where thousands of victims exist it may be appropriate to send individual victims an initial notification letter informing them of the nature of the offense and assessing their interest in receiving future notice and consultation services. In addition, defendants who have been convicted of offenses involving fraud may be ordered by the court to spend up to \$20,000 to provide notice to victims explaining the conviction pursuant to 18 U.S.C. § 3555. Offices that frequently deal with cases involving large numbers of identifiable fraud victims may wish to develop the ability to conduct such mass mailings in-house, while offices that do not may want to consider contracting with private entities approved to handle sensitive Government information and who can assist with the provision of such services when needed.

In other cases involving large numbers of victims, circumstances may suggest that the use of other methods to provide notice and assistance to the victims is appropriate. When a crime results in a large number of victims who likely have suffered significant harm and cannot be readily identified, but who reside in a limited geographic area, a well-publicized town meeting may be an effective way to identify

victims, provide victims with notice and pertinent information, and consult with victims concerning the crime and the Government's investigation. Still other cases may present the situation where a very large number of victims spread out over a large geographic area have likely suffered only minor (to them) financial losses. Under these circumstances, the use of representative victims, victim proxies (such as organizations that represent the interests of the victim class or actual class-action representatives), or even the general media may be the most appropriate method to provide victims with notice and information concerning the crime.

Other techniques beyond those mentioned above also exist that, in certain situations, can assist Department personnel to provide large numbers of victims with information concerning the ongoing status of an investigation, prosecution, or detention. For example, a toll-free telephone number system can be established that not only would permit victims to call in and get recorded information concerning the status of a matter, but would actually call the victims to alert them to a change in status. With individuals' increasing ability to access the Internet, Web sites can be created that contain information concerning the progress of investigations and prosecutions. Keep in mind, of course, that any information that is not for public dissemination should not be posted on the Internet. Items that would normally be appropriate for a press release, such as dates for public court proceedings, are appropriate for the Internet. Also, private groups that have within their membership a significant number of victims of a particular violation may have newsletters or other methods of informing their members that can be used to provide information about the ongoing progress of a case. Some victims themselves may be willing to assist with preparing and disseminating a newsletter or assisting in some other way.

H. Victims' Declination of Services

Justice Department employees are required, by law and under these *AG Guidelines*, to identify victims of crime and offer them services as described in these *AG Guidelines*. Victims, however, are not required to accept these services and may choose at any point in the criminal justice process to decline to receive further (or future) services. Justice Department employees need not provide services that victims have made an informed decision to decline.

Commentary

The law and these *AG Guidelines* provide for a wide range of information and services for victims. Some crime victims, however, may prefer not to receive the full range of assistance. Because certain statutory provisions concerning the Department's obligation to furnish services to crime victims are written in mandatory terms, it is important for Department personnel to ascertain specifically what information and services, if any, a victim wishes to forego. For example, a victim who declines an offer of assistance in contacting persons who are responsible for providing counseling, treatment, and other support (see 42 U.S.C. § 10607(c)(1)(C)-(D)) may nevertheless want to retain the right to be informed of

developments in the investigation and in the prosecution of the case. (see id. § 10607(c)(3)) Providing the victim with a written description of the available services (perhaps in a brochure or on a card) and obtaining a written description of the services the victim does or does not wish to receive (such as with a form victims can check off) may help to avoid any misunderstanding in this regard.

In cases involving large numbers of victims, it may be impractical to have individual personal contact with each victim or to give each victim the option to decline some individual services while accepting others. In such circumstances, Department personnel should follow the principles set forth in Article I.G. and the accompanying commentary. In cases where victim notification is accomplished through the media, town meetings, newsletters, the Internet, or in any other efficient manner, including automated notification systems, the only feasible way to honor the victim's preference not to receive some services may be to remove that victim's name from a list of persons to be provided with a broader range of services. In such situations, where a victim declines a service, the victim should be provided with an explanation of the options available under the circumstances of the case—which may include, but are not limited to, receiving all services or no services—and allowed to decide which of those options to accept.

ARTICLE II. GUIDELINES APPLICABLE TO ALL COMPONENTS

A. Mandatory Reporting of Compliance with the *AG Guidelines*

The Director, Office for Victims of Crime (OVC), has the statutory responsibility for monitoring Justice Department compliance with the *AG Guidelines*. (42 U.S.C. § 10603(c)(3)(A)) Since 1982, responsible officials have reported to the Attorney General, through the OVC Director, on the status of their *AG Guidelines* compliance efforts in the annual Best Efforts Report. Responsible officials shall continue to report annually to the Attorney General through the OVC Director about their *AG Guidelines* compliance through the Best Efforts Report and any modified monitoring system that succeeds it.

B. Performance Appraisal

The Attorney General directs that the annual work plans and performance appraisals of each appropriate Federal law enforcement officer, supervisor, investigator, prosecutor, and corrections officer (and appropriate staff of those agencies) include, as a required activity, implementation of and evaluation of adherence or nonadherence with the victims' rights and victims' and witnesses' services provisions set forth in these guidelines. All investigatory, prosecutorial, and correctional components with victims' rights and services responsibilities should include compliance with victims' rights responsibilities in the review and evaluation criteria of their offices. Verification of the institution of this recommendation must be included in the annual Best Efforts Report.

C. Mandatory Training

Responsible officials shall ensure that employees whose responsibilities include contact with crime victims and witnesses receive a copy of the *AG Guidelines* and attend, at a minimum, a one-hour training session concerning these *AG Guidelines* and victims' and witnesses' rights within 60 days of assuming these responsibilities. Current employees whose responsibilities include contact with crime victims and witnesses shall receive the same training within a reasonable time after the promulgation of this 2000 edition of the *AG Guidelines*. Responsible officials shall ensure that those same employees receive additional training within a reasonable time after any subsequent legislation that substantially alters these rights.

D. Reporting Suspected Cases of Child Abuse

All Federal law enforcement personnel have obligations under State and Federal law to report suspected child abuse. All Federal employees should refer to their State child abuse reporting laws to determine the scope of the obligation in cases of suspected child abuse. Moreover, when the suspected child abuse is observed on Federal lands, the Federal child abuse reporting law also applies. The Federal child abuse reporting law requires certain professionals (listed below) working on Federal land or in a Federally operated (or contracted) facility, in which children are cared for or reside, to report suspected child abuse to an investigative agency designated to receive and investigate such reports. (42 U.S.C. § 13031)

Commentary

A report should be made even if the information inadvertently comes to the employee's attention, but not if the suspected child abuse has already been reported and is the subject of an existing report or investigation.

1. **Sanctions for Failure to Report. A covered professional who, while working on Federal land or in a Federally operated (or contracted) facility, in which children are cared for or reside, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, but fails to report, is guilty of a Class B misdemeanor. (18 U.S.C. § 2258)**
2. **Mandated Reporters (covered professionals).** Persons engaged in the following professions and activities on Federal land or in a Federally operated (or contracted) facility are subject to the Federal child abuse reporting requirements.
 - a. Health care professionals. Physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, undertakers, coroners, medical examiners, alcohol or drug treatment personnel, and persons performing a healing role or practicing the healing arts.
 - b. Mental health professionals. Psychologists, psychiatrists, and mental health professionals.
 - c. Counselors. Social workers, licensed or unlicensed marriage, family, and individual counselors.
 - d. Educators. Teachers, teacher's aides or assistants, school counselors and guidance personnel, school officials, and school administrators.
 - e. Child care workers and administrators.
 - f. **Law enforcement. Law enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees.**
 - g. Foster parents.

h. Commercial film and photo processors.

(42 U.S.C. § 13031(b))

3. Agencies Designated to Receive Reports. Reports of child abuse required by 42 U.S.C. § 13031 shall be made to the local law enforcement agency or local child protective services agency that has jurisdiction to investigate reports of child abuse or to protect child abuse victims in the land area or facility in question. If the appropriate agency is not a Federal agency, it must enter into a formal written agreement to receive and investigate the reports with the Attorney General, her delegate, or a Federal agency with jurisdiction for the area or facility in question.

For Federal lands, Federally operated facilities, or Federally contracted facilities where no agency qualifies for designation under the above paragraph, the FBI has been designated as the agency to receive and investigate reports of child abuse made pursuant to 42 U.S.C. § 13031. (28 CFR Part 81, AG Order No. 1833-93)

Where a report of child abuse received by a designated agency that is not a law enforcement agency involves allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, that agency is required to immediately report such occurrence to a law enforcement agency with authority to take emergency action to protect the child, which may include removal of the child for the child's protection.

4. Verbal Reports Preferred. The report of suspected child abuse should be made by a method best suited to giving immediate notice, usually verbally, in person or by telephone, or by facsimile. Reporters should document their report in the same manner that they document other important work-related actions. Responsible officials may develop written reporting forms for this purpose. (*see* 42 U.S.C. § 13031(e) (use of a form is encouraged, but shall not take the place of the immediate making of oral reports when circumstances dictate)) Reports may be made anonymously. Reports are presumed to have been made in good faith and reporters are immune from civil and criminal liability arising from the report unless they act in bad faith. (42 U.S.C. § 13031(f))
5. Reporting in Indian Country. Reporting child abuse in Indian Country is governed by 18 U.S.C. § 1169 and 25 U.S.C. § 3203. Health care professionals, school employees, child care providers, social workers, mental health professionals and counselors, law enforcement officers, probation officers, workers in a juvenile rehabilitation or detention facility, or persons employed in a public agency who are responsible for enforcing statutes and judicial orders, are among those required to report reasonable suspicions that a child has been or may reasonably be expected to be abused. 18 U.S.C. § 1169(a)(1)(H) (full listing of mandated reporters). Reports are to be made to the Federal, State, or Tribal agency with primary responsibility for child protection or the investigation of child abuse within the portion of Indian Country involved. If the report involves a potential crime and either an Indian child is involved or the alleged

abuser is an Indian, the local law enforcement agency (if other than the FBI) is required to make an immediate report to the FBI. (25 U.S.C. § 3203(b)(2)) The agency receiving the initial report is required to prepare a written report describing the child, the alleged abuser, and the facts related to the abuse allegation within 36 hours. (25 U.S.C. § 3203(c)(1))

E. Victim Privacy

To the extent allowed by law, the Department of Justice employees engaged in investigation or prosecution of crimes, consistent with the purposes of 42 U.S.C. § 10606(b)(1), should respect a victim's privacy. In particular, Department of Justice employees should use their best efforts to respect the privacy and dignity of especially vulnerable victims such as sex offense victims, domestic violence victims, child victims, and elderly victims.

Commentary

This guideline is not intended to suggest that an investigator or prosecutor restrict in any way the scope of questioning undertaken to thoroughly investigate or prosecute a case. Rather, it is intended to remind all employees to treat victims with dignity and respect. Moreover, employees should be aware that in some situations, they may be in a position to assist in protecting a victim's privacy, which employees can and should do. For example, under Federal Rule of Evidence 412, the admissibility of evidence about a victim's past sexual behavior or alleged sexual predisposition is generally inadmissible in court. Prosecutors should be aware of this evidentiary rule and use it when appropriate.

ARTICLE III. VICTIMS' RIGHTS

A. Best Efforts to Accord Rights

42 U.S.C. § 10606(a) provides that:

“Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described [below]:”

B. Rights of Crime Victims

A crime victim has the following rights under 42 U.S.C. § 10606(b):

1. The right to be treated with fairness and with respect for the victim’s dignity and privacy.
2. The right to be reasonably protected from the accused offender.
3. The right to be notified of court proceedings.
4. The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
5. The right to confer with [an] attorney for the Government in the case.
6. The right to restitution.
7. The right to information about the conviction, sentencing, imprisonment, and release of the offender.

ARTICLE IV. SERVICES TO VICTIMS AND WITNESSES

A. Investigation Stage

The investigatory agency's responsibilities begin with the report of the crime and extend through the prosecution of the case. In some instances, where explicitly stated, the investigatory agency's responsibility for a certain task is transferred to the prosecution agency when charges are filed.

1. Designation of Responsible Officials. Application of Art. IV.A. will be the responsibility of the following officials:
 - a. In the FBI, the responsible official is the Special Agent-in-Charge of the division having primary responsibility for conducting the investigation.
 - b. In the DEA, the responsible official is the Special Agent-in-Charge of the office having primary responsibility for conducting the investigation.
 - c. In the INS, the responsible official is the District Director or Chief Patrol Agent of the office having primary responsibility for conducting the investigation.
 - d. In the U.S. Marshals Service, the responsible official is the U.S. Marshal in whose district the case is being conducted.
 - e. In the Office of the Inspector General, the responsible official is the Inspector General.
2. Identification of Victims. At the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation, and continuing throughout the investigation and prosecution of the case, the responsible official of the investigative agency shall identify the victims of a crime. (42 U.S.C. § 10607(b)(1))
3. Description of Services
 - a. Information, Notice, and Referral
 - (1) Initial Information and Notice. At the earliest opportunity after detection of a crime at which it may be done without interfering with an investigation, the responsible official of the investigative agency shall inform a victim of
 - (a) Their right to receive, on request, the services listed in 42 U.S.C. § 10607(c). (42 U.S.C. § 10607(b)(2)).
 - (b) The name, title, business address, and telephone number of the responsible official to whom such a request for services should be addressed. (42 U.S.C. § 10607(b)(3))

- (c) The place where the victim may receive emergency medical and/or social services. (42 U.S.C. § 10607(c)(1)(A))
- (d) Restitution or other relief (including crime victim compensation programs) to which the victim may be entitled under this or any other applicable law and the manner in which such relief may be obtained. (42 U.S.C. § 10607(c)(1) (B))
- (e) Public and private programs that are available to provide counseling, treatment, and other support to the victim. (42 U.S.C. § 10607(c)(1)(C))
- (f) The right to make a statement about pretrial release in cases of interstate domestic violence, violation of a protection order, and stalking.
At the earliest opportunity after detection of an interstate domestic violence, violation of a protection order, or stalking offense at which it may be done with out interfering with an investigation, the responsible official of the investigative agency shall inform the victim that he or she has the right to make a statement regarding the danger posed by the defendant for the purposes of determining pretrial release of the defendant or conditions of such release. (*see* 18 U.S.C. § 2263)
- (g) Information about payment for testing and counseling in cases of sexual assaults that pose a risk of transmission of sexually transmitted diseases.
At the earliest opportunity after detection of a sexual assault that poses a risk of transmission of sexually transmitted diseases at which it may be done without interfering with an investigation, the responsible official of the investigative agency shall inform victims of the Attorney General's obligation to provide for the payment of the cost of up to two anonymous and confidential tests of the victim for sexually transmitted diseases and the cost of a counseling session by a medically trained professional regarding the accuracy of such test(s) and the risk of transmission of sexually transmitted diseases to the victim as the result of the assault. (42 U.S.C. § 10607(c)(7))

Commentary

To comply with the above informational requirements, it is recommended that as soon as victims are identified, they should receive a printed brochure or wallet-sized card that lists victims' rights and local service providers, briefly describes the rights and available services, and lists the names and telephone numbers of key officials and the victim-witness coordinator or specialist. Models for such brochures, in a variety of different languages, are available through the Office for Victims of Crime. Whenever possible, personal contact should be initiated with victims. Institution of this recommendation should be included in the annual Best Efforts Report.

- (2) Referral. The responsible official shall assist the victim in contacting the person or office responsible for providing the services and relief described in paragraph A.1. (42 U.S.C. § 10607(c)(1)(D)) When charges are filed, the responsibility for making referrals is transferred to the responsible official of the prosecutor's office.
- (3) Notice during the investigation. During the investigation of a crime, a responsible official shall provide the victim the earliest possible notice concerning
 - (a) The status of investigation of the crime, to the extent that it is appropriate and will not interfere with the investigation. (42 U.S.C. § 10607(c)(3)(A))
 - (b) The arrest of a suspected offender. (42 U.S.C. § 10607(c)(3)(B))
- b. Protection from Harassment/Intimidation. The responsible official of the investigative agency shall arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender. (42 U.S.C. § 10607(c)(2))

Moreover, information on the prohibition against intimidation and harassment and the remedies therefor should routinely be made available to victims and witnesses. The responsible official should, if warranted, advise the component of the Justice Department having protection responsibilities for the victim of intimidation or harassment, of instances involving intimidation or harassment of any victim or witness.

Commentary

Civil procedures for protecting victims and witnesses against such harm and intimidation, including application for temporary restraining orders and protective orders, are set out in 18 U.S.C. §§ 1512-1515. Of course, the Justice Department can not guarantee victims complete freedom and safety from harassment and intimidation. There are, however, a wide range of security measures that victims, witnesses, and law enforcement can take to lessen the risk of harassment and intimidation. These measures may range from a victim changing his or her telephone number to the extreme measure of enrollment in the Federal Witness Security Program (which is available to witnesses only in limited situations and has very stringent guidelines about who qualifies for admission). Justice Department personnel should use their discretion and sound judgment when assessing and discussing possible threats and security measures with victims.

- c. Return of Property Held as Evidence. At all times, a responsible official shall ensure that any property of a victim that is being held for evidentiary purposes be maintained in good condition and returned to the victim as soon as it is no longer needed for evidentiary purposes. (42 U.S.C. § 10607(c)(6))

Commentary

This guideline is not intended to prohibit legitimate law enforcement use of victims' property that may be damaged or destroyed as part of the law enforcement process. This guideline does not apply to contraband which need not be returned to victims.

- d. Notification to Victims' and Witnesses' Employers and Creditors. Upon request by a victim or witness, the responsible official should assist in notifying
 - (1) The employer of the victim or witness if cooperation in the investigation of the crime causes his/her absence from work.
 - (2) The creditors of the victim or witness, where appropriate, if the crime or cooperation in its investigation affects his/her ability to make timely payments.

Upon filing of charges by the prosecutor, this responsibility transfers to the responsible official of the prosecutor's office.

