

**Ohio Victim Witness Association Public Policy Committee Meeting Minutes  
November 14, 2007, 9:30 am – Noon**

Minutes submitted by David Voth

Present: David Voth – Director, Crime Victim Services, Allen & Putnam Counties, Lima, OH  
Mary Wilson – Sexual Assault Coalition of Summit Co. & Kent State Univ., Kent, OH  
Jim Scott – Director, Victim Witness Div., Crawford Co. Prosecutor’s Ofc., Bucyrus, OH  
Kristen Arapp – Director of Victim Services, Summit Co. Prosecutor’s Ofc., Akron, OH

1) Kristen Arapp raised the issue of VINE (Victims Information and Notification Everyday) notices to victims using the word “release” when an inmate is only being transferred from one prison to another. Also, when one of several consecutive sentences ends the victim is informed the inmate is being “released”, when in fact subsequent sentences begin immediately and the inmate is never released. Kristen will follow up with the Department of Rehabilitation and Corrections.

2) Ohio Senate Bill 248 / 228 and House Bill 343 were discussed. These bills are referred to as “Roberta’s Law,” and toughen parole releases to require victim notification of hearings and five years of post-release control for high level felons. Advocates of the law say it will increase transparency and accountability of the Parole Board and provide a greater voice for victims.

3) Changes in Ohio Revised Code (ORC) Section 2930, Ohio’s Victim Rights Law, were discussed. Draft language submitted by David Voth and a detailed analysis by Mary Wilson were used as the basis for review.

**A) Summary – the victim right to confer with the prosecutor will be an “affirmative” right.** In 2930.06 victims are provided the right to confer with the prosecutor prior to a plea or dismissal of their case. Committee members agreed that this was not being followed in many jurisdictions. Current law and the proposed language does not allow victims control over the decision of the prosecutor, and it is not absolute (e.g. avoids “shall” be required to consult). The right must be strengthened and the consequence for violating the right should jeopardize the plea or dismissal decision prior to the court acceptance of such a motion. The victim right to a “meaningful role” in the Ohio Constitution Section 10a is violated without the consultation right in ORC 2930. The affirmative right of victims to consultation is in many other state statutes and constitutions, federal victim rights law, and the proposed Victim Rights Amendment to the U.S. Constitution. The Committee unanimously agreed to recommend to OVWA Membership the following language (underlined portion is deleted and the CAPITALIZED language is added):

“2930.06 (A) The prosecutor in a case, to the extent practicable, shall confer with the victim in the case ~~SHALL AFFIRMATIVELY PROVIDE THE REASONABLE RIGHT OF THE VICTIM(S) TO CONFER ON THE CASE~~ before amending or dismissing an indictment....”

“A prosecutor’s failure to confer with a victim as required by this division and a court’s failure to provide the notice as required by this division do not ~~MAY~~ affect the validity of an agreement **WHEN REQUESTED BY THE VICTIM AND WHEN THE COURT DETERMINES BY PREPONDERANCE OF THE EVIDENCE THAT THE SUBSTANCE AND IMPACT OF THE VICTIM(S) INPUT REQUIRES THAT THE AGREEMENT SHALL BE RE-CONSIDERED** between the prosecutor and the defendant or alleged juvenile offender in the case, a pretrial diversion of the defendant or alleged juvenile offender, .....”

**B) Summary - The right of victims to notice will be an “affirmative” right.** Committee members unanimously agreed to recommend the following language changes to OVWA members regarding 2930.08 (underlined portion is deleted and the CAPITALIZED language is added):

“2930.08 If a motion, request, or agreement between counsel is made in a case and the motion, request, or agreement might result in a substantial delay in the prosecution of the case, the prosecutor in the case, to the extent practicable, and SHALL AFFIRMATIVELY PROVIDE THE REASONABLE RIGHT OF SUCH NOTICE if the victim has requested notice pursuant to ...”

