

Examination of victim rights: Ensuring safety and participation in court process

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Asserting a crime victim's access to justice can improve our state's response to the epidemic of domestic violence in our country. The impacts of domestic violence reverberate throughout the lives of the victims and the children exposed to the abuse.¹ The U.S. economy loses \$8.3 billion annually due to a combination of lost productivity and increased health care costs caused by violence.² A system's response which anticipates the safety of the victim and allows the ability to meaningfully participate in the criminal justice process can nurture powerful results.

Modern crime victim rights

Most attorneys have heard victims (in real life and on television) discuss "bringing charges against" or "dropping" criminal charges against an individual. As we learned in our criminal procedure class, victims can no longer "press charges" against the accused perpetrator of a crime.³ In the U.S., it is within the prosecutor's purview to bring those charges. As a crime-victim-rights attorney, I explain this to my own clients many times throughout the investigation and prosecution.

The modern victim-rights movement partially took root in U.S. Supreme Court decisions in the 1970s and '80s, starting with the holding in *Linda R.S. v. Richard D.*⁴ Linda R.S. argued that a Texas district attorney should prosecute the father of her child for refusal to pay child support (a misdemeanor), and that the government's failure to do so violated the Equal Protection Clause of the 14th Amendment. The U.S. Supreme Court upheld the district attorney's decision and stated that Linda R.S. had no standing to prosecute this matter, as any outcome under the misdemeanor statute only brought about jail time and not the monetary relief she requested. The Court noted in dicta that "a citizen lacks standing to contest the policies of the prosecution authority when he himself is neither prosecuted nor threatened with prosecution."⁵ The Court also noted, however, that Congress had the power to "enact statutes creating legal

Domestic Violence series

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rights, the invasion of which creates standing . . ."⁶ This decision spurred a greater interest from victims and activists in advancing rights of victims of crime. The U.S. Supreme Court's early holding that victim impact statements were admissible in the sentencing phase of a homicide trial further recognized a victim's voice during important moments of a criminal prosecution.⁷

Subsequent federal and state statutes developed in recognition of a crime victim's need to participate in the system and to receive victim services. In 2004, the federal government enacted the Crime Victim Rights Act (CVRA), which afforded the following in all federal prosecutions: (1) the right to be reasonably protected from the accused; (2) the right to reasonable, accurate and timely notice of proceedings and/or release or escape of the accused; (3) the right not to be excluded from public court proceedings (with some exceptions); (4) the right to be reasonably heard; (5) the reasonable right to confer with the prosecution; (6) the right to full and timely restitution; (7) the right to proceedings free from unreasonable delay; (8) the right to be treated with fairness and with respect for the victim's dignity and privacy.⁸

Federal courts have developed a variety of remedies to victims whose rights were not recognized by the justice system. Victims may also file a complaint with the crime-victim-rights ombudsman with the U.S. Department of Justice, should they feel that their rights have been negatively impacted by the criminal justice process. Federal victim witness advocates work in U.S. Attorney offices to support victims and provide information regarding the case during the criminal prosecution, sentencing and beyond.

According to the Department of Justice, "the number of identified victims in federal cases has more than tripled since the CVRA passed, increasing from 554,654 victims in 2004 to 2.2 million victims in 2010, a 298 percent increase. Victim notifications doubled to 5.7 million notices within one year of CVRA's passage in 2004 and totaled nearly 8 million in 2010."⁹

1 Hilly McGahan and Brandi Ries, *Understanding Domestic Violence*. The Montana Lawyer 14-16 (March 2015).

2 Robert Pearl, M.D., *Domestic Violence: The Secret Killer that Costs \$8.3 Billion Annually* (Dec. 2015), available at <http://www.forbes.com/sites/robertpearl/2013/12/05/domestic-violence-the-secret-killer-that-costs-8-3-billion-annually/>.

3 Victims historically could prosecute crimes privately under the common law. For a fascinating overview (with extensive citations), see the National Crime Victim Law Institute's report at <http://law.lclark.edu/live/files/11822-fundamentals-of-victims-rights-a-brief-history-of>.

4 410 U.S. 614 (1973).

5 *Id.* at 619 (internal citations omitted).

6 *Id.* at 617, n. 3.

7 *Payne v. Tennessee*, 501 U.S. 808 (1991).

8 18 U.S.C. § 3771 (a).

9 U.S. Dept. of Justice, *Victim's Rights*, available at <http://www.justice.gov/usao/priority-areas/victims-rights-services/victims-rights>.

