

THE NATIONAL CENTER FOR
Victims of Crime

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February 15, 2007

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Peter. G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, DC 20544

Dear Mr. McCabe:

Please accept for filing the attached comments Mary Lou Leary, executive director of the National Center for Victims of Crime, on the proposed amendments to the Federal Rules of Criminal Procedure to implement the Crime Victims' Rights Act.

Sincerely,

Susan Smith Howley
Director, Public Policy

attachment

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Mary Lou Leary

**Comments on the Victims' Rights Amendments
to the Federal Rules of Criminal Procedure**

Mary Lou Leary, Executive Director

National Center for Victims of Crime

February 15, 2007

Crime victims' rights have become an established component of the American justice system. In the twenty-five years since the first bill of rights for crime victims was adopted in Wisconsin, every state has enacted a comprehensive set of rights for crime victims, and a majority of states have amended their constitutions to provide additional protection for those rights. Crime victims rights have been a part of the federal laws for more than fifteen years, although many in the federal criminal justice system were unaware of those rights because they were codified outside of the criminal code, in Title 42 of the U.S. Code. With the passage of the Crime Victims' Rights Act, those acts were strengthened and moved to Title 18 of the U.S. Code, Crimes and Criminal Procedure.

We commend the Advisory Committee on Federal Rules of Criminal Procedure for undertaking the task of incorporating the provisions of the Crime Victims' Rights Act into the court rules. This revision provides an opportunity to ensure consistent implementation of crime victims' rights across the federal court system. Providing a remedy for violation of rights is always less satisfactory than preventing the violation in the first place. Court rules of procedure can provide an important protection for victims' rights as cases progress through the process.

We offer the following comments on the proposed rules and suggest additional points through which the rules could implement the rights of victims.

Rule 12.1(b)(1)(B)

The Advisory Committee particularly requested comments on whether Rule 12.1(b)(1)(B) should provide for disclosure of the victim's address and telephone number only when the defendant establishes a need for this information, or whether it should assume that the defendant will need this information and limit disclosure only when a special need for victim protection is demonstrated. We urge you to act affirmatively to guard the victim's privacy and reduce the number of opportunities for the criminal justice process to be used as a tool to intimidate the victim. Personal information about the victim should not be divulged absent a showing of need by the defense. Compelling the government to routinely turn this information over to the defense may pose a real danger to the victim and would, at a minimum, discourage victims from coming forward.

Intimidation of victims and witnesses is a major barrier to the administration of justice in the

United States.¹ Because of the prevalence of witness intimidation, we also suggest that the Advisory Committee consider extending the same protections to other witnesses: that is, providing an alternative to divulging the address or phone number of witnesses if the government otherwise makes the witness available.

Rule 17. Subpoena

We oppose permitting the defense to obtain personal information about the victim in an ex parte manner. The committee note states that the amendment seeks to protect the interests of the victim, but the mechanism it provides puts the victim at a disadvantage. It requires the victim to move to quash an issued court order rather than to be heard at the time the court first considers the matter. This mechanism places an unacceptable burden on the victim and is particularly egregious given the stated purpose of the amendment: to protect the interests of the victim.

Rather, the rule should ensure that the victim is notified when the subpoena is requested and has an opportunity to be heard at the hearing on the request. The court would then be in the best position to weigh the defense's need for the information against the victim's interests in protecting personal and confidential information. This also serves the interests of judicial economy by providing that all arguments will be heard at one hearing, rather than successive hearings.

Additional suggestions

Right to protection

The Crime Victims' Rights Act gives federal crime victims the right to be "reasonably protected from the accused." This right could be further implemented at the prerelease stage by **amending Rule 46** to provide that before a defendant is granted pretrial release, the court must consider the danger the defendant may pose to the victim and witnesses and must issue a no-contact order. In drafting such an amendment, Maryland's court rule on pretrial release may provide guidance:

" In determining whether a defendant should be released and the conditions of release, the judicial officer shall take into account the following information, to the extent available:

(G) the danger of the defendant to the alleged victim, another person, or the community.

¹Matt Sapotsky, "Crime witnesses hard to find; Fear of retaliation, stigma against snitching prompt most to keep quiet," *The Columbus Dispatch*, Aug. 27, 2006, 01C; Bruce Lambert, "Schumer Seeks Funds to Protect Local Witnesses," *The New York Times*, April 4, 2006, B07; Jane Prendergast, "Louisville, Cincinnati both dealing with witness killings," *The Cincinnati Enquirer*, March 3, 2005, 1A.