- e. Payment for Forensic Sexual Assault Examinations. The responsible official, or the head of another department or agency that conducts an investigation of a sexual assault shall pay, either directly or by reimbursement of payment by the victim, the cost of a physical examination of the victim and the costs of materials used to obtain evidence. The department or agency conducting the sexual assault investigation pays the cost of a forensic medical examination, unless payment is provided by other means. In no case shall the sexual assault victim be held responsible for payment of the forensic sexual assault examination. (42 U.S.C. § 10607(c)(7))
- f. Logistical Information. Victims and witnesses should be provided information or assistance with respect to transportation, parking, child care, translator services, and other investigation-related services. Upon filing of charges by the prosecutorial agency, this responsibility transfers to the responsible official of the prosecutorial agency.
- g. Programs for Department of Justice Employees Who Are Victims of Crime. Responsible officials should ensure that Department of Justice employees have access to an Employee Assistance Program.

B. Prosecution Stage

The prosecution stage begins when charges are filed and continues through postsentencing legal proceedings, including appeals and collateral attacks.

1. Responsible Officials. For cases in which charges have been instituted, the responsible official is the U.S. Attorney in whose district the prosecution is pending. For cases in which a litigating division of the Department of Justice is solely responsible, the responsible official is the chief of the section having responsibility for the case. The Department attorney handling the case shall perform the same duties under these guidelines as are required of an Assistant U.S. Attorney. By agreement between the Criminal Division and EOUSA, the responsible official from the Criminal Division may delegate some responsibilities to the U.S. Attorney in whose district the prosecution is pending.

For cases in which the U.S. Marshals Service is the custodial agency and is housing Federal pretrial detainees (at the same time the offender is being concurrently prosecuted by the U.S. Attorney's Office), the responsible official for purposes of performing the duties of the corrections agencies contained in Art. III.C. shall be the U.S. Attorney in whose district the prosecution is pending.

2. Services to Crime Victims

- a. Information, Notice, and Referrals

- (1) Notice of case events. During the prosecution of a crime, a responsible official shall provide the victim the earliest possible notice of
 - (a) The release or detention status of an offender or suspected offender. (42 U.S.C. § 10607(c)(3)(E))
 - (b) The filing of charges against a suspected offender, or the proposed dismissal of all charges, including the placement of the offender in a pretrial diversion program and the conditions thereof. (42 U.S.C. § 10607(c)(3)(C))
 - (c) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim or witness is either required to attend or entitled to attend. (42 U.S.C. § 10607(c)(3)(D))
 - (d) The acceptance of a plea of guilty or *nolo contendere* or the rendering of a verdict after trial. (42 U.S.C. § 10607(c)(3)(F))
 - (e) If the offender is convicted, the date set for sentencing, the sentence imposed, and the availability of the Bureau of Prisons notification program which shall provide the date, if any, on which the offender will be eligible for parole or supervised release. (42 U.S.C. § 10607(c)(3)(G))

- (2) Information about additional rights. If the victim is not a trial witness, the responsible official shall make reasonable and diligent efforts to inform the victim about the victim's right to attend the trial regardless of whether the victim intends to make a statement or present any information in relation to the sentence. (*see* 18 U.S.C. § 3510(a))
- (3) Information about proceedings. During the prosecution of a crime (if the victim has provided a current address or telephone number), a responsible official should provide the victim with general information, preferably in writing, about the criminal justice process, in particular
 - (a) The role of the victim in the criminal justice process, including what the victim can expect from the system as well as what the system expects from the victim.
 - (b) The stages in the criminal justice process of significance to a crime victim and the manner in which information about such stages can be obtained.(*cf.* Pub. L. 97-291 § 6(a)(1)(C) and (D), *see* Historical and Statutory Notes, 18 U.S.C. § 1512)
- (4) Referrals. Once charges are filed, the responsible official shall assist the victim in contacting the persons or offices which are responsible for providing the services and relief listed in Article IV. A.3.a.(1) (Investigation Stage, Initial Notice).
- (5) Postsentencing notifications. Responsible officials should make reasonable efforts, consistent with statutory requirements, to notify identified victims of postsentencing filings and court proceedings, including appeals and collateral attacks. In determining what is reasonable, the responsible official should consider factors relevant to the wisdom and practicality of giving notice in the context of the particular case, including, but not limited to, the following factors:
 - (a) The impact on public safety and risks to personal safety.
 - (b) The nature of the relief sought.
 - (c) The number of victims.
 - (d) Whether time is of the essence.
 - (e) Whether there is a need for confidentiality.
 - (f) The effect that relaying any information may have upon the defendant's constitutional rights.(*see* 42 U.S.C. § 10607(c)(3)(D))

Commentary

42 U.S.C. § 10607(c)(3)(D) has historically been interpreted to apply only to trial court proceedings and has not been considered to cover appellate and other post-sentencing matters. This guideline is intended to extend the provision of notice about court proceedings to appeals and other postsentencing court proceedings.

b. Consultation With a Government Attorney

- (1) In general. Federal prosecutors should use their best efforts to consult with victims about major case decisions.
- (2) Proposed plea bargains. Responsible officials should make reasonable efforts to notify identified victims of, and consider victim views about, any proposed or contemplated plea negotiations. In determining what is reasonable, the responsible official should consider factors relevant to the wisdom and practicality of giving notice and considering views in the context of the particular case, including, but not limited to, the following factors:
 - (a) The impact on public safety and risks to personal safety.
 - (b) The number of victims.
 - (c) Whether time is of the essence in negotiating or entering a proposed plea.
 - (d) Whether the proposed plea involves confidential information or conditions.
 - (e) Whether there is a need for confidentiality.
 - (f) Whether the victim is a possible witness in the case and the effect that relaying any information may have upon the defendant's right to a fair trial.

Commentary

This guideline is intended to accord victims their right to confer with an attorney for the Government as provided in 42 U.S.C. § 10606(b)(5). Congress specifically requested that the AG Guidelines contain guidance on this right and suggested that the Government attorney obtain the victims' views about the disposition of the case including dismissals, release of the accused pending judicial proceedings, plea negotiations, and pretrial diversion.

- c. Separate Waiting Area. During court proceedings, the responsible official of the prosecutor's office in cooperation with the U.S. Marshals Service shall ensure that a victim is provided a waiting area removed from and out of the sight and hearing of the defendant and defense witnesses. (42 U.S.C. § 10607(c)(4))

- d. Notification to Victims' and Witnesses' Employers and Creditors. Upon request by a victim or witness, the responsible official should assist in notifying
 - (1) The employer of the victim or witness if cooperation in the investigation or prosecution of the crime causes his/her absence from work.
 - (2) The creditors of the victim or witness, where appropriate, if the crime or cooperation in its investigation or prosecution affects his/her ability to make timely payments.
- e. Victim Privacy. Federal prosecutors should keep in mind that the names, addresses, and phone numbers of adult victims and civilian witnesses are private. Prosecutors should be aware of their discovery obligations under Federal Rule of Criminal Procedure 16, any local rules or customs, and court orders and should reveal such information to the defense only pursuant to these rules, customs or court orders, or special prosecutorial need. Prosecutors should also be aware that they have the option of applying for a protective order if discovery of the private information may create a risk of harm to the victim or witness and the prosecutor may seek a temporary restraining order under 18 U.S.C. § 1514 prohibiting harassment of a victim or a witness. Further, all staff of the prosecutor's office should avoid needlessly or carelessly revealing private information to any person.

Child victims and witnesses have statutory privacy protections more fully addressed *infra*. (see 18 U.S.C. § 3509(d))
- f. Logistical Information. Victims and witnesses should be provided information or assistance with respect to transportation, parking, child care, translator services, and other prosecution-related services.
- g. Limited Testing of Defendants In Sexual Assault Cases (42 U.S.C. § 14011)
 - (1) Notice and information. The responsible official should advise the victim of a sexual assault that poses a "risk of transmission" of the Acquired Immunodeficiency Syndrome (AIDS) virus of the circumstances under which the court may order that the defendant be tested for this condition.
 - (2) Procedure. A court may order that the defendant be tested for the AIDS virus(es) and that the results be revealed to the victim along with appropriate counseling accompanying the results, if the following requirements are met:
 - (a) If the victim of a sexual assault that poses a risk of transmission of the AIDS virus
 - (i) Shows that the defendant has been charged,
 - (ii) Requests that the defendant be tested, and
 - (iii) Shows that the test would provide information necessary to his or her health; and

- (b) After the defendant has had
 - (i) Notice, and
 - (ii) An opportunity to be heard
- (3) Negative test results. If the initial test is negative, the court may order followup testing and counseling on dates that occur six and twelve months after the initial test(s). (*see* 42 U.S.C. § 14011(b))

Commentary

Models of an Affidavit, Petition and Order are contained in Appendix E.

- h. Right to Make a Statement About Pretrial Release in an Interstate Domestic Violence, Stalking, or Violation of a Protective Order Case. In an interstate domestic violence, stalking, or violation of a protective order prosecution, the victim has the right to be heard regarding the danger posed by the defendant (18 U.S.C. § 2263). In applicable cases, responsible officials shall use reasonable and diligent efforts to bring this provision to the court’s attention, inform victims of its existence, and facilitate its implementation.
 - i. Closed Circuit Televising of Court Proceedings in Change of Venue Cases. If the court changes the trial venue out of the State in which the case was initially brought more than 350 miles from the location in which the proceedings originally would have taken place, the court must order closed circuit televising of the proceedings to the original location to permit victims who qualify under the statute to watch the trial proceedings. (42 U.S.C. § 10608) In applicable cases, responsible officials shall inform victims of the provision and, if requested by victims, bring it to the court’s attention and facilitate its implementation.
 - j. Programs for Department of Justice Employees Who Are Victims of Crime. Responsible officials should ensure that Department of Justice employees have access to an Employee Assistance Program.
3. Sentencing Proceedings and Victim Impact Statements
- Note: F.R.Crim. P. 32 has its own definition of “victim.” (*See infra* Appendix A, Definition of Victim.) For purposes of the *AG Guidelines* provisions based on Rule 32, Department personnel should use the definition of victim from Rule 32.
- a. Victim Impact Statement
 - (1) When a defendant(s) is convicted, a responsible official should inform victims
 - (a) That the U.S. Probation Officer is required to prepare a presentence investigation report which includes a section assessing the financial, social, psychological, and medical impact of the crime on any

individual against whom the offense was committed. (F.R.Crim. P. 32(b)(4)(D)) This section is called the “Victim Impact Statement” and it includes a provision on restitution.

- (b) About how to communicate directly with the probation officer if victims desire.
- (2) A responsible official should inform the probation officer about information in the Government’s possession relevant to the topics addressed in the Victim Impact Statement so that the presentence investigation report will fully reflect the effects of the crime upon victims as well as the appropriateness and amount of restitution.

b. Sentencing

- (1) Consistent with available resources, other responsibilities, and prosecutorial and law enforcement priorities, Federal prosecutors should advocate the interests of victims, including child victims, at the time of sentencing.
- (2) The Right of Victims of Crimes of Violence or Sexual Abuse to Allocute at Sentencing. If a sentence is to be imposed for a crime of violence or sexual abuse, at the earliest opportunity and within sufficient time for the victim to prepare a statement that can be presented at sentencing, the responsible official shall notify the victim by available and reasonable means of the victim’s right to address the court at sentencing and of the date, time, and place of the scheduled hearing. If the victim is present and if the victim wishes to make a statement at the sentencing, Federal prosecutors should advocate to the court the right of a victim of a crime of violence or sexual abuse to make a statement or present information in relation to the offender’s sentence. (*see* F.R.Crim.P. 32(c)(3)(E))

Regardless of whether the victim is present, the right of allocution defined above may be exercised instead by a parent or legal guardian of the victim who is present at the sentencing hearing if the victim is below the age of eighteen (18) years or is incompetent. (*see* F.R.Crim.P. 32(f)(1)(A)) If the victim is deceased or incapacitated, this right of allocution by the victim may be exercised by one or more family members or relatives designated by the court and present at the sentencing hearing. (*see* F.R.Crim.P. 32 (f)(1)(B))

- (3) Death Penalty Cases. If the Government decides to seek the death penalty, it is required to file notice with the court of its intention to do so. The notice sets forth the aggravating factors that the Government proposes to prove as justifying a death sentence. The factors for which notice is provided may “include factors concerning the effect of the offense on the victim and the victim’s family, and may include oral testimony, a Victim Impact Statement that identifies the victim of the

offense, the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information." (18 U.S.C. § 3593 (a))

- (a) If the Government files the proper notice, the responsible official should notify the victim (as defined in Appendix A) and other appropriate family members of their potential opportunity to address the court during the aggravation portion of the sentencing hearing and of the date, time, and place of the scheduled hearing.
- (b) Responsible officials shall also notify victims who are not trial witnesses that the court cannot exclude them from the trial merely because the victims may, during the sentencing hearing, testify as to the effect of the offense on the victims and the victims' family or about any other factor for which notice is required. (*see* 18 U.S.C. § 3510(b))

C. Corrections Stage

1. Responsible Officials. For cases in which the U.S. Marshals Service is the custodial agency, housing Federal pretrial detainees (at the same time the offender is being concurrently prosecuted by the U.S. Attorney's Office), the responsible official is the U.S. Attorney in whose district the prosecution is pending. For cases in which the BOP has become involved, the responsible official is the Director or Warden of each BOP facility where the defendant is incarcerated. If the INS is the custodial agency, the responsible official is the Executive Associate Commissioner for Field Operations.
2. Services to Victims
 - a. Notice
 - (1) Custodial Release Eligibility Information. A responsible official of the custodial agency shall provide the victim with general information regarding the corrections process, including information about work release, furlough, probation, and eligibility for each. (42 U.S.C. § 10607(c)(8))
 - (2) Custodial Release Notification. After trial, the responsible official shall provide a victim the earliest possible notice of the
 - (a) Date on which an offender will be eligible for parole and the scheduling of a release hearing, if any, for the offender. (42 U.S.C. §§ 10607(c)(3)(G) and (c)(5)(A))
 - (b) Escape, work release, furlough, or any other form of release from custody of the offender. (42 U.S.C. § 10607(c)(5)(B))
 - (c) Death of the offender, if the offender dies while in custody. (42 U.S.C. § 10607(c)(5)(C))

Commentary

42 U.S.C. §§ 10607(c)(3)(G) and (c)(5) and the AG Guidelines require corrections agencies to provide victims, including inmate victims, with “the earliest possible notice” of certain events involving an incarcerated offender. One factor that a corrections agency can take into consideration in determining the “earliest possible notice” provided to an inmate victim is the security of the offender inmate. Accordingly, when the corrections agency notifies an inmate victim about such events as the scheduled release hearing, work release, furlough, or release from custody of an incarcerated offender, the corrections agency can time the notification to take into consideration any security concerns. If there is a serious security risk in informing an inmate victim of an offender's status, the corrections agency may time the notice to minimize that risk, even if the notification takes place after the event. This determination should be made on a case by case basis and should not be interpreted to prevent an inmate victim from providing input in any parole proceeding. Because the corrections agency is responsible for the security of both victim and offender inmates, the corrections agency is in the best situation to determine when

notification given to inmate victims may jeopardize the security of offender victims. Moreover, one important purpose of the notification requirement is to enable the victim to take protective measures when he knows that an offender is being released. When the victim is an inmate, the corrections agency has the responsibility for the victims' security and can time the notice in such a way as to protect both victim and offender. The corrections agency has the discretion to determine what method to use to provide the notice.

The notice requirement contained in this guideline applies even in cases in which a Department of Justice component is holding a defendant after time served. For example, the INS frequently obtains custody of deportable aliens for deportation purposes after time served in State or Federal facilities. Under 42 U.S.C. § 10607(c)(5)(B), notice is required for any form of release from custody, including whether the INS's release is to officials from another country for deportation or into the community in this country or some other.

- b. Programs for Department of Justice Employees Who Are Victims of Crime. Responsible officials should ensure that Department of Justice employees have access to an Employee Assistance Program.

ARTICLE V. RESTITUTION

A. Background

On April 24, 1996, the *Antiterrorism and Effective Death Penalty Act of 1996* was enacted (Pub. L. 104-132). Title II of this legislation, the *Mandatory Victims Restitution Act* (MVRA), significantly reformed the law on restitution and the manner in which it is enforced. The MVRA expanded the scope of mandatory restitution, provided consolidated procedures for the issuance of restitution orders, and provided enhanced postconviction enforcement of restitution orders.

Earlier versions of the restitution statutes may apply, to some extent, to offenses committed before April 24, 1996. Consult the 1995 edition of the *AG Guidelines* for more information about and the requirements for enforcing restitution under the laws in effect prior to April 24, 1996.

Commentary

The Victim and Witness Protection Act (VWPA), passed in 1982, was the first general Federal victims' restitution statute. In enacting that statute, The Senate Judiciary Committee in its report stated, "As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our Federal courts long ago. Under current law, 18 U.S.C. § 3651, the court may order restitution for actual damage or loss, but only as part of a probationary sentence. As a matter of practice, even that discretionary grant of authority is infrequently used and indifferently enforced. In this respect, Federal criminal courts have gone the way of their State counterparts, reducing restitution from being an inevitable, if not exclusive, sanction to being an occasional afterthought." (S.Rep. No. 97-532, reprinted in 1982 U.S.C.C.A.N. 2515, 2536)

During the first ten years following enactment of the VWPA, Congress attempted on occasion to refine the enforcement mechanisms for restitution, but there were only minor amendments to the substantive provisions of the law dealing with imposition of restitution. It was not until 1992, with the enactment of the Child Support Recovery Act, that the concept of "mandatory" restitution was introduced into the Federal law. That Act mandated that courts impose restitution in cases of individuals convicted of willful failure to pay past due child support. (18 U.S.C. § 228) Two years later, in 1994, the Violence Against Women Act was enacted. In that Act, Congress identified four other types of crimes that were specifically subject to mandatory restitution: sexual abuse, sexual exploitation and other abuse of children, domestic violence, and telemarketing fraud.