Starting in the 1970s, a majority of U.S. states have enacted discrete constitutional amendments providing victims with rights in a criminal proceeding. Many of these amendments are modeled after CVRA. Other states do not enumerate all eight rights listed above, but typically grant the right to be heard, informed and present at all important stages of a criminal prosecution. As of the writing of this article, 32 states display a victim-rights amendment in their constitutions.

The rights of domestic violence victims

Previous articles have discussed the low percentage of prosecutions against perpetrators of domestic violence and the pervasive acceptance of spousal abuse in U.S. society.¹⁰ Abuse of a wife was historically considered “a necessary tool for a man to maintain order and discipline in his home, to make sure that his superior intelligence rules, and to avoid the mushrooming of the hysterical, short-sighted and naïve qualities that men widely attribute to women.”¹¹ These not-so-distant attitudes entrench themselves into our criminal justice system response and lurk within our juries. We do not believe the victim. We accuse her of trying to get the upper hand in a family law case. We do not take a trauma-informed approach to addressing victims’ needs, despite the fact that many victims (including children who witness the abuse) develop post-traumatic stress disorder as a result of abuse. We blame the victim.

A prosecutor once told me that while the abuse committed by a particular batterer was dangerous to the community and most likely lethal for my client, that my client also “really knew how to push [perpetrator’s] buttons.” This betrays a basic misunderstanding of the dynamics of a battering relationship. This perpetrator created a world in which the victim is manipulated, intimidated and terrorized. Because of the creation of that world, no matter what my client did or did not do, she ran the risk of “pushing” the buttons of the perpetrator. It was unsurprising that my client was reluctant to cooperate with law enforcement after running into that perspective on multiple occasions.

Finally, victims must fully understand the role of the players in the criminal justice system. Defense attorneys protect the constitutional rights of their clients and strive for acquittal or dismissal of charges. Often, this goal is at direct odds with what a victim seeks from the criminal justice process. Victims must also recognize that prosecutors are not the victim’s attorneys. While conscientious prosecutors develop practice priorities around victim safety and input, they cannot represent the victims.¹² A prosecutor’s goals in a domestic violence prosecution may not ultimately align with the victim’s goals. Victims should understand that they hold rights independent of their role as a witness for the prosecution, and they need to understand how to assert those rights.

Montana’s statutory rights and remedies

In Montana, victims are generally identified as those who suffer the loss of property, bodily injury or reasonable apprehension of bodily injury as the result of a crime or as a result of attempting to prevent a crime/apprehend a perpetrator. Members of the immediate family of a homicide victim are also considered crime victims.¹³

A crime victim’s rights are listed in Title 46, Chapter 24 of the Montana Code Annotated. The Montana Constitution does not provide enumerated rights to crime victims as provided by the states discussed above. Montana statute lists several rights of victims in the criminal justice process, although not all contemplated by the federal CVRA. At this time, Montana does not provide victims the level of enforcement available in other states under an exhaustive constitutional amendment. Additionally, Montana also has not developed a significant body of case law regarding the rights of victims in the context of criminal prosecutions.

That being said, Montana citizens approved a right of restitution through constitutional amendment in 1998. This amendment amended the purposes of Montana’s criminal prosecution from a focus on prevention and reform to a focus on prevention, reform, public safety and restitution.¹⁴ Further, the express right of privacy contained in Article II, § 10 of the Montana Constitution has been examined by the Montana Supreme Court in the context of privacy for the victims of sex crimes during investigation and prosecution.

The right of notice and participation

Prosecutors must consult with victims of both misdemeanor and felony domestic violence offenses regarding dismissal of the case or release of the accused during pretrial proceedings, pretrial negotiations and pretrial diversion. Further, a victim must be notified of scheduling changes in the criminal case, if the change will impact their appearance at that hearing. Finally, a victim must be kept aware of the status of any criminal prosecution and notified of the confinement status and location of an accused.¹⁵ Montana courts must also provide one free copy of all public documents from the court file to victims or their representative. Victims may be allowed additional criminal justice information at the prosecutor’s discretion.¹⁶

Consultation with prosecution is essential for victims of domestic violence. Updates of the status of a criminal case and the location of a perpetrator of domestic violence are extremely important to the victim. Victims of domestic violence are in danger of additional violence or homicide during the criminal prosecution of a domestic violence case. Something as basic to attorneys as rescheduling a pretrial evidentiary hearing involving an accused out on bond might mean additional logistical and safety planning for a victim. In other situations, a victim may wish to be present at or provide crucial information to

10 Hilly McGahan and Brandi Ries, *Understanding Domestic Violence* at 15.

11 Lundy Bancroft, *Why Does He Do That? Inside the Minds of Angry and Controlling Men* 321 (Berkeley Books 2002).

12 Montana Attorney General’s Office, *The Criminal Justice System and You* (Nov. 2006), available at <https://dojmt.gov/wp-content/uploads/2011/05/criminaljusticeandyou.pdf>. Additional forms and information relevant to victims of crime are available on the Attorney General’s website at <https://dojmt.gov/victims>.