(3) Imposition of conditions of release. If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set out in section (e) of this Rule that will reasonably:

(B) protect the safety of the alleged victim by ordering the defendant to have no contact with the alleged victim or the alleged victim's premises or place of employment or by other appropriate order, and

...

(e) Conditions of release. The conditions of release imposed by a judicial officer under this Rule may include:

...

(5) subjecting the defendant to any other condition reasonably necessary to:

(B) protect the safety of the alleged victim, and

(C) ensure that the defendant will not pose a danger to another person or to the community . . .

Md. Rule 4-216 (2006)

Right to be heard regarding a plea agreement

A majority of criminal convictions are the result of a plea. Thus, unless crime victims are afforded the opportunity to be involved during plea negotiations and related proceedings, a majority of them will be effectively denied any chance for meaningful participation in the criminal justice process. It is vital that the court rules specifically address the right of a victim to be heard regarding the entry of a plea agreement. Affirmative action by the court to ensure compliance with this right at the plea hearing is preferable to any remedy that might be provided following violation of this right. We urge the drafters to modify Rule 11 to incorporate such a mechanism to ensure that victims are provided this right.

For example, the Advisory Committee might follow the lead of Indiana:

Notice of recommendation to victim.

(a) In making a recommendation on a felony charge, a prosecuting attorney must:

(1) Inform the victim that he has entered into discussions with defense counsel or the court concerning a recommendation;

(2) Inform the victim of the contents of the recommendation before it is filed; and

(3) Notify the victim that the victim is entitled to be present and may address the court (in person or in writing) when the court considers the recommendation.

(b) A court may consider a recommendation on a felony charge only if the prosecuting attorney has complied with this section.

Burns Ind. Code Ann. § 35-35-3-2 (2006)

Certification of notification to victims - Statement by victim - Failure to comply.

(a) As a part of the recommendation submitted to the court, the prosecuting attorney must certify that he has offered to show the proposed recommendation to the victims of the felony, if any, and that they have been offered an opportunity to present their opinion of the recommendation to the prosecuting attorney and the court.

Burns Ind. Code Ann. § 35-35-3-5 (a) (2006)

Thus the actions of the court ensure compliance with the victim's right to be heard regarding a proposed plea agreement.

Right to proceedings free from unreasonable delay

If the victim's right to proceedings "free from unreasonable delay" is to have meaning, **Rule 50 should be amended** to allow for consideration of the victim's interest in ruling on a motion for continuance. The right to a speedy disposition is important to victims, many of whom put their lives on hold for the duration of the criminal justice process, delaying family trips, weddings, and so forth. Many victims suffer the emotional toll of preparing themselves mentally for the trial and facing the offender in court, only to have a continuance granted. For child victims, repeated delays can be particularly devastating and may cause a family to withdraw from participating in the prosecution. For elderly or infirm victims, repeated delays may mean the victim is no longer able to testify at the time of trial.

Courts should be given the explicit authority to consider the interests of the victim, as well as the parties, in ruling on a motion for continuance. Arizona has a court rule that might provide guidance on this issue:

Rule 8.5. Continuances.

...

b. Grounds for motion. A continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable

to the interests of justice. A continuance may be granted only for so long as is necessary to serve the interests of justice. In ruling on a motion for continuance, the court shall consider the rights of the defendant and any victim to a speedy disposition of the case. If a continuance is granted, the court shall state the specific reasons for the continuance on the record.

Ariz. R. Crim. P. 8.5 (2006)²

Conclusion

Americans who have been harmed by the criminal actions of an individual look to the justice system for reassurance that there is fairness and order in the world. When their rights to be kept informed, to be present, and to be heard are disregarded, they become disillusioned. Victims who call our National Crime Victim Helpline often express bitterness at their mistreatment by criminal justice officials. They are shocked and disappointed when they are revictimized by the very system they turned to for justice.

We commend the Advisory Committee for its work to implement the Crime Victims' Rights Act through amendments to the Federal Rules of Criminal Procedure, and we would be pleased to offer any assistance you may require.

² See also Tenn. Code Ann. § 40-38-116 (2006), requiring the court to consider the victim's views and the victim's right to a speedy trial in ruling on a motion for continuance.