1. **Mandatory Restitution.** Passage of the MVRA in 1996 brought a more comprehensive notion of mandatory, loss-based restitution to the Federal criminal justice system. The MVRA now requires courts to order full restitution in certain cases. It creates a new 18 U.S.C. § 3663A, which requires courts to enter restitution orders for each defendant (without regard to the defendant's economic situation) who has been convicted of or pled guilty to charges of

- A crime of violence as defined in 18 U.S.C. § 16.
- An offense against property under Title 18, including any offense committed by fraud or deceit.
- An offense described in section 1365, relating to tampering with consumer products.

(18 U.S.C. § 3663A(c)(1)(A))

And,

- Where there exists an identifiable victim¹ or victims who suffered a physical injury or pecuniary loss. (18 U.S.C. § 3663A(c)(1)(B))

Note: The MVRA also provides that the court shall order restitution to persons other than the victim of the offense if agreed to by the parties in a plea agreement. (18 U.S.C. § 3663A(a)(3))

The only exception to mandatory restitution for the above categories is for an offense against property if the court makes a finding from facts on the record that

- The number of identifiable victims is so large that restitution is impracticable; or
- Determining complex issues of fact related to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. (18 U.S.C. § 3663A(c)(3))

Additionally, the four areas of mandatory restitution enacted under the Violence Against Women Act of 1994 still exist:

- Sexual abuse. (18 U.S.C. § 2248)
- Sexual exploitation and other abuses of children. (18 U.S.C. § 2259)
- Domestic violence. (18 U.S.C. § 2264)
- Telemarketing fraud. (18 U.S.C. § 2327)

The procedures for issuing restitution under these sections are now the same as for the other areas of mandatory restitution and the general restitution statute. These procedures are set forth in 18 U.S.C. § 3664.

¹ The definition of "victim" is expanded by the new law to include those "proximately" harmed as a result of the commission of the offense. (see 18 U.S.C. §§ 3663(a)(2) and 3663A(a)(2))

2. Discretionary Restitution. The general restitution statute, 18 U.S.C. § 3663, now states that the court “may order” restitution
- For any Title 18 offense not covered by the new mandatory restitution provisions of 18 U.S.C. § 3663A(c).
 - For drug offenses under 21 U.S.C. §§ 841, 848(a), 849, 856, 861, and 863, as long as the victim is not a participant.²
 - For air piracy offenses (unless they fall within the new mandatory restitution provisions of 18 U.S.C. § 3663A(c)).
 - In any criminal case to the extent agreed to by the parties in a plea agreement. (18 U.S.C. § 3663(a))

Courts are also required to impose restitution under Section 3663 for past due child support for convictions under the *Child Support Recovery Act*. (18 U.S.C. § 228) In determining whether to award restitution in these cases, the court is required to consider

- The amount of the loss sustained by each victim as a result of the offense.
- The financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant’s dependents, and such other factors as the court deems appropriate.

Also, to the extent the court determines that the complication and prolongation of the sentencing process involved in ordering restitution outweigh the need to provide restitution to any victims, the court may decline to do so. (18 U.S.C. § 3663(a)(1)(B)(ii))

3. Restitution as a Condition of Probation. Restitution can also be ordered as a discretionary condition of probation and is not limited to the offenses set forth in 18 U.S.C. §§ 3663(a) or 3663A(c)(1)(A) (offenses for which mandatory or discretionary restitution applies). (18 U.S.C. § 3563(b)(2))

B. Effective Date

The changes to the law made by the MVRA “shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment...” (Section 211 of the Act)

Prosecutors should use their best efforts to determine the current state of the law in their jurisdictions regarding the applicability of the provisions of the MVRA to offenses that occurred prior to April 24, 1996, the effective date of the Act.

² An order of “community restitution” for certain drug offense may be imposed in cases where no identifiable victim exists. The amount of such community restitution will be based on the amount of the public harm caused by a defendant in accordance with guidelines promulgated by the Sentencing Commission. (18 U.S.C. § 3663(c) and U.S.S.G. § 5E1.1(d))

Commentary

Because the MVRA makes substantive and procedural changes to restitution law, ex post facto questions arise with respect to convictions occurring on or after April 24, 1996 for offenses that occurred prior to that date. The Department of Justice has taken the position that any provision of the MVRA regarding the decision to impose restitution or the amount of the obligation must apply prospectively to offenses completed on or after April 24, 1996. Other provisions of the Act can apply to offenses committed before its effective date. Attorneys for the Government should seek to apply the new law where it would be constitutionally permissible to do so. A simple test is to ask “Will applying the new law increase the amount of restitution?” If the answer is “yes,” the Ex Post Facto Clause prohibits application to offenses that were completed before April 24, 1996.

*As of the date of this publication, at least two courts have issued reported decisions that disagree with the Department of Justice’s position regarding ex post facto concerns. United States v. Newman, 144 F.3d 531 (7th Cir. 1998), where the court, in disagreeing with the Eighth Circuit Court of Appeals in United States v. Williams, 128 F.3d 1239 (8th Cir. 1997), held that restitution authorized under the Victim Witness Protection Act, and mandated under the MVRA, is not a criminal punishment for the purposes of invoking the Ex Post Facto Clause, so the mandatory imposition of restitution was upheld for an offense that occurred prior to April 24, 1996; United States v. Nichols, 169 F.3d 1255, 1279-80 (10th Cir. 1999), petition for cert. filed, (U.S. June 30, 1999) (No. 99-5063). *See also*, United States v. Ledford, (Unpublished Decision) 1997 WL 659673 (6th Cir. Oct. 22, 1997) (Since full restitution was allowed under the Victim Witness Protection Act prior to the 1996 amendments, there was no ex post facto violation in applying the full restitution provisions of the MVRA amendments.).*

But see, United States v. Baggett, 125 F.3d 1319 (9th Cir. 1997) (Application of the MVRA had the potential to increase the amount of restitution the defendant would be required to pay, and so applying the mandatory provision would violate the Ex Post Facto Clause of the Constitution. However, application of the MVRA may not create such constitutional problems if the defendant was already subject to mandatory restitution under the Senior Citizens Against Marketing Scams Act of 1994 (SCAMS Act). The case was remanded to the district court to determine if SCAMS applied.) *See also*, United States v. Williams, 128 F.3d 1239 (8th Cir. 1997) (In dicta, the court stated that an order of restitution under the MVRA is punishment for application of the Ex Post Facto Clause. But, the court held that a restitution order for the full amount of a victim’s loss according to a plea agreement did not violate the Ex Post Facto Clause because the offense to which he pled occurred after the effective date of the Act, even though the amount of restitution included in the loss calculation was a result of conduct that occurred prior to the effective date of the Act); United States v. Sclafani, 996 F.Supp. 400 (D. N.J. 1998) (Application of the mandatory restitution provisions of the MVRA to offenses prior to its effective date was prohibited).

C. Considerations in Plea Agreements

In all plea agreements negotiated by the United States, prosecutors must give consideration to “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 (codified as a Note under 18 U.S.C. § 3551)) Pursuant to the requirements of that provision, the Attorney General, on July 24, 1996, issued guidelines to ensure compliance with this provision. Those guidelines, which are also published in the United States Attorneys’ Manual (USAM) at §9-16.320, are restated below. Any commentary following the guidelines was added to the Attorney General’s original guidelines for purposes of this publication.

1. **Mandatory Restitution Offenses.** First, 18 U.S.C. § 3663A mandates that restitution be ordered for crimes of violence, for offenses against property under the criminal code (unless the court makes a special finding described in subsection (c)(3) of that section), and for offenses described in 18 U.S.C. § 1365, if an identifiable victim or victims suffered a physical injury or pecuniary loss. There are also several other previously enacted statutes that mandate restitution: 18 U.S.C. §§ 2248, 2259, 2264, and 2327. In cases that fall under these statutes, the court is obligated to impose a restitution order.

Commentary

In cases that fall under any of the statutes that require mandatory restitution, prosecutors must give consideration to requesting in a plea agreement that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleads.

Subsection (c)(3), mentioned in the guideline above, provides an exception for a court in imposing mandatory restitution if the court finds that the number of identifiable victims is so large as to make restitution impracticable; or, that determining complex issues of fact related to the cause or the amount of the victims’ losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. (18 U.S.C. § 3663A(c)(3))

2. **Nonmandatory Restitution Offenses.** Second, even when restitution is not mandatory, Federal prosecutors should give careful consideration to seeking full restitution to all victims of all charges contained in the indictment or information as part of any plea agreement.
3. **Both Mandatory and Nonmandatory Restitution Offenses.** Third, when an indictment contains both charges for which restitution is mandatory, and charges for which restitution is not mandatory, prosecutors should give careful consideration to requiring either a plea to a mandatory restitution charge, or an

acknowledgment by the defendant in the plea agreement that a mandatory restitution charge gave rise to the plea agreement, which acknowledgment will trigger the mandatory restitution provisions of 18 U.S.C. § 3663A to apply. (18 U.S.C. § 3663A (c)(2))

Commentary

Section 3663A(c)(2) of Title 18 provides that the mandatory restitution provisions will apply even in cases where a defendant enters a guilty plea to a nonmandatory offense if the plea agreement specifically states that a mandatory offense gave rise to the plea agreement.

4. Application of the Sentencing Guidelines. Fourth, prosecutors should be mindful that the *United States Sentencing Guidelines* (USSG) generally require the imposition of restitution when it is authorized by the law, and should not enter into agreements regarding restitution that would violate the USSG (*see* USSG § 5E1.1; USAM § 9-27.410 [now published at USAM § 9-27.400 *et seq.*])
5. Approval of Plea Agreements by Supervisory Attorneys. Supervisory attorneys who approve plea agreements, as is required by the Principles of Federal Prosecution (USAM § 9-27.450), and Assistant United States Attorneys who draft plea agreements, should ensure that plea agreements comply with the law and these guidelines. The Principles of Federal Prosecution list the factors that should be considered when determining whether to enter into a plea agreement. These factors include, among other factors, the effect the plea agreement will have upon the victim’s right to restitution. (USAM 9-27.420-430)

D. Restitution Procedures

Regardless of how restitution is imposed—as mandatory under new 3663A or the *Violence Against Women Act* provisions, under the *Child Support Recovery Act*, as discretionary under 18 U.S.C. § 3663, or as a condition of probation—prosecutors must follow the procedures that are now set forth in 18 U.S.C. § 3664 in imposing restitution in all cases.

1. Determining the Amount of Restitution
 - a. If requested by the probation officer, but not later than 60 days prior to sentencing, the attorney for the Government must promptly provide the probation office with a listing of the amounts subject to restitution. Before providing this list, the attorney for the Government should first consult, “to the extent practicable,” with all identified victims. (18 U.S.C. § 3664(d))

Commentary

The statute does not detail the manner in which the attorney for the Government is to consult “to the extent practicable” with victims. The attorney for the Government should use his or her best judgment to determine whether such consultation is

practicable, and if it is, to then determine the best and most efficient and effective manner of such consultation. Consultation with the victims by the attorney for the Government may include, but is not limited to, the following:

- *Contact with the victims, their attorneys, or their personal representatives either in person, by telephone, or by written correspondence.*
- *In appropriate circumstances, such as when the number of victims makes other contact impractical, publication of notice in a manner designed to reach as many victims as possible.*

- b. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the Government. (18 U.S.C. § 3664(e)) Since the attorney for the Government bears this burden, the attorney should work with the investigative agent to try to confirm and verify the amount of losses claimed by each victim. After the required consultation with the victims, the attorney for the Government may make an independent determination regarding the amount of the losses that can be proven by a preponderance of the evidence, and which are appropriately attributable to the defendant's criminal conduct.
- c. In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses, without consideration of the economic circumstances of the defendant. (18 U.S.C. § 3664(f)(1)(A)) In other words, even though it may not be mandatory restitution that is imposed, once the court determines that restitution will be ordered, it must be ordered for the full amount of the loss without regard for the defendant's ability to pay. For example, for discretionary restitution under 3663, the amount of the loss and the defendant's economic circumstances can be considered by the court on the issue of whether to award restitution, but once that decision is made, those considerations are irrelevant to the amount of restitution ordered.
- d. If the losses of the victim(s) cannot be determined within 10 days of the sentencing hearing, the attorney for the Government or the probation officer should so inform the court, and a date for final determination of the losses can be set for up to 90 days after the sentencing. (18 U.S.C. § 3664(d)(6))
- e. Even after a final determination of restitution, a victim may petition the court for an amended restitution order within 60 days after discovering additional losses. A showing of good cause for failure to include such losses in the initial claim is required before such an order can be granted. (18 U.S.C. § 3664(d)(5))
- f. A fine should not be imposed if it would impair the defendant's ability to make restitution, unless the victim is the United States. (18 U.S.C. § 3572(b))

- g. After the attorney for the Government gives to the probation officer the listing of the amounts subject to restitution, the probation officer is required to include in the presentence report (or another report if a presentence report is not prepared) a complete accounting of losses to each victim; restitution owed pursuant to a plea agreement; and, information relating to the economic circumstances of each defendant. Each defendant is required to provide to the probation officer an affidavit describing his or her financial resources, including a complete listing of all assets owned or controlled as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information as the court may require. (18 U.S.C. § 3664(d)(3)) If the number or identity of the victims cannot be ascertained, or other circumstances exist that make it impracticable for the probation officer to complete the report to the court, the probation officer will so inform the court. (18 U.S.C. § 3664(a))
 - h. It is the probation officer's responsibility, which may be coordinated with the prosecutor's office, to provide notice to all identified victims of
 - Offense(s) of which the defendant was convicted.
 - Amounts subject to restitution submitted to the probation officer.
 - Opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses.
 - Scheduled date, time, and place of the sentencing hearing.
 - Availability of a lien in favor of the victims pursuant to 18 U.S.C. § 3664 (m) (1)(B).
 - Opportunity of the victim to complete and file with the probation officer a separate affidavit (on a form provided by the probation officer) relating to the amount of the victim's losses subject to restitution.(18 U.S.C. § 3664(d)(2))
 - i. After reviewing the probation officer's report, the court may require additional documentation or hear testimony. (18 U.S.C. § 3664(d)(4)) These proceedings may be done in camera for privacy concerns and are governed only by Fed.R.Crim.P. 32(c), chapter 227 (sentences) and chapter 232 (miscellaneous sentencing provisions). (18 U.S.C. § 3664(c))
2. Payment Provisions. The attorney for the Government should advocate that payment of restitution be made immediately, unless the interests of justice require a different payment option. (18 U.S.C. § 3572(d)(1)) If the court finds that the interests of justice so require, the court may provide for payment on a date certain or in installments. (18 U.S.C. § 3572 (d)(1)) If the court orders other than immediate payment, the length of time over which scheduled payments are made shall be the shortest time in which full payment can reasonably be made. (18 U.S.C. § 3572(d)(2))

Commentary

After the court determines the amount of restitution owed to each victim, the court must, pursuant to 18 U.S.C. § 3572, establish the manner and schedule according to which restitution is to be paid. (18 U.S.C. § 3664(f)) This determination should be made after considering the interests of justice, as required by 18 U.S.C. § 3572, and after considering the financial resources and other assets of the defendant, including whether any assets are jointly controlled, the projected earnings and other income of the defendant, and any financial obligations of the defendant. The court may then order the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. (18 U.S.C. § 3664(f)(3)(A))

If the “economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments,” the court may order the defendant to make nominal periodic payments. (18 U.S.C. § 3664(f)(3)(B))

3. **Change in Defendant’s Economic Circumstances.** A restitution order must provide that the defendant notify the court and the Attorney General (through the United States Attorney’s Office) of any material change in economic circumstances that might affect his or her ability to pay restitution. (18 U.S.C. § 3664(k)) This requirement should only be in effect for as long as the defendant remains liable for payment of the restitution. Victims and the United States may also notify the court of any change in the defendant’s economic condition. (18 U.S.C. § 3664(k)) After receiving notice of any material change in the defendant’s economic circumstances, the United States Attorney’s Office must then notify all of the victims of this change in circumstances, and must certify to the court that the victims have been notified. After receiving this notification, the court may on its own or on motion of any party, adjust the repayment schedule. (18 U.S.C. § 3664(k))

Commentary

In addition to the requirement that the defendant notify the United States and the court of any material change in economic circumstances, if an incarcerated defendant who is obligated to pay restitution receives “substantial resources from any source,” the defendant is required to apply the value of the resources to any unpaid restitution or fine. (18 U.S.C. § 3664(n))

E. Enforcement of Restitution

Pursuant to § 209 of the MVRA, Pub. L. No. 104-132, § 209 (codified as a Note under 18 U.S.C. § 3551), the Attorney General was directed to issue guidelines to ensure that “orders of restitution made pursuant to the amendments made by this

subtitle [the MVRA] are enforced to the fullest extent of the law. Those guidelines, issued July 24, 1996, are restated below. Any *Commentary* that follows the guidelines was added to the Attorney General's original guidelines for purposes of this publication.

1. Enforcement by the United States. Orders of restitution imposed under the MVRA must be enforced to the fullest extent of the law. Restitution owed to victims of crimes is a critical part of the criminal judgment. The Financial Litigation Units in the United States Attorneys' Offices should take all steps possible to help ensure that this money is collected and that victims of crime are fully compensated for their losses. All prosecutors and Victim-Witness Coordinators should support the mission of criminal debt collection.
2. Aggressive Efforts to Enforce Restitution. Absent a court-ordered stay on appeal, a defendant who fails to pay restitution that is due immediately or defaults on a payment plan should be aggressively pursued for collection of the debt.