13 Mont. Code Ann. § 46-24-106(5).

14 Mont. Const. Art. II, § 28.

15 Mont. Code Ann. §§ 46-24-104, -203, -204.

16 Mont. Code Ann. § 46-24-106(6).

the prosecutor for bond hearings. The release of the accused may bring about dangerous consequences to the victim and the family.

The right of protection from the accused

Each district court has the *option* of issuing standing criminal no-contact orders over individuals accused of domestic violence at the time of arrest. In participating counties, those arrested for or charged with domestic-violence-related offenses in Montana are immediately under the no contact order. This means the accused cannot contact the victim prior to his first appearance. The presiding judge has the opportunity to extend that no-contact order at the initial appearance (or impose it for the first time). This no-contact order immediately disappears with dismissal or should a judge not include it in the sentence.¹⁷ Victims must be given the opportunity to consult with prosecutors and law enforcement regarding any violations of the no-contact order during prosecution, to ensure that the full context of the battering relationship is considered.

Victims of domestic violence prosecutions must also receive safety planning services from attorneys and crime victim advocates from the time of arrest to the end of the case. For safety planning purposes, the victim and/or her advocates/attorneys must understand the status of all phases of a criminal prosecution. Any attorneys interested in representing domestic violence survivors in any type of criminal or civil proceeding can review the American Bar Association's safety planning publication for assistance in developing their own tool.¹⁸

The right to be heard

As discussed above, prosecutors must discuss key stages in the case with victims. Montana law also allows victims to attend criminal proceedings.¹⁹ Under this statute, victims are not merely witnesses subject to sequestration. Victims must be given the opportunity to argue why they should be allowed to remain in the courtroom during the trial, even as the prosecution or defense moves to sequester witnesses. Oftentimes, domestic violence victims are not represented by counsel in the criminal proceeding and may feel unable to address the court directly regarding his/her right to be present for the hearing. Unfortunately, I have observed victims of domestic violence who were without representation be removed from the courtroom after they have testified without the opportunity to address the court on the decision.

The right of privacy

Information about victims of domestic violence is not automatically removed from public court documents under Montana statute. Victims of domestic violence must specifically request that law enforcement not disseminate their

17 For this reason, many crime victims opt to apply for a civil order of protection, which holds the possibility of permanent protection.

18 American Bar Association Commission on Domestic and Sexual Violence, *Safety Planning*, available at <http://www.americanbar.org/content/dam/aba/migrated/tips/publicservice/DVENG.authcheckdam.pdf>.

19 Mont. Code Ann. § 46-24-106.

address, telephone number or place of employment (with some exceptions). On the other hand, law enforcement may never voluntarily release any information identifying a victim of sexual offense (besides the address of the crime scene in some situations). A victim who has fled the home may wish to have her new address concealed from the accused. Montana statute protects the victim from having to disclose her address when testifying in open court.²⁰

Further, throughout the course of the criminal prosecution, the prosecution and/or the defense may attempt to admit evidence that violates victim privacy. A major portion of victim-rights legal work involves protecting that privacy if the victim wishes. Victim-rights attorneys must also be prepared to explain privacy implications of participating in the criminal justice process, and how the exclusion of some victim information could impact the criminal prosecution.

The Right of Information — Notification of Victim Assistance

Many domestic violence victims remain in an abusive situation because they cannot afford to leave. A 2012 Mary Kay Foundation survey of 700 domestic violence shelters across the U.S. revealed that 75 percent of domestic violence survivors stayed with their abuser longer because of financial insecurity.²¹ A cooperative victim may have to take time off from work to participate in the criminal justice process, to appear in family court proceedings (or order of protection proceedings), or for medical or therapy appointments.²²

Montana law enforcement is required to give victims written notice of the availability of crime victim compensation and victim advocacy programs.²³ Crime victim compensation statutes allow victims to apply for the following benefits without having to wait for a restitution order: lost wages, medical bills, funeral expenses and mental health counseling (for both the victim and child victims of domestic violence).²⁴

Victim rights in tribal court

The tribal courts located in Montana have developed their own statutes to address domestic violence. Some of these statutes list enumerated victim's rights in the prosecution of domestic violence offenses. Further, since the passage of the Violence Against Women Act Reauthorization of 2013, tribal courts have exercised greater jurisdiction over prosecutions on the reservation.²⁵ Attorneys practicing in Montana tribal court should consult the statutes for each individual tribal court

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20 Mont. Code Ann. § 44-5-311.