Commentary

The liability to pay a fine or restitution issued under the MVRA lasts 20 years plus any period of incarceration or until the death of the defendant. (18 U.S.C. § 3613(c))

The MVRA provides that an order of restitution may be enforced by the United States

1. *In the manner provided for fines (chapters 227 and 229 of Title 18) (like a civil judgment under Federal or State law. (18 U.S.C. § 3613(a))*
2. *By all other available and reasonable means. (18 U.S.C. § 3664(m)(1)(A)(i) and (ii))*

Other enforcement provisions of the MVRA provide

- *Payments for fines, restitution, and special assessments must be made to the clerk of the court and are to be applied first to special assessments, then to restitution to all victims, and finally to all other fines, penalties, costs, and other payments required under the sentence. (18 U.S.C. §§ 3611,3612(c))*
- *Interest accrues on unpaid restitution, as do delinquency and default penalties. (18 U.S.C. §§ 3612(f), (d), and (e); § 3572(h) and (i)) A defendant can also be resentenced under 18 U.S.C. § 3614 for knowingly failing to pay restitution.*
- *Either State or Federal procedures may be used to effect enforcement for restitution. (18 U.S.C. § 3613(a)) Under the MVRA, criminal defendants have very limited property that is exempt from seizure. The only property that is exempt from enforcement is some of the same property that is exempt from an IRS levy for taxes. (18 U.S.C. § 3613(a)(1))*

3. Filing of Liens. To guarantee enforcement to the fullest extent of the law, a lien should be filed by the United States in all cases where restitution is ordered and not immediately paid.

Commentary

An order of restitution is a lien in favor of the United States on all property and rights to property of the person fined as if it were liability for unpaid taxes. (18 U.S.C. § 3613(c)) The lien arises on the entry of judgment and continues until satisfied, remitted or set aside, or for 20 years plus the period of incarceration or the death of the defendant. (18 U.S.C. § 3613(c))

4. Discovery of Assets. Additionally, discovery of the debtor's assets should be pursued, to include, but not limited to, the following: reviewing the presentence report for asset information; requesting a financial statement or completed interrogatories from the debtor regarding assets and liabilities or, in the case of an incarcerated debtor, consulting with the assigned case manager regarding assets and liabilities; inquiring whether any victims have information about the debtor's assets; requesting asset information from the prosecutor and case agent; and, researching on-line property locator services available to the Financial Litigation Unit.
5. Further Investigation. In cases where the United States Attorney's Office has reason to believe that the debtor might have assets based on the inquiries and research set forth above or other information, a credit report should be obtained and, where practicable, the deposition of the defendant or other parties who may have knowledge of the debtor's assets should be conducted.
6. Default. If it is discovered that a defendant who has defaulted on payment of restitution has the ability to pay, a default hearing under 18 U.S.C. § 3613A, or resentencing pursuant to 18 U.S.C. § 3614, should be considered. All enforcement remedies, including those under the *Federal Debt Collection Procedures Act*, 28 U.S.C. §§ 3001-3308, should be pursued, including garnishment of the debtor's wages, execution of the debtor's nonexempt property, and filing of a fraudulent transfer action.

Commentary

Upon a finding that a defendant is in default of a payment toward a fine or restitution, the court may

- *Revoke the defendant's probation or supervised release pursuant to 18 U.S.C. § 3565*
- *Modify the terms of the defendant's probation or supervised release.*
- *Resentence a defendant under 18 U.S.C. § 3614.*
- *Hold the defendant in contempt of court.*
- *Enter a restraining order or injunction.*

- *Order the sale of property of the defendant.*
- *Accept a performance bond.*
- *Enter or adjust the defendant's payment schedule.*
- *Take any other action necessary to obtain compliance.*

(18 U.S.C. § 3613A(a)(1))

In determining what action to take, the court must consider the defendant's employment status, earning ability, financial resources, and willfulness in failing to comply with the order. (18 U.S.C. § 3613A(a)(2)) Any default hearing that is held may be held by a magistrate judge and, to the extent practicable, be conducted without removing an incarcerated defendant from prison. (18 U.S.C. § 3613A(b))

7. Enforcement for Debtors Who Are Under Supervision by the Probation Office. Enforced collection remedies should only be used against debtors under the supervision of the probation office after consultation with that office. Additionally, while the new law provides the Government the ability to reach substantial assets of a criminal defendant, the Government must be cautious about seizing a debtor's residence if family members would be left homeless. For this reason, approval of the United States Attorney is required prior to executing upon a criminal debtor's residence. USAM § 3-21.020 [now published at USAM § 3-10.540, made applicable to criminal procedures by USAM § 3-12.350].

F. Interaction Between Restitution and Asset Forfeiture

Government attorneys prosecuting civil or criminal forfeiture cases should assist crime victims in obtaining restitution in the following manner. If a defendant has sufficient assets to pay the restitution order without using property forfeitable to the Government, the defendant must use other assets (not the forfeitable property) to satisfy the restitution order. Where, however, a defendant does not have sufficient assets to pay the restitution order without using forfeitable property, the Government may use the procedural provisions of the forfeiture statutes to preserve and recover forfeitable property, and then move to dismiss the forfeiture proceeding to allow the property to be used for the benefit of the victims.

G. Limitation on Liability

These guidelines are issued in conformance with the statutory requirements of the MVRA. Pursuant to that Act, 18 U.S.C. § 3664(p), nothing in §§ 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of Title 18 and arising out of the application of those sections, and therefore nothing in these guidelines, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

ARTICLE VI. GUIDELINES FOR CHILD VICTIMS AND CHILD WITNESSES

A. Statement of Purpose

These guidelines are intended to guide every Justice Department law enforcement officer, investigator, prosecutor, victim/witness professional, and staff member in the proper and appropriate treatment of child victims and witnesses in matters under their responsibility. At all times, Justice Department personnel should be aware of the trauma child victims and child witnesses experience when they are forced to relive the crime during the investigation and prosecution of a criminal case, and particularly while testifying in court. A primary goal of such officials, therefore, shall be to reduce the trauma to child victims and witnesses caused by their contact with the criminal justice system. To that end, Justice Department personnel are required to provide child victims with referrals for services, and should provide child witnesses with services referrals.

Commentary

Children may be the direct victims of a variety of Federal crimes including physical abuse, sexual abuse, exploitation, and pornography. Additionally, children witness a broad range of Federal crimes. Too often in the past the criminal justice system has not paid sufficient attention to the needs and welfare of child victims and witnesses causing serious consequences. Contact with the system aggravated the trauma that the child had already experienced making it more difficult for the child to participate in the investigation and prosecution of the case and ultimately making it more difficult to prosecute the case.

The basic victims' rights laws discussed elsewhere in these guidelines apply equally to child victims. In addition, Congress has enacted laws to specifically address the issues raised by children's participation in the criminal justice process. Congress enacted the Victims of Child Abuse Act of 1990 (VCAA) in response to an alarming increase in reports of suspected child abuse made each year. To address this nationwide emergency, the 1990 VCAA requires certain professionals to report suspected cases of child abuse under Federal jurisdiction and amends the United States Criminal Code to ensure protection of children's rights in court and throughout the criminal justice system. (see 18 U.S.C. § 3509) Article VI of these guidelines shall serve to ensure full implementation of the VCAA by all investigative, prosecutorial, and correctional components of the Department of Justice. Guidelines dealing with the reporting of suspected child abuse appear in Article I.

B. General Guidelines

1. Privacy Protections for Child Victims and Witnesses (18 U.S.C. § 3509(d))
 - a. Confidentiality of Information. All Government employees connected with a criminal proceeding involving a child victim or witness shall keep all documents that disclose the name or any other information concerning the child in a secure place and shall disclose the documents only to persons who by reason of their participation in the proceeding have reason to know the information. (18 U.S.C. § 3509(d)(1))
 - b. Filing Under Seal. Any Justice Department employee filing papers in court that disclose the name of or any other information concerning a child shall file the papers under seal. (*see* procedure laid out in 18 U.S.C. § 3509(d)(2))
 - c. Protective Orders. Federal prosecutors can seek protective orders if necessary to protect the privacy of the child. (*see* 18 U.S.C. § 3509(d)(3)) (*see also* 18 U.S.C. § 3509(b)(2)(E) (for protective orders in the context of videotaped depositions)) Prosecutors should be aware that “any person” may seek such an order.
 - d. **Sanctions for Violating the Disclosure Rules. A knowing or intentional violation of the privacy protection accorded children in 18 U.S.C. § 3509 is a criminal contempt punishable by not more than one year’s imprisonment, or fine, or both. (18 U.S.C. § 403)**
 - e. Disclosure to Certain Persons. Title 18 U.S.C. § 3509 does not prohibit disclosure of a child’s name or other information about the child to the defendant, the attorney for the defendant, and others listed in the statute including anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child. (18 U.S.C. § 3509(d)(4))
2. Guardian Ad Litem (18 U.S.C. § 3509(h))
 - a. Appointment. To protect the best interests of the child, the court may appoint a guardian *ad litem* for a child who was a victim of, or a witness to, a crime involving abuse or exploitation. (18 U.S.C. § 3509(h)(1))
 - b. Attendance at Proceedings. The court-appointed guardian *ad litem* may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. (18 U.S.C. § 3509 (h)(2))
 - c. Access to Documents. The guardian *ad litem* may have access to all reports, evaluations, and records, except attorney’s work product, necessary to effectively advocate for the child. Because of the grand jury secrecy provisions contained in Federal Rule of Criminal Procedure 6(e), the extent of a guardian *ad litem*’s access to grand jury materials is limited to the access routinely provided to victims and their representatives. (18 U.S.C. § 3509(h)(2))

- d. Duties. The guardian *ad litem* shall marshal and coordinate the delivery of resources and special services to the child. (18 U.S.C. § 3509 (h)(2))
- e. Testimony. The guardian *ad litem* shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian *ad litem*. (18 U.S.C. § 3509(h)(2))

Commentary

Although 18 U.S.C. § 3509(h) by its terms only applies to cases where the child is a victim of or witness to abuse or exploitation, the appointment of a guardian ad litem is a practice that the prosecutor may want to ask the court to extend by analogy to all cases in which a child is a victim of or witness to a crime. The guidelines recommend that Federal prosecutors urge courts to appoint guardians ad litem for all children who are victims of or witnesses to any type of crime. If possible, it is also a good practice for the prosecutor's office to appoint an advocate to assist the child with navigating the criminal justice process.

- 3. Extension of Child Statute of Limitations (18 U.S.C. § 3283). The statute of limitations for offenses involving the sexual or physical abuse of a child under the age of 18 years is extended until the child reaches the age of 25 years.

C. Investigation/Forensic Interviewing of Child Victims and Witnesses

1. Referral for Medical Exam

The first investigator responding to a report of child abuse or sexual abuse shall refer the child victim for an emergency medical examination.

Commentary

The evidence from a medical examination may provide the only corroboration for a successful prosecution of the case. The examination provides documentation of the event and any findings.

- 2. Forensic Interviewing Procedures to Reduce Trauma to Children. Whenever possible, interviews of child victims and witnesses should be conducted by personnel properly trained in the techniques designed to best elicit truthful information from a child while minimizing additional trauma to the child.

Commentary

A forensic interview is a critical part of the investigative process. It is conducted to gather factual information from a child to determine if that child was the victim of a crime or if that child witnessed a crime against another person. A forensic interview should not be confused with a therapeutic interview that is conducted as part

of an assessment by a mental health professional for the purpose of designing and providing treatment to a child victim. A forensic interview should be age and developmental level appropriate.

3. Multidisciplinary Child Abuse Teams

- a. Definition. A multidisciplinary child abuse team is a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse. (18 U.S.C. § 3509(a)(7))
- b. A multidisciplinary child abuse team shall be used when it is feasible to do so. (18 U.S.C. § 3509(g)(1))

Commentary

The purpose of multidisciplinary teams is to maintain the credibility and reliability of the child's testimony as well as to monitor the child's safety and well-being throughout the case. The goals of the multidisciplinary team are (1) to minimize the number of interviews to which the child is subjected to reduce the risk of suggestibility in the interviewing process; (2) to provide needed services to the child; and, (3) to monitor the child's safety and well-being.

Justice Department personnel should use existing multidisciplinary teams in their local communities. Law enforcement personnel are encouraged to bring other professionals into the teams. Local laws and guidelines concerning the teams may vary, and Federal personnel should become familiar with the local provisions. If no multidisciplinary team is in place in a particular community, Justice Department personnel should develop a team.

- c. Role of Multidisciplinary Child Abuse Teams. The role of the multidisciplinary child abuse team shall be to provide for child services that the members of the team in their professional roles are capable of providing, including
 - (1) Case service coordination and assistance, including the location of services available from public and private agencies in the community. (18 U.S.C. § 3509 (g)(2)(F)) (*see Commentary* below)
 - (2) Medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings. (18 U.S.C. § 3509(g)(2)(A))
 - (3) Telephone consultation services in emergencies and in other situations. (18 U.S.C. § 3509(g)(2)(B))
 - (4) Medical evaluations related to abuse or neglect. (18 U.S.C. § 3509(g)(2)(C))

- (5) Psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or witness case. (18 U.S.C. § 3509(g)(2)(D))
- (6) Expert medical, psychological, and related professional testimony. (18 U.S.C. § 3509(g)(2)(E))
- (7) Training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses. (18 U.S.C. § 3509(g)(2)(G))

Commentary

The statutory and guidelines references to “case service coordination and assistance” and “services available from public and private agencies in the community” mean victim assistance services such as child support services, court schools for children, and other similar services.

4. Privacy Protections for Child Victims and Witnesses (18 U.S.C. § 3509(d)). During the investigation of a case involving child victims or witnesses, Justice Department personnel should scrupulously protect children’s privacy in accordance with 18 U.S.C. § 3509(d) and these guidelines. (*see* Art VI.B.1)

D. Prosecutions Involving Child Victims and Child Witnesses

1. Consultation With Multidisciplinary Teams. Federal prosecutors and victim witness personnel shall use multidisciplinary child abuse teams when it is feasible to do so. The attorney for the Government shall consult with multidisciplinary child abuse teams as appropriate. (18 U.S.C. § 3509(g)(1))
2. Privacy Protections for Child Victims and Witnesses (18 U.S.C. § 3509(d)). During the prosecution of a case involving child victims or child witnesses, Justice Department personnel should scrupulously protect children’s privacy in accordance with 18 U.S.C. § 3509(d) and these guidelines. (*see* Art. VI.B.1.)
3. Closing the Courtroom (18 U.S.C. § 3509(e)). When a child testifies, the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines, on the record, that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child’s inability to effectively communicate. An order to close the courtroom shall be narrowly tailored to serve the Government’s specific compelling interest.

Commentary

Federal prosecutors should consider consulting an expert when evaluating whether testifying in open court may cause a child “substantial psychological harm.” A “narrowly tailored” order contemplates the least restrictive provisions necessary to minimize future victimization of the child while insuring the defendant’s rights.

4. Speedy Trial (18 U.S.C. § 3509(j)). In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government, or a guardian *ad litem*, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child’s well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.
5. Stay of Civil Action (18 U.S.C. § 3509 (k)). If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action, and any mention of the civil action during the criminal proceeding is prohibited. A criminal action is pending until its final adjudication in the trial court.
6. Competency (18 U.S.C. § 3509(c))
 - a. Presumption. A child is presumed to be competent. (18 U.S.C. § 3509(c)(2) (*see also*, Rule 601, *Federal Rules of Evidence*))
 - b. Requirements of Written Motion and Compelling Reasons. The court may conduct a competency examination of a child witness only upon written motion and offer of proof of incompetency by a party. To hold an examination, the court must determine on the record that compelling reasons exist. A child’s age alone is not a compelling reason. Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need. (18 U.S.C. §§ 3509(c)(3), (4), and (9))
 - c. Conduct of the Examination. A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury. Only persons listed in 18 U.S.C. § 3509(c)(5) are permitted to be present. Direct examination of the child shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant, including a party appearing *pro se*. The court may permit an attorney, but not a party appearing *pro se*, to examine a child directly on competency, if the court is satisfied that the child will not suffer

emotional trauma as a result of the examination. (18 U.S.C. §§ 3509(c)(5), (6), and (7)) The court is required to ask questions as explained in 18 U.S.C. § 3509 (c)(8).

Commentary

Title 18 U.S.C. § 3509(c)(7) gives the court the discretion to allow the Government attorney to examine the child during the competency hearing if the court is satisfied that the child will not suffer emotional trauma as a result of the examination. Federal prosecutors should consider making this request of the court because in many instances questioning by a familiar person may be less traumatic for the child. Prosecutors should, however, be aware that defense attorneys likewise may make such a request.

7. Adult Attendant (18 U.S.C. § 3509(i)). A child testifying at or attending a judicial proceeding has the right to be accompanied by an adult attendant to provide emotional support to the child. (18 U.S.C. § 3509(i))

Commentary

The statute permits the court, at its discretion, to allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. The adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the adult attendant, for the time the child is testifying by closed-circuit television or being deposed, shall be recorded on videotape contemporaneously with the image of the child. (18 U.S.C. § 3509(i)) Federal prosecutors should inform children and their guardians of this right and facilitate its implementation.

8. Testimonial Aids (18 U.S.C. § 3509(l)). The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.

Commentary

Federal prosecutors have a wide variety of demonstrative devices to choose from to assist children in testifying. Prosecutors should use their sound judgment in deciding which device to use. Some devices, such as anatomical dolls, should only be used after training on their proper use and careful consideration of the case law regarding their use.

9. Alternatives to Live, In-Court Testimony by Child Victims (18 U.S.C. § 3509(b))

- a. Reasons. Federal prosecutors may use certain alternatives (that is, closed-circuit television and videotape depositions) to live, in-court testimony in cases involving offenses against children, where the court finds that the child is unable to testify in open court for any of the following reasons:
- (1) The child is unable to testify because of fear.
 - (2) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying or testifying in open court.
 - (3) The child suffers a mental or other infirmity.
 - (4) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(18 U.S.C. §§ 3509(b)(1)(B)(i) - (iv) and (b)(2)(B)(i)(I) - (IV))

- b. Who may apply. In a proceeding involving an alleged offense against a child, the following persons may apply to the court for an order for an alternative to live, in-court, testimony: the attorney for the Government; the child's attorney; a guardian *ad litem*; and the child's parent or legal guardian (videotaped depositions only). (18 U.S.C. § 3509(b)(1)(A) and (b)(2)(A))

- c. Child Victims' Live Testimony by 2-Way Closed-Circuit Television (18 U.S.C. § 3509(b)(1))

- (1) Timing. The person seeking the order shall apply for the order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.
- (2) Preliminary findings. The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child (of one or more of the factors/reasons listed in 9.a. above) is so substantial as to justify an order allowing testimony by closed-circuit television, the court may question the child in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time, with the child attendant, the prosecutor, the child's attorney, the guardian *ad litem*, and the defense counsel present.
- (3) Conduct of the televised proceeding. If the court orders the taking of the child's testimony by closed-circuit television, the attorney for the Government and the attorney for the defendant (not including a defendant appearing *pro se*) shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are the child's attorney or guardian *ad litem*; persons necessary to operate the closed-circuit television equipment; a judicial officer, appointed by the court; and other

persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant, as described in 18 U.S.C. § 3509 (i).

The child's testimony shall be transmitted by closed-circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed-circuit television transmission shall relay the defendant's image and the voice of the judge into the room in which the child is testifying.

- d. Videotape Deposition of Child Victims (18 U.S.C. § 3509(b)(2)). A court may issue an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape. If at the time of trial the court finds that the child is unable to testify for the reasons set out above, the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. (18 U.S.C. § 3509(b)(2)(C))
- (1) Preliminary finding. Upon receipt of an application for a videotaped deposition, the court is required to make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the reasons listed in 9.a. above. If the court finds that the child is likely to be unable to testify in open court for any of these reasons, the court shall order that the child's deposition be taken and preserved by videotape.
 - (2) Conduct of the deposition. The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are the attorney for the Government; the attorney for the defendant; the child's attorney or guardian *ad litem*; persons necessary to operate the videotape equipment; the defendant, subject to 18 U.S.C. § 3509(b)(2)(B)(iv); and, other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant, as described in 18 U.S.C. § 3509(i).
 - (3) Defendant's rights. The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child. (18 U.S.C. § 3509(b)(2)(B)(iii) and (iv))
 - (4) Procedures for handling and preserving the videotape. Procedures for handling and preserving the child's videotape deposition are listed in 18 U.S.C. §§ 3509 (b)(2)(B)(v) and (b)(2)(F).

(5) In connection with the taking of a videotaped deposition, the court may enter a protective order to protect the privacy of the child. (18 U.S.C. § 3509(b)(2)(E))

10. Victim Impact Statement (Fed.R.Crim.P. 32(b)(4)(D) and AG Guidelines, Art. IV. B.3.a.). The *AG Guidelines* concerning Victim Impact Statements appearing in Article IV. B.3.a. herein, apply equally to cases in which children are victims and witnesses.

Responsible officials should obtain and report to the probation officer accurate information concerning a child's victimization. Children can prepare Victim Impact Statements. Child Victim Impact Statements should be in an age appropriate format that permit the child to express the child's views concerning the personal consequences of the child's victimization at a level and in a form of communication commensurate with the child's age and ability.

11. Sentencing (F.R.Crim.P. 32 and AG Guidelines Art. IV.B.3.b.). Consistent with available resources, other responsibilities, and prosecutorial and law enforcement priorities, Federal prosecutors should advocate the interests of victims, including child victims, at the time of sentencing.

As with adult victims, if a sentence is to be imposed for a crime of violence or sexual abuse, at the earliest opportunity and within sufficient time for the victim to prepare a statement that can be presented at sentencing, the responsible official should notify the victim by available and reasonable means of the victim's right to address the court at sentencing and of the date, time, and place of the scheduled hearing. If the victim is present and if the victim wishes to make a statement at the sentencing, Federal prosecutors should advocate to the court the right of a victim of a crime of violence or sexual abuse to make a statement or present information in relation to the offender's sentence. (*see* F.R.Crim.P. 32(c)(3)(D) and (E))

Regardless of whether the victim is present, the right of allocution defined above may be exercised instead by a parent or legal guardian of the victim who is present at the sentencing hearing if the victim is below the age of eighteen (18) years or is incompetent. (*see* F.R.Crim.P. 32(f)(1)(A)) If the victim is deceased or incapacitated, this right of allocution by the victim may be exercised by one or more family members or relatives designated by the court and present at the sentencing hearing. (*see* F.R.Crim.P. 32(f)(1) (B))

Commentary

To provide the probation officer with the most useful and accurate information possible, responsible officials should request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected.

ARTICLE VII. NONLITIGABILITY

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, or standards of conduct or care, substantive or procedural, enforceable at law by any person in any matter civil or criminal. These guidelines shall not be construed to create, enlarge, or imply any duty or obligation to any victim, witness, or other person for which the United States or its employees could be held liable in damages. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Appendix A. Definitions

For purposes of these guidelines, the following words and terms are defined as follows:

1. Adult attendant. An adult who accompanies a child witness throughout the judicial process for the purpose of providing emotional support. (18 U.S.C. § 3509 (i))
2. Child abuse. The physical or mental injury, sexual abuse, exploitation, or negligent treatment of a child. The term “child abuse” does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty. (18 U.S.C. § 3509(a)(3))
3. Earliest opportunity. An opportunity that will not interfere with an investigation or hamper the responsible official in the performance of other law enforcement responsibilities.
4. Local child protective services agency (used in Article II. E.). That agency of the Federal Government, of a State, or of a local government that has the primary responsibility for child protection within a particular portion of the Federal lands, a particular Federally operated facility, or a particular Federally contracted facility in which children are cared for or reside.
5. Local law enforcement agency (used in Article II. E.). That Federal, State, or local law enforcement agency that has the primary responsibility for the investigation of an instance of alleged child abuse occurring within a particular portion of the Federal lands, a particular Federally operated facility, or a particular Federally contracted facility in which children are cared for or reside.
6. Mental injury to child. Harm to a child’s psychological or intellectual functioning that may be exhibited by severe anxiety, depression, withdrawal, or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition. (18 U.S.C. § 3509(a)(5))
7. Multidisciplinary child abuse team. A professional unit composed of representatives from health, social/child protective service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse. (18 U.S.C. § 3509(a)(7))
8. Negligent treatment. The failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of a child. (18 U.S.C. § 3509(a)(11))
9. Responsible official. A person designated by the Attorney General in Art. I. to perform the functions of a responsible official.

10. Risk of transmission. Applies to crimes where there is a reasonable possibility of the exchange of blood or fluid born pathogens. (*see* 21 CFR § 800.20)
11. Sexual exploitation. See chapters 109A, 110, and 117 of 18 U.S.C. for applicable definitions.
12. Telemarketing. A plan, program, promotion, or campaign that is conducted to induce purchases of goods or services, or participation in a contest or sweepstakes, by use of one or more interstate telephone calls initiated either by a person who is conducting the plan, program, promotion or campaign or by a prospective purchaser or contest or sweepstakes participant. (*See* 18 U.S.C. § 2325(1)(A) and (B))
13. Victim.
 - a. For purposes of these *AG Guidelines*, the term “victim” means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including:
 1. In the case of a victim that is an institutional entity, an authorized representative of the entity.
 2. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference):
 - (a) A spouse;
 - (b) A legal guardian;
 - (c) A parent;
 - (d) A child;
 - (e) A sibling;
 - (f) Another family member; or
 - (g) Another person designated by the court.

(42 U.S.C. § 10607(e)(2))

Further, it is Justice Department policy that a person who is culpable for the crime being investigated or prosecuted should not be considered a victim for purposes of the rights and services provided under the *AG Guidelines*. A person who may be culpable for crimes other than the crime being investigated or prosecuted is considered a victim under this policy. For examples of the application of this definition, see Article I, E.

- b. Three different definitions of the term “victim” appear in the statutes and the Federal Rules of Criminal Procedure.

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- (1) The definition from 42 U.S.C. § 10607(e)(2), which applies to the majority of the statutory rights and services and generally for purposes of the *AG Guidelines*, is as follows:

The term “victim” means a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including:

- (a) In the case of a victim that is an institutional entity, an authorized representative of the entity.
 - (b) In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, at least one of the following (in order of preference): a spouse, a legal guardian, a parent, a child, a sibling, another family member, or another person designated by the court.
- (2) For purposes of sentencing procedures pursuant to Federal Rule of Criminal Procedure 32, the Rule provides that “ ‘victim’ means any individual against whom an offense has been committed for which a sentence is to be imposed. . . . ” (F.R.Crim.P. 32(f)(1))
 - (3) For purposes of restitution issues, “the term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may assume the victims’ rights under this section, but in no event shall the defendant be named as such representative or guardian.” (18 U.S.C. § 3663(a)(2))

14. Witness. A person who has information or evidence concerning a crime, and provides information regarding his/her knowledge to a law enforcement agency. Where the witness is a minor, the term “witness” includes an appropriate family member or legal guardian. The term “witness” does not include a person who is solely a defense witness.

Appendix B.
**Attorney General Guidelines for Victim and
Witness Assistance (2000 Ed.) Chart**

Fold out to view chart

ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESSES

INVESTIGATIVE COMPONENT

PROSECUTORIAL COMPONENT

RESPONSIBILITIES

• AT EARLIEST OPPORTUNITY

- (1) Identify victims (Art IV.A.2) (42 U.S.C. §10607(b)(1))
- (2) Assist victims in contacting sources for services listed in (3) below (Art IV.A.3.a(2)) (42 U.S.C. §10607(c)(1)(D))

• DURING INVESTIGATION

- (1) Arrange for reasonable protection (includes providing information on the remedies for intimidation and harassment) (Art IV.A.3.b) (42 U.S.C. §10607(c)(2))
- (2) Property (maintain property seized as evidence and return when no longer needed) (Art IV.A.3.c) (42 U.S.C. §10607(c)(6))
- (3) Notify victims' employers and creditors upon request (Art IV.A.3.d) (Pub L. 97-291 §6(a)(8))
- (4) Provide information and assistance for transportation, parking, translator services, and related services (Art IV.A.3.f) (Pub L. 97-291 §6(a)(10))

• DURING PROSECUTION

- (1) At court proceedings provide a separate waiting area for victims (Art IV.B.2.c) (42 U.S.C. §10607(C)(4))
- (2) Notify victims' employers and creditors upon request (Art IV.B.2.d) (Pub. L. 97-291 §6(a)(8))
- (3) Provide information and assistance for transportation, parking, translator services and related services (Art IV.B.2.f) (Pub. L. 97-291 §6(a)(10))
- (4) Provide general information about proceedings (Art IV.B.2.a(3)) (Pub. L. 97-291 §6(a)(1)(C) and (D))

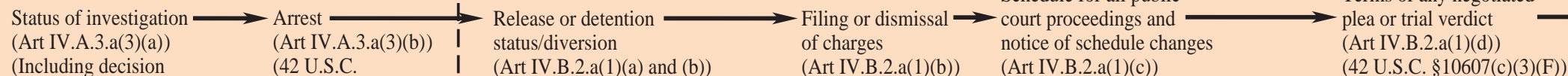
- (5) Make referrals (Art IV.B.2.a(4)) (42 U.S.C. §10607(c)(1)(D))
- (6) Government attorney consults with victim. Make reasonable efforts to consult about proposed plea negotiations. (Art IV.B.2.b) (42 U.S.C. §10606(b)(5))

- (7) Protect victim privacy (Art IV.B.2.e)
- (8) Change of venue — explore televising proceedings (Art IV.B.2.i) (42 U.S.C. §10608)

NOTICE

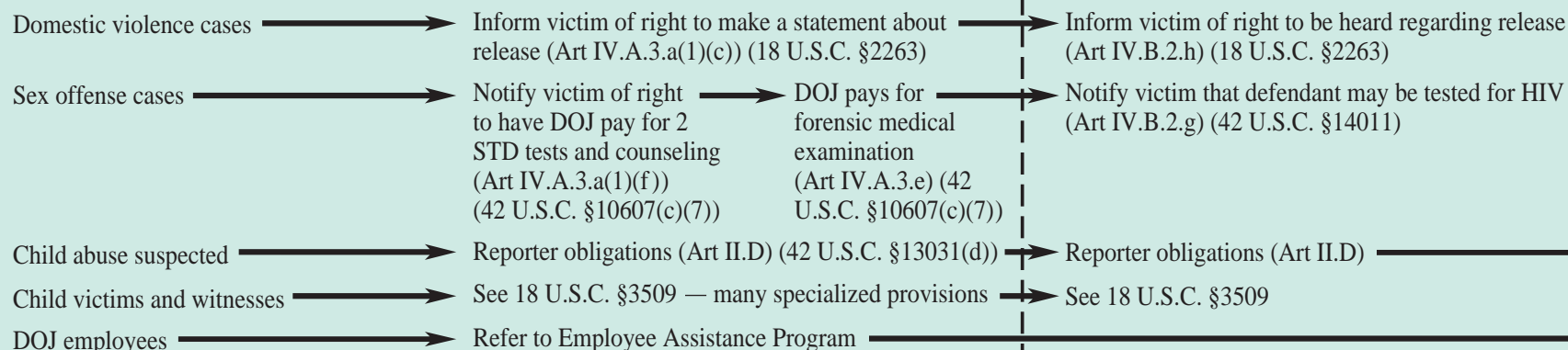
- (3) Initial notice: Notify victims of: (Art IV.A.3.a(1)) (42 U.S.C. §10607(b)(2))
 - a) Right to services (Art IV.A.3.a(1)(a)) (42 U.S.C. §10607(b)(2))
 - b) VWC's name & phone number (Art IV.A.3.a(1)(b)) (42 U.S.C. §10607(b)(3))
 - c) Place to receive emergency medical and social services (Art IV.A.3.a(1)(c)) (42 U.S.C. §10607(c)(1)(A))
 - d) Programs for counseling and support (Art IV.A.3.a(1)(e)) (42 U.S.C. §10607(c)(1)(C))
 - e) Compensation & restitution and how to obtain (Art IV.A.3.a(1)(d)) (42 U.S.C. §10607(c)(1)(B))

• NOTICE REGARDING MAJOR CASE EVENTS



ADDITIONAL RESPONSIBILITIES IN CERTAIN TYPES OF CASES

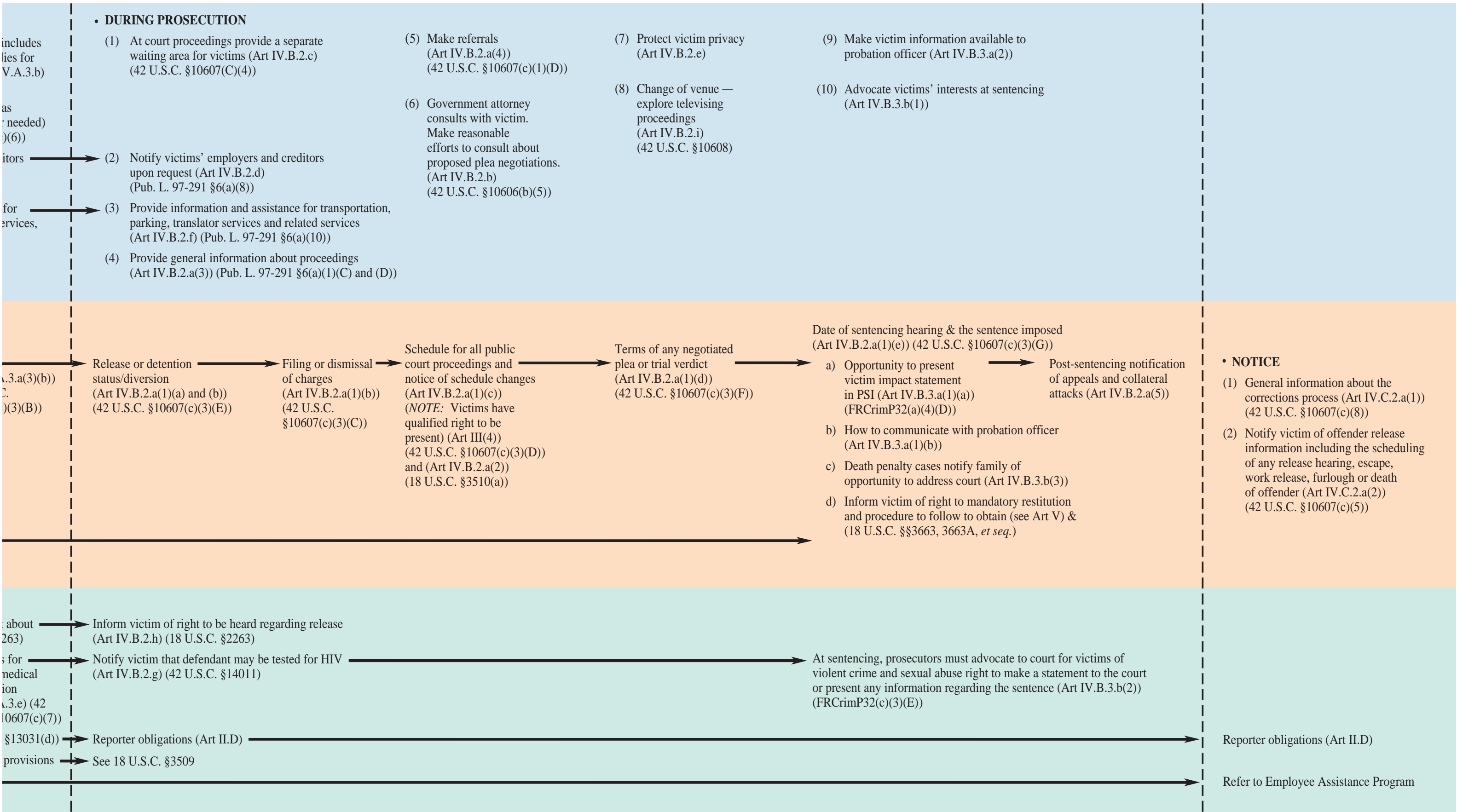
• IN CERTAIN TYPES OF CASES



GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2000 ED.)