21 Truth About Abuse Survey Report (Mary Kay Foundation 2012).

22 Fortunately, MCA § 46-24-205 bars a victim's employer from firing or disciplining her for participating in the criminal justice process. However, Montana law does not require employers to provide paid leave for employees experiencing domestic violence.

23 Mont Code Ann. § 46-24-201.

24 Mont. Code Ann. § 53-9-101 et al.

25 U.S. Dept. of Justice, VAWA Reauthorization 2013: <http://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0>.

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before proceeding.²⁶

Conclusion

Recognition and celebration of the rights of domestic violence victims could very well save lives. A victim-centered approach to domestic violence crimes and supportive policies can improve the lives of victims and their families. Attorneys can assist these victims in asserting their rights under state, federal and tribal constitutional and statutory schemes. Crime-victim-rights work is extremely rewarding. I have seen my clients gain confidence and healing from asserting their rights through this

²⁶ State Law Library Indian Law Portal, at <http://indianlaw.mt.gov/default.mcp>. Note: The State Law Library has not updated this data in the past few years, therefore, it is recommended that attorneys ensure they have the most updated statutes from the tribal court of interest before proceeding.

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with each document presented as if it were printed and scanned into an electronic file. For example, a group of emails can be exported from Outlook into a single, multi-page, PDF file. Converting to this format allows for Bates stamping, redaction, removal of confidential information, and control of metadata. Traditionally lawyers would collect the data to be produced, print it, and then scan it back into a PDF, a costly and inefficient process. Software now allows this process to be performed seamlessly by the user when extracting data, thus decreasing cost and making this an often preferred method of production for data.

Lastly, the paper format is just as it sounds, production completely in paper. As in near-paper, this provides the ability to completely control redaction, Bates stamping, and removal of confidential information. However paper will not include any metadata and, unlike all methods above, will not allow the party to electronically search the information.

Technology that Fits

Currently, discovery extends to any non-privileged matter relevant to any party's claim or defense, making it very broad and far reaching. Proposed changes to the Federal Rules of Civil Procedure include a change to Rule 26, limiting discovery to be "proportional to the needs of the case." The motivation for this change stems from an effort to decrease cost and increase efficiency in the age of growing data volumes. The current interpretation of Rule 26 has led to increased costs and delays as firms struggle to sift through large amounts of data even though the expense often far outweighs the benefit to either party. Opinions vary on the impact of such changes but most agree that the proportionality standard will require substantiation beyond legal arguments – namely based on technical and resource expenditures. Most attorneys struggle with these types of arguments, requiring technical experts to weigh in as to the limits and accuracy of the software used when courts require a

process. Additionally, a positive experience with the criminal justice system inspires the victim to participate through family law and order of protection matters in the civil justice system.

Local crime-victim advocates and victim witness professionals are an excellent resource to both victims and attorneys. Advocates are experts in safety planning and confidentiality, and provide crisis counseling, support, information on the criminal justice system, and information on the rights described above. You can find local advocacy organizations around the state and on all of Montana's Indian reservations at www.mcadsv.com or at <https://dojmt.gov/victims/crime-victim-advocates/>.

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party to prove proportionality.

Many cases and controversies settle without data volume becoming a factor, and without a thorough examination of documents and emails. A case with 1,000 pages of documents and email may appear too small for technology, yet paralegals and lawyers struggle to keep the content of that data organized mentally, especially when handling dozens of matters simultaneously. A case with 10,000 pages requires more than the human memory. However, a matter valued at \$200,000 may not warrant a five-figure technology investment. What technology fits a case like this?

Practicing attorneys can answer this question without the need to become technology geeks. Simple tools that merely organize data into a table of contents linking file names to file locations provide very little value. Tools that truly assist in analyzing, relating, and understanding the content in a dataset provide the real assistance needed. Software such as Start:Review, Encase, Logikull, and iPro fit the bill. The current market offers varying solutions, from cloud-based data review to on-site software. With each vendor having their own methods to perform the complicated analysis required, this allows lawyers to shop around, finding the right features, at the right price, to find those needles in their haystack of data.

Conclusion

E-discovery is an area of the law that every lawyer should embrace and understand enough to work in. Big data is not going away, and sooner or later the time will come that requires the use of complicated software to navigate a case. Understanding how TAR can help you wade through a seemingly impossible task is the first step in embracing e-discovery, and is your obligation to effectively serving your client by providing them more bang for their buck.

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