CORRECTIONS COMPONENT

PROSECUTORIAL COMPONENT



AND IS NOT INTENDED TO BE AN EXHAUSTIVE LIST OF ALL FEDERAL VICTIMS' RIGHTS PROVISIONS. FOR MORE EXPLANATION, SEE THE CITED SOURCES.

Appendix C.

Selected Federal Laws Concerning Victims of Crime

CAVEAT

The summations that follow are intended for use only as an aid in research. Please refer to the exact language of the statute for an accurate account of the current law.

ALLOCUTION

See **VICTIMS' RIGHTS: Right to Speak in Court**

AMERICAN INDIAN CHILDREN

See **AMERICAN INDIANS**

AMERICAN INDIANS

Background Investigations (25 U.S.C. § 3207)

By the Secretary of the Interior and the Secretary of Health and Human Services (25 U.S.C. § 3207(a))

The Secretary of the Interior and the Secretary of Health and Human Services shall compile a list of all authorized positions within their respective departments that have duties and responsibilities involving regular contact with, or control over, Indian children.

Criminal Records (25 U.S.C. § 3207(b))

None of the individuals appointed to a position listed under 25 U.S.C. § 3207(a) may have been found guilty of or entered a plea of nolo contendere or guilty to any Federal, State, or Tribal crime of (1) violence; (2) sexual assault or contact, molestation, exploitation, or prostitution; or (3) crimes against persons.

Confidentiality (25 U.S.C. § 3205)

Agencies of any Indian Tribe, of any State, or of the Federal Government that investigate and treat incidents of abuse of children may provide information and records to those agencies of any Indian Tribe, any State, or of the Federal Government that need to know the information in the performance of their duties.

Indian Child Protection and Family Violence Prevention Program (25 U.S.C. § 3210)

Responsibilities of Agencies and Officials (25 U.S.C. § 3210(c))

An Indian Tribe operating an Indian Child Protection and Family Violence Prevention Program shall designate the agency or officials which shall be responsible for the (1) investigation of reported cases of child abuse and child neglect; (2) treatment and prevention of incidents of family violence; and (3) provision of immediate shelter and related assistance for victims of family violence and their dependents.

Responsibilities and Functions of (25 U.S.C. § 3210(d))

Funds may be used for (1) the establishment of a child protective services program, including employment and training of personnel and the purchase of equipment; (2) the establishment of a family violence prevention and treatment program, including employment of staff, provision of immediate shelter to victims of family violence and their dependents, training programs, and construction of shelters; (3) the development and implementation of a multidisciplinary child abuse investigation and prosecution program; (4) the development of Tribal codes and regulations; (5) training programs; (6) community education; and (7) other programs as the Secretary may approve.

Parental Consent (25 U.S.C. § 3206)

Examinations and Interviews (25 U.S.C. § 3206(a))

Photographs, x-rays, medical examinations, psychological examinations, and interviews of an Indian child alleged to have been subject to abuse in Indian Country shall be allowed without parental consent as long as local child protective services or local law enforcement officials have reason to believe the child has been subject to abuse.

Interviews by Law Enforcement and Child Protective Services Officials (25 U.S.C. § 3210(b))

Local law enforcement or child services officials need not first obtain consent from the parent, guardian, or legal custodian to interview an Indian child if they have reason to believe that the child has been subject to abuse in Indian Country.

ATTENDING AND OBSERVING TRIAL

See **VICTIMS' RIGHTS:** Right to Attend and Observe Trial

AUTHORIZATION (CONGRESSIONAL) FOR THE ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE

See Pub.L. 97-291, as amended Pub.L. 98-473, Title II, § 1408(b), Oct. 12, 1984, 98 Stat. 2177

CHILD VICTIMS

Adult Attendants (18 U.S.C. § 3509(i))

A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court may allow the attendant to remain close to the child during the child's testimony. During all other portions of the trial, the court may allow the attendant to hold the child's hand or allow the child to sit on the adult attendant's lap. The attendant may neither assist the child in giving testimony nor prompt the child in any way. To prevent prompting, the statute requires that the image of the attendant shall be recorded on videotape during the child's testimony.

Alternatives to Live In-Court Testimony (18 U.S.C. § 3509(b))

2-Way Closed Circuit Television Testimony

Generally (18 U.S.C. § 3509(b)(1))

Under certain circumstances, the attorney for the Government, the child's attorney, or a guardian *ad litem* appointed under 18 U.S.C. § 3509(h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television.

Who Must Be Present (18 U.S.C. § 3509(b)(1))

If such an order is granted, the attorney for the Government and the attorney for the defense (excluding *pro se* defendants) shall be present while such testimony is given and the child shall be subject to cross-examination.

Who May Be Present (18 U.S.C. § 3509(b)(1))

Other people who are permitted to be present in the same room where the child testifies include the child's attorney or guardian *ad litem* appointed under 18 U.S.C. § 3509(h) (*see Guardian Ad Litem*), television equipment operators, a court-appointed judicial officer, and other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

Videotaped Deposition of a Child (18 U.S.C. § 3509(b)(2))

Generally (18 U.S.C. § 3509(b)(2)(A))

The attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian *ad litem* appointed under 18 U.S.C. § 3509(h) (*see Guardian Ad Litem*) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

Admissibility (18 U.S.C. § 3509(b)(2)(C))

The videotaped deposition may be admitted into evidence if, at the time of trial, the court finds that the child is unable to testify for one of the four reasons listed in 18 U.S.C. § 3509(b)(2)(B)(i) (*see Approval of Application*).

Approval of Application (18 U.S.C. § 3509(b)(2)(B)(i))

To approve the application, the court must find that the child is likely to be unable to testify in open court in the physical presence of the defendant, judge, jury, and public for any of the following reasons: (1) fear; (2) a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court; (3) a mental or other infirmity; or (4) conduct by the defendant or defense counsel that causes the child to be unable to continue testifying.

Destruction of Tape (18 U.S.C. § 3509(b)(2)(F))

A videotaped deposition taken in accordance with this statute shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal, including Supreme Court review.

Protective Orders (concurrency with) (18 U.S.C. § 3509(b)(2)(E))

If a child's deposition is being videotaped under 18 U.S.C. § 3509(b)(2), the court may enter a protective order to protect the privacy of the child.

Judge Must Preside (18 U.S.C. § 3509(b)(2)(B)(iii))

If the court grants an order to videotape a child's deposition, the trial judge shall preside at the deposition and shall rule on all questions as if at trial.

Who May Be Present (18 U.S.C. § 3509(b)(2)(B)(iii))

People who are permitted to be present in the same room where the deposition is taken include the attorney for the Government, the attorney for the defense, the child's attorney or guardian *ad litem* appointed under 18 U.S.C. § 3509(h) (*see Guardian Ad Litem*), video equipment operators, other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant and, subject to 18 U.S.C. § 3509(b)(2)(B)(iv), the defendant.

Child Abuse Reporting (42 U.S.C. § 13031)

Generally (42 U.S.C. § 13031(a))

If a person described in 42 U.S.C. § 13031(b), on Federal land or in a Federally operated or Federally contracted facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, that person is required to make a report as soon as possible.

Immunity for Good Faith Reporting (42 U.S.C. § 13031(f))

All persons who, acting in good faith, make a report under 42 U.S.C. § 13031 (Child Abuse Reporting) or otherwise provide information or assistance with a report, investigation, or legal intervention pursuant to a report shall be immune from civil and criminal liability arising out of such action. Any such person is presumed to have acted in good faith. No immunity is accorded to persons acting in bad faith.

Multiple Interviews (42 U.S.C. § 13031(d))

Whenever appropriate, investigations shall be conducted jointly by social services and law enforcement personnel to avoid unnecessary multiple interviews with the child.

Child Care Worker Employee Background Checks (42 U.S.C. § 13041)

Each agency of the Federal Government and every Federally operated or Federally contracted facility that hires or contracts to hire individuals involved in the provision of child care services to children under the age of 18 shall assure that all existing and newly hired employees undergo a criminal history background check.

Civil Remedies for Personal Injuries (18 U.S.C. § 2255)

Generally (18 U.S.C. § 2255(a))

Any minor who is a victim of a violation of 18 U.S.C. § 2251 (Sexual Exploitation of Children) or § 2252 (Certain Activities Relating to Material Involving the Sexual Exploitation of Minors) and who suffers personal injury as a result may sue in District Court and may recover actual damages and the cost of the suit, including a reasonable attorney's fee. Any minor, as described in the preceding sentence, shall be deemed to have sustained damages of no less than \$50,000 in value.

Statute of Limitations (18 U.S.C. § 2255(b))

The statute of limitations for a civil suit brought under 18 U.S.C. § 2255(a) is six years after the right of action first accrues or not later than three years after a legal disability.

Closing the Courtroom (18 U.S.C. § 3509(e))

To prevent substantial psychological harm to the child or to prevent impairment of the child's ability to effectively communicate, the court may order the exclusion from the courtroom of all those who do not have a direct interest in the case, including the press.

Competency Examinations (18 U.S.C. § 3509(c))

Federal Rules of Evidence (18 U.S.C. § 3509(c)(1))

Nothing in this subsection shall be construed to abrogate rule 601 of the Federal Rules of Evidence (General Rule of Competency).

Compelling Reasons Requirement (18 U.S.C. § 3509(c)(4))

Competency examinations may be conducted only if the court finds compelling reasons. Age alone is not a compelling reason.

No Jury Present (18 U.S.C. § 3509(c)(6))

Competency examinations shall be conducted out of the sight and hearing of a jury.

Questions Asked (18 U.S.C. § 3509(c)(8))

Questions asked of the child at a competency hearing shall be appropriate to the age and developmental level of the child, shall not be related to issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

Competency Presumption (18 U.S.C. § 3509(c)(2))

A child is presumed to be competent.

Confidentiality

See **CHILD VICTIMS: Privacy Protection**

Enhanced Penalty

See **SENTENCING: Vulnerable Victim**

Guardian Ad Litem (18 U.S.C. § 3509(h))

Generally (18 U.S.C. § 3509(h)(1))

To protect the best interests of the child, the court may appoint a guardian *ad litem* for a child who was a victim of, or a witness to, a crime involving abuse or exploitation as defined in 18 U.S.C. § 3509(a).

Duties (18 U.S.C. § 3509(h)(2))

A guardian *ad litem* is required to marshal and coordinate the delivery of resources and special services to the child. Beyond those duties, a guardian *ad litem* may attend all depositions, hearings, and trial proceedings in which a child participates and may make recommendations to the court concerning the welfare of the child. Moreover, the guardian *ad litem* may have access to all reports, evaluations, and records, except attorney's work product, that are necessary to effectively advocate for the child (limitations on access to grand jury materials are stated).

Immunities (18 U.S.C. § 3509(h)(3))

Under a presumption of good faith conferred by this section, the guardian *ad litem* shall be immune from civil and criminal liability for acting within the lawful scope of the duties described in 18 U.S.C. § 3509(h)(2).

Special Relationship with Child (18 U.S.C. § 3509(h)(2))

A guardian *ad litem* shall not be compelled to testify in court concerning any information or opinion received from the child in the course of serving as a guardian *ad litem*.

Missing Children

See Reporting Requirement

Multidisciplinary Child Abuse Teams (role of) (18 U.S.C. § 3509(g))

The role of a multidisciplinary child abuse team is to provide certain services for a child, including (1) medical diagnoses and evaluation services, to include provision of or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings; (2) telephone consultation services in emergencies and in other situations; (3) medical evaluations related to abuse or

neglect; (4) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, other care givers, or any other individual involved in a child victim or child witness case; (5) expert medical, psychological, and related professional testimony; (6) case service coordination and assistance, including the location of services available from public and private agencies in the community; and (7) training services in handling child victims and child witnesses provided for judges, litigators, court officers, and others involved in child victim and child witness cases.

Privacy (18 U.S.C. § 403)

To knowingly or intentionally violate the privacy protection accorded by 18 U.S.C. § 3509 (Child Victims' and Child Witnesses' Rights) constitutes a crime of contempt, punishable by not more than one year imprisonment or a fine or both.

Privacy Protection (18 U.S.C. § 3509(d))

Application (18 U.S.C. § 3509(d)(B))

Title 18 U.S.C. § 3509(d) applies to all employees of the Government connected with the case, including DOJ employees, employees of the court, the jury, and the defendant and his employees (for example, the defendant's attorney).

Confidentiality (8 U.S.C. § 3509(d)(1))

Those individuals described in 18 U.S.C. § 3509(d) shall keep confidential all documents that disclose the name or any other information concerning a child and shall disclose such documents only to persons who, by reason of their participation in the proceeding, have reason to know such information.

Reporting Requirement for Missing Child (42 U.S.C. § 5779)

Each Federal, State, and local law enforcement agency shall report to the National Crime Information Center of the Department of Justice each case of a missing child under the age of 18 received by that agency.

Stay of Civil Action (18 U.S.C. § 3509(k))

During the criminal action for damage or injury to the person of a child, any pending civil cause of action for recovery of compensation arising out of the same occurrence in which the child is the victim shall be stayed until the end of all phases of the criminal action. Any mention of the civil action during the criminal proceeding is prohibited. For purposes of this section, a criminal action is pending until final adjudication.

Speedy Trial (18 U.S.C. § 3509(j))

On motion by the attorney for the Government, by the guardian *ad litem*, or by the court itself, the court may designate a proceeding in which a child is called to give testimony as being of special public importance. In such cases, the court shall expedite the proceeding and ensure that it takes precedence over any other proceeding to minimize the length of time the child must endure the stress of involvement with the criminal process.

Televised Testimony

See **CHILD VICTIMS: Alternatives to Live In-Court Testimony**

Testimonial Aids (18 U.S.C. § 3509(l))

The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.

Victim Impact Statements (18 U.S.C. § 3509(f))

A guardian *ad litem*, appointed under 18 U.S.C. § 3509(h), shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the personal consequences of the child's victimization, communicating this information at a level and in a form commensurate with the child's age and ability.

Videotaped Deposition of

See **CHILD VICTIMS: Alternatives to Live In-Court Testimony**

DOMESTIC VIOLENCE

See **RELEASE OF DEFENDANT**

See **SENTENCING: Stalking or Domestic Violence**

ENHANCED PENALTIES

See **SENTENCING**

FINES

Factors To Consider To Determine Amount of Fine To Impose (Sent. Guidelines 5E1.2(d))

To determine the amount of the fine, the court shall consider, among other factors, the (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant); (2) any restitution or reparation the defendant has made or is obligated to make; and (3) any other pertinent equitable considerations.

Restitution (concurrency with) (18 U.S.C. § 3572(b))

The court shall not impose a fine or other monetary penalty which will impair the ability of the defendant to make restitution to the victim.

Factors To Consider In Imposing a Fine (18 U.S.C. § 3572(a))

In determining whether to impose a fine, the amount of the fine, payment schedule, and method of payment, the court shall consider, among other factors, whether restitution has been ordered, has been made, and the amount of such restitution.

FORFEITURE

Civil Forfeiture (18 U.S.C. § 2254)

The following property shall be subject to civil forfeiture: all child pornography, property purchased with the profits from the production of child pornography, and all property used in the production of child pornography.

Criminal Forfeiture (18 U.S.C. § 2253)

A person who is convicted of an offense under 18 U.S.C. Chapter 110 (Sexual Exploitation and Other Abuse of Children) involving a visual depiction described in 18 U.S.C. § 2251 (Sexual Exploitation of Children), § 2251A (Selling or Buying of Children), or § 2252 (Certain Activities Relating to Material Involving the Sexual Exploitation of Minors) shall forfeit the following items to the United States: (1) any visual depiction described in 18 U.S.C. § 2251, § 2251A, § 2252, or any book, magazine, periodical, film, videotape, or other matter that contains any such visual depiction, that was produced, transported, mailed, shipped, or received in violation of 18 U.S.C. Chapter 110; (2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and, (3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense.

Special Forfeiture

See **NOTORIETY FOR PROFIT**

FRAUD

Mandatory Restitution for Telemarketing Fraud

See **RESTITUTION:** for Telemarketing Fraud

Notice of Fraud Conviction

See **NOTICE**

HIV/AIDS TESTING

See **SEXUALLY TRANSMITTED DISEASE TESTING**

IDENTIFICATION OF VICTIMS

See **VICTIMS' SERVICES:** Identification of Victims

NOTICE

Notice of Fraud Conviction (18 U.S.C. § 3555)

In addition to any sentence imposed under 18 U.S.C. § 3551 (Authorized Sentences), the court may order that a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices give

reasonable notice and explanation of the conviction to the victims of the offense. The court shall designate the means by which notice will be given, which may be by mail, by advertising, or by other appropriate means.

Payment of Cost of Notice to Victims (Sent. Guidelines 5F1.4)

The court may order the defendant to pay the cost of giving notice to victims pursuant to 18 U.S.C. § 3555 (Order of Notice to Victims). This cost may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive.

Also, *see* **NOTORIETY FOR PROFIT: Notice to Victims of Order of Special Forfeiture**

NOTORIETY FOR PROFIT

Order of Special Forfeiture (18 U.S.C. § 3681)

At any time after the conviction of a defendant for an offense under 18 U.S.C. § 794 (Gathering or Delivering Defense Information to Aid Foreign Government), or for an offense against the United States resulting in physical harm to an individual, the United States Attorney may move for an order that the defendant be required to forfeit all or any part of proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.

Notice to Victims of Order of Special Forfeiture (18 U.S.C. § 3682)

To notify victims of an order of special forfeiture, the United States Attorney shall, within 30 days after the order is issued and at such other times as the Attorney General may require, publish a notice subject to the following conditions: (1) the notice shall be published in a newspaper of general circulation in the district in which the offense occurred, and (2) the notice shall state the defendant's name and other identifying information, state the offense, and state that the court has imposed an order of special forfeiture.

PROTECTIVE ORDER

See **TEMPORARY RESTRAINING ORDER**

RELEASE OF DEFENDANT

Pretrial Release Hearing (18 U.S.C. § 3142)

In a case that involves a serious risk that the defendant will threaten, injure, or intimidate a prospective witness or juror, the attorney for the Government may move for a hearing to determine whether placing any condition on the pretrial release of a defendant will reasonably assure the safety of any other person.

Victim's Opportunity to Speak at Pretrial Release Hearing (18 U.S.C. § 2263)

In a proceeding pursuant to 18 U.S.C. § 3142 (Pretrial Release Hearing) in cases of interstate domestic violence, stalking, and violation of a protective order, the alleged victim shall be given an opportunity to be heard regarding the danger posed by the defendant.

RESPONSIBLE OFFICIALS

See **VICTIMS' SERVICES: Description of Services**

RESTITUTION

Generally (18 U.S.C. § 3663(a))

This section gives the court the authority to order restitution. Restitution may be ordered in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law. A restitution order may require the defendant to make restitution to any victim of an offense or, if the victim is deceased, to the victim's estate.

Assignment of Interest in Restitution Payments (18 U.S.C. § 3664(g)(2))

A victim may, at any time, assign the victim's interest in restitution payments to the Crime Victim's Fund in the Treasury without, in any way, impairing the obligation of the defendant to make such payments.

Complex Cases (18 U.S.C. § 3663(a)(1)(B)(ii))

The court may decline to make a restitution order if it finds that the complication and prolongation of the sentencing process from the fashioning of the order outweighs the need to provide restitution to any victims.

Change in Defendant's Economic Circumstances (18 U.S.C. § 3664(k))

A restitution order shall provide that the defendant shall notify the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. Once the court receives notification of a change in the defendant's economic circumstances, it may, on its own motion or the motion of any party, including a victim, adjust the payment schedule or require immediate payment in full.

Compensation from Other Sources (18 U.S.C. § 3664)

Civil Proceedings (18 U.S.C. § 3664(j)(2))

Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim (1) in any Federal civil proceeding and (2) in any State civil proceeding, to the extent provided by the law of the State.

Insurance Payments and the Like (18 U.S.C. § 3664(j)(1))

If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the party who provided or is obligated to provide the compensation, but the

restitution order shall provide that all restitution to victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

Not a Factor in Determining Restitution Amount (18 U.S.C. § 3664(f)(1)(B))

In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

Default

Generally (18 U.S.C. § 3572(i))

A payment of restitution is in default if a payment is delinquent (*see Delinquent*) for more than 90 days. When this occurs, the entire amount is due within 30 days after notification of the default, subject to the provisions of 18 U.S.C. § 3613A (*see Effect of Default*).

Effect of Default (18 U.S.C. § 3613A)

If the defendant is in default on a payment of restitution, the court may take action in any of the following forms: Pursuant to 18 U.S.C. § 3565, the court may revoke probation or a term of supervised release or modify the terms or conditions of probation or a term of supervised release; resentence a defendant pursuant to 18 U.S.C. § 3614; hold the defendant in contempt of court; enter a restraining order or injunction; order the sale of property of the defendant; accept a performance bond; enter or adjust a payment schedule; or take any other action necessary to obtain compliance with the order of a fine or restitution.

Delinquency (18 U.S.C. § 3572(h))

A payment of restitution is delinquent if the payment is more than 30 days late.

Economic Circumstances of the Defendant Irrelevant (18 U.S.C. § 3664(f)(1)(A))

When the court orders restitution, it shall do so in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant. Compare with 18 U.S.C. § 3663(a)(1)(B)(i)(II), which requires that the court consider the economic circumstances of the defendant in determining whether to order restitution under that section.

Estoppel (18 U.S.C. § 3664(l))

A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding brought by the victim, to the extent consistent with State law.

Fines

See FINES: Restitution (concurrency with)

In-Kind Restitution (18 U.S.C. § 3664(f)(4))

An in-kind (noncash) payment described in 18 U.S.C. § 3664(f)(3)(A) (*see* Type of Payment) may be in the form of (1) return of property; (2) replacement of property; or, (3) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

Installment Payments

Equality of Payments (18 U.S.C. § 3572(d)(1))

If the court provides for installment payments, the installments shall be equal in monthly payments over the period provided by the court, unless the court establishes another schedule.

Length of Time of Payments (18 U.S.C. § 3572(d)(2))

Also, the length of time over which the scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made.

Joint and Several Liability of Defendants (18 U.S.C. § 3664(h))

If the court finds that more than one defendant has contributed to the loss of a victim, the court (1) may make each defendant liable for payment of the full amount of restitution, or (2) may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

Mandatory Restitution

Mandatory Restitution to Victims of Certain Crimes (18 U.S.C. § 3663A)

The court shall order mandatory restitution in addition to, or, in the case of a misdemeanor, in addition to or in lieu of any other penalty, for the following crimes: (1) those in which there is an identifiable victim or victims who have suffered a physical injury or pecuniary loss, and (2) those that fall under one of the following categories: (a) a crime of violence, as defined in 18 U.S.C. § 16; (b) an offense against property under Title 18 of the U.S. Code, including any offense committed by fraud or deceit; or (c) an offense described in 18 U.S.C. § 1365 (relating to tampering with consumer products).

for Interstate Domestic Violence, Stalking, and Violation of a Protective Order (18 U.S.C. § 2264)

Notwithstanding 18 U.S.C. § 3663 (Order of Restitution) or § 3663A (Mandatory Restitution to Victims of Certain Crimes) and, in addition to any other civil or criminal penalty, the court shall order restitution for any offense under 18 U.S.C., Chapter 110A (Interstate Domestic Violence, Stalking, and Violation of a Protective Order).

for Sexual Abuse (18 U.S.C. § 2248)

Notwithstanding 18 U.S.C. § 3663 (Order of Restitution) or § 3663A (Mandatory Restitution to Victims of Certain Crimes) and, in addition to any other civil or criminal penalty, the court shall order restitution for any offense under 18 U.S.C., Chapter 109A (Sexual Abuse).

for Sexual Exploitation and Other Abuse of Children (18 U.S.C. § 2259)

Notwithstanding 18 U.S.C. § 3663 (Order of Restitution) or § 3663A (Mandatory Restitution to Victims of Certain Crimes) and, in addition to any other civil or criminal penalty, the court shall order restitution for any offense under 18 U.S.C., Chapter 110 (Sexual Exploitation and Other Abuse of Children).

for Telemarketing Fraud (18 U.S.C. § 2327)

Notwithstanding 18 U.S.C. § 3663 (Order of Restitution) or § 3663A (Mandatory Restitution to Victims of Certain Crimes) and, in addition to any other civil or criminal penalty, the court shall order restitution for any offense under 18 U.S.C., Chapter 113A (Telemarketing Fraud).

Method of Payment

See Installment Payments

Multiple Victims

Generally (18 U.S.C. § 3664(i))

If the court finds that more than one victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim.

The United States as One of the Victims (18 U.S.C. § 3664(i))

If the United States is a victim, the court shall ensure that all other victims receive full compensation before the United States receives any restitution.

Participation of Victim (18 U.S.C. § 3664(g)(1))

No victim shall be required to participate in any phase of a restitution order.

Payment of Restitution With Bail Money (28 U.S.C. § 2044)

On motion of the United States Attorney, the court shall order any money belonging to and deposited by, or on behalf of, the defendant with the court for the purposes of a criminal appearance bail bond (trial or appeal) to be held and paid over to the United States Attorney to be applied to the payment of any assessment, fine, restitution, or penalty imposed upon the defendant. The court shall not release any money deposited for bond purposes after a plea or verdict of the defendant's guilt has been entered and before sentencing, except upon a showing that an assessment, fine, restitution, or penalty cannot be imposed for the offense the defendant committed or that the defendant would suffer an undue hardship.

Presentence Reports (18 U.S.C. § 3664)

Notice by Probation Officer (18 U.S.C. § 3664(b)(2))

Prior to submitting a presentence report under 18 U.S.C. § 3664(a), the probation officer shall, to the extent practicable, provide all victims notice of (1) the offense or offenses; (2) the amounts subject to restitution submitted to the probation officer; (3) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses; (4) the scheduled date, time, and place of the sentencing hearing; (5) the availability of a lien in favor of the victim pursuant to 18 U.S.C. § 3664(m)(1)(B); and (6) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution. Title 18 U.S.C. § 3664(b)(2)(B) also requires the probation officer to provide the victim with a form for submitting such an affidavit.

Restitution Orders and (18 U.S.C. § 3664(a))

For orders of restitution under Title 18 of the U.S. Code, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

Restitution by Plea Agreement (18 U.S.C. § 3663(a)(3))

The court may order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

Sentencing

Identifiable Victim (Sent. Guidelines 5E1.1(a))

In the case of an identifiable victim, the court shall (1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248 (Sexual Abuse), § 2259 (Sexual Exploitation and Other Abuse of Children), § 2264 (Interstate Domestic Violence, Stalking, and Violation of a Protective Order), § 2327 (Telemarketing Fraud), § 3663 (Order of Restitution), or § 3663A (Mandatory Restitution to Victims of Certain Crimes); or (2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss in the case of an identifiable victim of the offense if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1), but otherwise meets the criteria for an order of restitution under that section.

Nominal Periodic Payments (Sent. Guidelines 5E1.1(f))

A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

Restitution Made Before Fine Paid (Sent. Guidelines 5E1.1(c))

If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

Subsequent Windfalls to Defendant While Incarcerated (18 U.S.C. § 3664(n))

If a person required to provide restitution receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

Time of Payment (18 U.S.C. § 3572(d))

Restitution shall be paid immediately unless, in the interest of justice, the court provides for payment on a date certain or in installments.

Type of Payment (18 U.S.C. § 3664(f)(3)(A))

A restitution order may direct the defendant to make (1) a single, lump sum payment; (2) partial payments at specified intervals; (3) in-kind (noncash) payments; or (4) a combination of payments at specified intervals and in-kind payments.

RETALIATION AGAINST A VICTIM, WITNESS, OR AN INFORMANT

Title 18 U.S.C. § 1513 lists and refers the reader to various sections of the U.S. Code for the penalties for various acts done or attempts made to retaliate against a witness, victim, or an informant who has attended an official proceeding, testified, given documents or other objects in an official proceeding, or provided law enforcement any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings.

RIGHTS OF VICTIM

See **VICTIMS' RIGHTS**

SENTENCING

Extreme Conduct (Policy Statement) (Sent. Guidelines 5K2.8)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

Extreme Psychological Injury (Policy Statement) (Sent. Guidelines 2K2.3)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked. Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

Hate Crime Motivation (Sent. Guidelines 3A1.1(a))

If the finder of fact at trial or, in the case of a plea, if the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, the sentence is increased.

Injury to Victim (Sent. Guidelines 2H1.3)

If injury occurred to the victim from the commission of an offense, the sentence is increased.

Official Victim (Sent. Guidelines 3A1.2)

If (1) the victim was a Government officer or employee (either at the time of the offense or at any time prior to the offense) or a member of the immediate family of any Government officer or employee, and the offense of conviction was motivated by such status; or if (2) during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury, the sentence is increased.

Physical Injury (Policy Statement) (Sent. Guidelines 5K2.2)

If significant injury resulted from the crime, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant, though criminally negligent, did not knowingly create the risk of harm, a less substantial departure would be indicated.

Restraint of Victim (Sent. Guidelines 3A1.3)

If a victim was physically restrained in the course of the offense, the sentence is increased.

Stalking or Domestic Violence (Sent. Guidelines 2A6.2)

If the offense included a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim as an aggravating factor, the sentence is increased.

Vulnerable Victim (Sent. Guidelines 3A1.1(b))

If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, the sentence is increased.

SERVICES TO VICTIMS

See **VICTIMS' SERVICES**

SEXUALLY TRANSMITTED DISEASE TESTING

Limited Testing of Defendants (42 U.S.C. § 14011(b))

The victim of an offense referred to in 42 U.S.C. § 14011(a) may obtain an order in the district court in which charges are brought, after notice to the defendant and an opportunity to be heard, requiring that the defendant be tested for HIV and that the results of the test be communicated to the victim and the defendant. Any test result of the defendant given to the victim or the defendant must be accompanied by appropriate counseling.

Payment for the Cost of (42 U.S.C. § 10607(c)(7))

Generally (42 U.S.C. § 10607(c)(7))

Whenever an investigatory officer determines it is necessary or useful for evidentiary purposes to have a physical examination conducted upon the victim of a sexual assault, the Attorney General or the head of the investigating department or agency shall pay the cost of the examination, either directly or by reimbursing the victim for payment he or she made.

Two-Test Maximum (42 U.S.C. § 10607(c)(7))

During the 12 months following a sexual assault that poses a risk of transmission, the Attorney General shall provide for the payment of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases (STDs), including HIV, gonorrhea, herpes, chlamydia, and syphilis and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of STDs to the victim as a result of the assault.

Waiver of Anonymity and Confidentiality (42 U.S.C. § 10607(c)(7))

A victim may waive anonymity and confidentiality of any test paid for under 42 U.S.C. § 10607(c)(7).

“SON OF SAM” LAW

See **NOTORIETY FOR PROFIT:** Order of Special Forfeiture

STALKING

See **RELEASE OF DEFENDANT**

See **SENTENCING:** Interstate Domestic Violence, Stalking, and Violation of a Protective Order

TAMPERING WITH A VICTIM, WITNESS, OR AN INFORMANT

According to Title 18 U.S.C. § 1512, tampering with a victim, witness, or an informant (1) by killing or attempted killing, (2) through intimidation or physical force, (3) by threat, (4) by corrupt persuasion or the attempt thereof, or (5) by engaging in misleading conduct toward another person with intent to prevent, influence, delay, or otherwise affect testimony or other acts relevant to a criminal proceeding is a crime and the punishments are enumerated therein.

TEMPORARY RESTRAINING ORDER

According to Title 18 U.S.C. § 1514, an attorney for the Government may apply for a temporary restraining order or a protective order prohibiting harassment of a victim or witness in a Federal criminal case.

TELEVISED COURT PROCEEDINGS

Closed Circuit Televised Court Proceedings, Generally (42 U.S.C. § 10608)
To permit victims of crime to watch criminal trial proceedings in cases where the venue has been changed both out of the State and more than 350 miles from the location in which those proceedings originally would have taken place, the trial court shall order closed circuit televising of the proceedings to that location for viewing by such persons as the court determines to have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense caused by the change of venue.

Child Victims

See **CHILD VICTIMS:** Alternatives to Live In-Court Testimony: 2-Way Closed Circuit Television Testimony.

VENUE

See **TELEVISED COURT PROCEEDINGS:** Closed Circuit Televised Court Proceedings.

VICTIM IMPACT STATEMENTS

(Fed.R.Crim.P. 32(b)(4)(D)) Presentence reports must contain verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact of the crime on any individual against whom the offense has been committed.

By Children

See **CHILD VICTIMS:** Victim Impact Statements of

VICTIMS' RIGHTS

Generally (42 U.S.C. § 10606)

In addition to other rights afforded victims by the Code, a crime victim has the following rights: (1) to be treated with fairness and with respect for the victim's dignity and privacy; (2) to be reasonably protected from the accused offender; (3) to be notified of court proceedings; (4) to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial; (5) to confer with the attorney for the Government in the case; (6) to restitution; and (7) to information about the conviction, sentencing, imprisonment, and release of the offender.

Child Victims (rights of)

See **CHILD VICTIMS**

Right to Attend and Observe Trial (18 U.S.C. § 3510)

Capital Cases (18 U.S.C. § 3510(b))

Victims may not be excluded from the trial of a defendant accused of that offense because such victim may, at sentencing, make a statement or present any information in relation to the sentence.

Noncapital Cases (18 U.S.C. § 3510(a))

Victims may not be excluded from the trial of a defendant accused of that offense because such victim may, at sentencing, testify as to the effect of the sentence on the victim and the victim's family.

Right to Be Free From Gender Crimes (42 § U.S.C. 13981)

All persons within the United States shall have the right to be free from crimes of violence motivated by gender, meaning crimes committed because of gender or on the basis of gender and due, at least in part, to an animus based on the victim's gender.

Right to Speak in Court (Fed.R.Crim.P. 32(c)(3)(E))

Before imposing the sentence for crimes of violence or sexual abuse, the court must address the victim personally, if the victim is present at the sentencing hearing, and determine if the victim wishes to make a statement or present any information in relation to the sentence.

VICTIMS' SERVICES

Designation of Responsible Officials (42 U.S.C. § 10607(a))

The head of each department and agency of the United States engaged in the detection, investigation, or prosecution of a crime shall designate by names and office titles the persons who will be responsible for identifying the victims of crime and performing the services described in 42 U.S.C. § 10607(c) at each stage of a criminal case.

Description of Services (42 U.S.C. § 10607(c))

During Court Proceedings (42 U.S.C. § 10607(c)(4))

During court proceedings, a responsible official shall ensure that a victim is provided a waiting area removed from and out of the sight and hearing of the defendant and defense witnesses.

During Investigation and Prosecution (42 U.S.C. § 10607(b)(3))

During the investigation and prosecution of a crime, a responsible official shall provide a victim with the earliest possible notice of (1) the status of the investigation of the crime, to the extent that it is appropriate to inform the victim and to the extent that it will not interfere with the investigation; (2) the arrest of a suspected offender; (3) the filing of charges against a suspected offender; (4) the scheduling of each court proceeding that the witness either is required to attend or, under 42 U.S.C. § 10606(b)(4), is entitled to attend; (5) the release or detention status of an offender or suspected offender; (6) the acceptance of a plea of guilty or nolo contendere or the rendering of a verdict after trial; and (7) the sentence imposed on an offender, including the date on which the offender will be eligible for parole.

Post-Trial (42 U.S.C. § 10607(c)(5))

After trial, a responsible official shall provide a victim the earliest possible notice of (1) the scheduling of a parole hearing for the offender; (2) the escape, work release, furlough, or any other form of release from custody of the offender; and (3) the death of the offender, if the offender dies while in custody.

Additional Duties of Responsible Officials (42 U.S.C. §§ 10607(c)(1), (c)(8))

The duties of a responsible official include (1) informing a victim of the place where the victim may receive emergency medical and social services; (2) informing a victim of any restitution or other relief to which the victim may be entitled under this or any other law, and the manner in which such relief may be obtained; (3) informing a victim of public and private programs that are available to provide counseling, treatment, and other support to the victim; (4) assisting a victim in contacting the persons who are responsible for providing the services and relief described in (1), (2), and (3); and (5) providing the victim with general information regarding the corrections process, including information about work release, furlough, probation, and eligibility for each.

Property of a Victim (42 U.S.C. § 10607(c)(6))

At all times, a responsible official shall ensure that any property of a victim that is being held for evidentiary purposes be maintained in good condition and returned to the victim as soon as it is no longer needed for evidentiary purposes.

Protection (42 U.S.C. § 10607(b)(2))

A responsible official shall arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender.

Identification of Victims (42 U.S.C. § 10607(b))

At the earliest opportunity after the detection of a crime at which it may be done without interfering with an investigation, a responsible official, as designated pursuant to 42 U.S.C. § 10607(a), shall (1) identify the victims of a crime; (2) inform the victims of their rights to receive, on request, the services described in 42 U.S.C. § 10607(c); and (3) inform the victims of the name, title, business address, and telephone number of the responsible official to whom the victim should address a request for each of the services described in 42 U.S.C. § 10607(c).

WAITING AREAS

See **VICTIMS' SERVICES: Description of Services: During Court Proceedings**

Appendix D. Popular Names of Selected Statutes Related to Victims of Crime and Their Respective Provisions in the U.S. Code

Antiterrorism and Effective Death Penalty Act of 1996

8 U.S.C.	§§	1189, 1252, 1531 to 1537
18 U.S.C.	§§	2322b to 2322d, 3059B, 3295, 3613A, 3663A
22 U.S.C.	§§	262p-4q, 2349aa-10, 2377, 2378, 2781
28 U.S.C.	§§	2261 to 2266
40 U.S.C.	§	137
42 U.S.C.	§§	10603b, 10608

Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992

42 U.S.C.	§§	5106f-1, 10414, 10415
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Child Abuse Victims' Rights Act of 1986

18 U.S.C.	§	2255
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Child Support Recovery Act of 1992

18 U.S.C.	§	228
42 U.S.C.	§§	3796cc, 3796cc-1 to 3796cc-6

Crime Control Act of 1990

10 U.S.C.	§	2693
12 U.S.C.	§§	4201 to 4213, 4221 to 4230, 4241 to 4247
15 U.S.C.	§	2057b
18 U.S.C.	§§	225, 403, 1032, 1517, 2258, 3059A, 3509, 4046
21 U.S.C.	§	863
28 U.S.C.	§§	2044, 3001 to 3015, 3201 to 3206, 3301 to 3308
42 U.S.C.	§§	3759, 3762a, 3762b, 3796aa, 3796aa-1, 3796aa-3, 3796aa-5, 3796aa-6, 3796aa-8, 3796bb, 3796bb-1, 5779, 5780, 10606, 10607, 13001, 13001a, 13001b, 13002 to 13004, 13011 to 13014, 13021 to 13024, 13031, 13041

Justice for Victims of Terrorism Act of 1996

42 U.S.C. §§ 10603b, 10608

Mandatory Victims Restitution Act of 1996

18 U.S.C. §§ 3613A, 3663A

Victim and Witness Protection Act of 1982 (VWPA)

18 U.S.C. §§ 1512 to 1515, 3663, 3664

Victim Rights Clarification Act of 1997

18 U.S.C. § 3510

Victims of Child Abuse Act of 1990

18 U.S.C. §§ 403, 2258, 3509

42 U.S.C. §§ 3796aa, 3796aa-1 to 3796aa-6, 3796aa-8, 13001, 13001b, 13002 to 13004, 13011 to 13014, 13021 to 13024, 13031, 13041

Victims of Crime Act of 1984

18 U.S.C. §§ 3013, 3681, 3682

42 U.S.C. §§ 10601 to 10603, 10603a, 10603b, 10604, 10605

Victims of Terrorism Compensation Act

5 U.S.C. §§ 5569, 5570

10 U.S.C. §§ 1032, 1095a, 2181 to 2185

37 U.S.C. §§ 559, 1013

Victims' Rights and Restitution Act of 1990

42 U.S.C. §§ 10606, 10607

Violence Against Women Act of 1994

16 U.S.C. § 1a-7a

18 U.S.C. §§ 2247, 2248, 2259, 2261 to 2266

42 U.S.C. §§ 300w-10, 3796gg, 3796gg-1 to 3796gg-5, 3796hh, 3796hh-1 to 3796hh-4, 5712d, 10416 to 10418, 13931, 13941 to 13943, 13951, 13961 to 13963, 13971, 13981, 13991 to 13994, 14001, 14002, 14011 to 14015, 14031 to 14040

Violent Crime Control and Law Enforcement Act of 1994

2 U.S.C.	§	901a
15 U.S.C.	§	45a
16 U.S.C.	§§	1a-7a, 831c-3, 5201 to 5207
18 U.S.C.	§§	21, 23, 36, 37, 470, 511A, 521, 668, 880, 1033, 1034, 1118 to 1121, 1547, 1716D, 2245, 2247, 2248, 2258, 2259, 2261 to 2266, 2280, 2281, 2325 to 2327, 2332a, 2339A, 2721 to 2725, 3239, 3286, 3294, 3591 to 3598, 3608, 3626, 4047
21 U.S.C.	§	849
28 U.S.C.	§§	540A, FRE Rule 413 to 415
31 U.S.C.	§§	6701 to 6720
42 U.S.C.	§§	3796dd, 3796dd-1 to 3796dd-8, 3796ee, 3796ee-1 to 3796ee-5, 3796ff, 3796ff-1 to 3796ff-4, 3796gg, 3796gg-1 to 3796gg-5, 3796hh, 3796hh-1 to 3796hh-4, 3796jj, 3796jj-1 to 3796jj-7, 3796kk, 3796kk-1 to 3796kk-6, 5776a, 10416 to 10418, 13701 to 13712, 13721 to 13725, 13741 to 13744, 13751 to 13758, 13771 to 13777, 13791 to 13793, 13801, 13802, 13811, 13812, 13821 to 13826, 13841, 13842, 13851 to 13853, 13861 to 13868, 13881 to 13883, 13891 to 13893, 13901, 13902, 13911, 13921, 13931, 13941 to 13943, 13951, 13961 to 13963, 13971, 13981, 13991 to 13994, 14001, 14002, 14011 to 14015, 14031 to 14040, 14051 to 14053, 14061, 14062, 14072, 14081 to 14083, 14091 to 14102, 14111 to 14119, 14131 to 14134, 14141, 14142, 14151, 14161, 14171, 14181, 14191 to 14199, 14211, 14213, 14214, 14221 to 14223

Appendix E. Sample Petition and Affidavit, Order for HIV/STD Testing, and Pamphlet

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN RE PETITION OF _____)
_____)
FOR AN ORDER UNDER 42 U.S.C.)
SECTION 14011(b), REQUIRING)
_____ TO SUBMIT)
TO TESTS FOR THE ETIOLOGIC)
AGENT FOR ACQUIRED IMMUNE)
DEFICIENCY SYNDROME)

PETITION AND AFFIDAVIT

I, **(Insert name of victim here.)** under oath do hereby apply to the Court and further depose and say as follows:

1. I am the victim of a sexual assault that poses a risk of transmission of a sexually transmitted disease. Specifically, I was **(Insert the type of offense here. For example, “Sexual Act” at 18 U.S.C. 2246(2)(A-C) or “Sexual Abuse of a Minor” at 18 U.S.C. 2246(2)(D), etc.)**, by **(Insert name of defendant here.)** (hereinafter referred to as “defendant”). I have been informed by **(Insert name of the medically trained counselor here.)** that this conduct creates a risk of transmission, as determined by the Centers for Disease Control, of the etiologic agent for acquired immune deficiency syndrome.

2. There exists probable cause to believe that the defendant has committed a Federal offense of **(Insert the type of offense that appears in the indictment, information, or complaint here.)** in violation of **(Insert the United States Code violation here.)**. An attested copy of documentation reflecting that such probable cause exists is attached hereto and is incorporated herein.

3. I hereby request that the defendant be tested for the etiologic agent for acquired immune deficiency syndrome, in accordance with Title 42 U.S.C. Section 14011(b).

4. I hereby request that if the initial test of the defendant for the etiologic agent for acquired immune deficiency syndrome is negative, that the defendant be re-tested six (6) months and again twelve (12) months following the initial test, in accordance with Title 42 U.S.C. Section 14011(b)(3).

5. I have received appropriate counseling on the accuracy of such tests and the risks of transmission of sexually transmitted diseases as the result of a sexual assault. I am advised that the tests I request would provide information necessary for my health.

WHEREFORE, I respectfully petition this Court: 1) To order the defendant to appear, or in the event that defendant is in custody, that the Court direct the United States Marshal for this district to produce the defendant before you; 2) that after a hearing, the Court direct the defendant to submit to testing for the presence of the etiologic agent for acquired immune deficiency syndrome; 3) to order the defendant to be re-tested six months and again twelve months following the initial test, if the initial test is negative; and 4) that after the completion of the said tests, the entity conducting the tests provide the test results to me.

I further request that the Court seal this Petition, any Order filed as a result thereof, any docket entries and other records created thereby except as to me, the defendant, the entity who is to perform the tests, and such officers and agents of the Court as are necessary to carry out this Order.

DATED: _____

Petitioner

I hereby attest to the foregoing Petition to be truthful to the best of my knowledge.

DATED: _____

Notary Public or other officer
authorized to entertain oaths

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

IN RE PETITION OF _____)
_____)
FOR AN ORDER UNDER 42 U.S.C.)
SECTION 14011(b), REQUIRING)
_____ TO SUBMIT)
TO TESTS FOR THE ETIOLOGIC)
AGENT FOR ACQUIRED IMMUNE)
DEFICIENCY SYNDROME)

ORDER

This matter comes before me, upon the Petition of _____.
After notice and hearing or opportunity therefor, I can and do find:

1. That there exists probable cause to believe that **(Insert name of defendant here.)** has committed the crime of _____, in violation of _____, a sexual assault.
2. That such conduct has exposed the Petitioner to the risk of a transmission, as determined by the Centers for Disease Control, of the etiologic agent for acquired immune deficiency syndrome.
3. That the Petitioner, after appropriate counseling, has requested that the defendant be tested for the presence of the etiologic agent for acquired immune deficiency syndrome, in accordance with Title 42 U.S.C. Section 14011(b).
4. That the Petitioner, after appropriate counseling, has also requested that if the initial test for the etiologic agent for acquired immune deficiency syndrome is negative, that the defendant be re-tested six (6) months and twelve (12) months following the initial test, in accordance with Title 42 U.S.C. Section 14011(b)(3).
5. That such tests would provide information necessary for the Petitioner’s health.
6. That the Petitioner’s application and affidavit establish good cause for the sealing of the application, this Order, any docket entries created thereby, and the record of this proceeding.

NOW THEREFOR, IT IS HEREBY ORDERED THAT:

1. The defendant shall submit to tests for the presence of the etiologic agent for acquired immune deficiency syndrome;
2. If the defendant is in custody, the United States Marshals Service officer or other officer shall produce the defendant at an appropriate location for the execution of such testing;
3. If the defendant is not in custody, the defendant shall submit to such testing at an appropriate location, which may include a locally accessible free testing facility;
4. The entity performing the tests shall provide the results thereof to the Petitioner and the defendant;
5. The Petitioner shall not disclose the results of such testing to any person other than a medical professional, counselor, family member, or a sexual partner the Petitioner may have had since the date of the sexual assault. Further, the Petitioner shall advise any such person(s) that such person(s) shall not make further disclosure of the said test results and that the terms of this Order shall apply to such person(s) as though entered against such person(s) personally;
6. The Clerk shall seal this Order, the Petition, the docket entries, and any other records of this proceeding and shall not make disclosure thereof other than to the parties and individuals or entities whom the Clerk deems necessary to carry out this Order. SO ORDERED.

DATED: _____

United States District Judge
United States Magistrate Judge

What you need to know about HIV and other STDs

- There are many common sexually-transmitted diseases (STDs), including gonorrhea, syphilis, chlamydia, genital warts, herpes, and HIV (the AIDS virus).
- Proper testing is the only way to know if you are infected.
- STDs, including HIV, usually are passed through vaginal, oral, or anal intercourse. However, some STDs can be passed from skin-to-skin contact in the genital area.
- An infected woman can pass HIV to her baby through breast milk.
- Many STDs can be cured easily especially if they are found early.
- HIV is fairly hard to get from a single sexual act. There are only a few cases of HIV infection from sexual assault. You are more likely to get other STDs from a single contact with an infected person.
- Signs of STDs may not show up right away. Some people never notice any signs of infection. This is especially true for women.

Clinics and support

Your private doctor can test you for HIV and other STDs or you can go to a clinic. The following confidential clinics are in the area:

Clinic Numbers

What sexual assault victims need to know about HIV and other sexually transmitted diseases



For more information contact:

**Victim Witness Assistance Unit
United States Attorney's Office**

Victim Witness Assistance Unit United States Attorney's Office

Impact of sexual assault

Sexual assault can be an extremely traumatic experience. You may have been hurt both physically and emotionally. Feelings of anger, guilt, shame, and fear are common reactions. In addition to dealing with these strong emotions, you may also be concerned about being infected with a sexually transmitted disease or HIV, the virus that causes AIDS.

This brochure provides you with information about sexually transmitted diseases and available medical counseling services to help you deal with your concerns. ***Remember: It is not your fault. You are not alone.***

Testing for STDs and HIV

If you did not get immediate medical attention after the sexual assault, get a full check up for STDs, including HIV, right away. A rape examination usually includes STD tests. If STD and HIV testing are not available, you should go to another clinic for a test as soon as possible.

Most medical clinics, hospitals, and private physicians will test for STDs and HIV. Some clinics and public hospitals will do the testing free of charge. Clinic telephone numbers are listed on this brochure. If the case is being investigated or prosecuted by a Federal Government agency, you are entitled to testing at no cost to you. Certain requirements apply. Check with the Victim

Witness Assistance Unit for details and procedures.

Many STDs take several days to several months to show up. If an STD is diagnosed at an exam done right after the assault, you probably had the STD before the assault. The infection could be from past sexual contact or drug use. Talk to your health care provider about taking medicine and telling partners. If your first tests are negative, you may be able to rule out the possibility that you had an STD before the assault.

Even if your tests are negative, get tested again in 3 to 6 months. You cannot be sure if you have HIV or another STD unless you get tested at least 3 months after the assault. It can take up to 6 months after infection for antibodies to show up on a test. The U.S. Attorney's Office can assist you in obtaining this second test at no cost to you. Your health and peace of mind are worth it!

While waiting for the test results, it is normal to feel anxious and worried. Your counselor or doctor may be able to help. During this time, you need to protect your health and your loved ones from infection.

Testing and confidentiality

It is important to be tested in a facility that offers counseling and protects your confidentiality. STD and HIV tests usually are free in public health clinics.

You have the right to have up to two confidential and anonymous tests following a sexual assault that poses a risk of transmission

of HIV virus or an STD. Test results are not given over the phone or sent in the mail. The nurse who drew your blood will give you the test results on your second visit and explain them to you in private.

Counseling and information

Most sexual assault crisis centers have hotlines operated by trained counselors who understand sexual assault and will talk to you confidentially. Most medical centers also provide counseling. Or, a Victim Witness Advocate in the U.S. Attorney's Office will help you make arrangements for counseling.

HIV testing and the perpetrator of sexual assault

A judge can order a person charged with a sexual assault to be tested for HIV if the victim requests this through the Assistant U.S. Attorney. You will be given the results; however, you are allowed to share this information **ONLY** with your doctor, counselor, family members, and any sexual partners you may have had after the assault.

Regardless of the perpetrator's test, you still need to have your own HIV test. Even if the perpetrator has HIV, you may not have been infected during the sexual assault. If the perpetrator's HIV test is negative, the perpetrator could still have HIV. Recent infections (within 3-6 months) may not show up on his test. People with HIV can infect others at any time, even before their own blood shows signs of HIV.

Appendix F.

WANTED



We need you to report suspected child abuse!

*If you observe an incident
of suspected child abuse,
it is your duty by law to report it.*

*If the child is in immediate danger, call 911
Otherwise, contact your
local police or sheriffs' department.*

*If you are on federal land or a
federally operated or contracted facility,
contact your local FBI field office.*



Your report could save a child's life!!!