**C) Summary – The right of victims to be present will be strengthened as exclusion can only be by “clear and convincing evidence” on the record by the court.** Committee members discussed the routine violation of victims’ right to be present in all court proceeding where the defendant is present (except Grand Jury). Language was agreed upon that strengthens this right, recognizing that circumstances will exist to exclude a victim due to court room out bursts or a genuine issue of tainting of material testimony. It was agreed to raise the bar on the level of evidence required to exclude a victim and require a hearing and written record to strengthen this right and preserve the record for appellate review. The unanimous decision was to recommend the following language changes (CAPITALIZED language is added):

“2930.09 A victim in a case may be present whenever the defendant or alleged juvenile offender in the case is present during any stage of the case against the defendant or alleged juvenile offender that is conducted on the record, other than a grand jury proceeding, unless the court determines **BY CLEAR AND CONVINCING EVIDENCE** that exclusion of the victim is necessary to protect the defendant’s or alleged juvenile offender’s right to a fair trial or to a fair delinquency proceeding **AND ANY EXCLUSION OF THE VICTIM SHALL BE CONSIDERED IN A MOTION HEARING AND REASONS FOR THE EXCLUSION SHALL BE ENTERED INTO THE RECORD OF THE HEARING OR PROCEEDING.** At any stage of the case at which the victim is present, the court, at the victim’s request, shall permit the victim to be accompanied by an individual to provide support to the victim unless the court determines **BY CLEAR AND CONVINCING EVIDENCE** that exclusion of the individual is necessary to protect the defendant’s or alleged juvenile offender’s right to a fair trial or to a fair delinquency proceeding **AND ANY EXCLUSION OF THE INDIVIDUAL SHALL BE CONSIDERED IN A MOTION HEARING AND REASONS FOR THE EXCLUSION SHALL BE ENTERED INTO THE RECORD OF THE HEARING OR PROCEEDING.**”

**D) Summary – Victims will be allowed oral AND written Victim Impact Statements.** Three counties in Ohio were noted as having had a judge deny the right of victims to present both an oral and written Victim Impact Statement. This right is probably upheld by over 97% of all judges. The following language was unanimously agreed upon by members for OVWA approval (CAPITALIZED language is added):

“2930.14 Before imposing sentence upon, or entering an order of disposition for, a defendant or alleged juvenile offender for the commission of a crime or specified delinquent act, the court shall permit the victim of the crime or specified delinquent act to **SUBMIT A WRITTEN STATEMENT PRIOR TO THE SENTENCING OR DISPOSITION PROCEEDING AND make an ORAL statement DURING THE SENTENCING OR DISPOSITION PROCEEDING. ...**”

**E) Summary – Victim will have standing to enforce their rights, have the right to file motions through their attorney, prosecutor, and Ohio Ombudsman Office, and have their rights heard on appeal by the Victim Rights Division of the Ohio Court of Claims.** ORC 2930 lacks a significant victim rights enforcement process, and Committee members agreed this oversight results in victim rights without adequate recourse and remedy. A check and balance system is needed to assure victims rights without victim abuse of the justice process (such as victims’ appealing decisions frivolously and objecting to legitimate legal decisions they simply don’t like). Members noted that other states with a compliance process report that 70-80% of all

victim rights complaints are not substantiated, thus most frequently, providing justice officials with support in their duties and decisions.

The three core elements needed are the right of victims to assert standing to enforce their rights, funding and jurisdiction for an Office of the Victims' Rights Ombudsman, and a court-based process with state-wide jurisdiction to provide expertise, uniformity, and prompt enforcement of victim rights. Since the Court of Claims has state-wide jurisdiction and a victims division established for Victim Compensation applications, it was deemed a logical location to house the victim rights appeals. To accomplish these needs, the Committee unanimously recommends the following concepts to OVWA members:

"2930.19 Government officers and employees, and their designee, other than a court or court officer, engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in the Ohio constitution, law, and rules.

(1) The crime victim or their lawful representative, or the prosecutor, may assert the rights described in this chapter. A person accused of a crime may not obtain any form of relief under this chapter.

(2) The rights described in this chapter shall be asserted in the court in which a defendant is prosecuted for the crime or, if no prosecution is underway, in the county, municipal, common pleas general or common pleas juvenile division courts in the jurisdiction in which the crime occurred. The court shall adjudicate any motion asserting a victim's right forthwith. If the court denies the relief sought, the movant may petition the court of claims for a writ of mandamus or injunctive relief. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(3) The application and enforcement of the rights described in this chapter shall be monitored by the Ohio attorney general and the private non-profit ombudsman contractor of the Ohio attorney generals office. The contract shall include submission of an annual report of activities and interventions listed by county. The attorney general, with the advice of the Ohio attorney general crime victim advisory board, shall reasonably fund and enumerate the duties, conditions, and outcome and performance measures for the Ohio Victim Rights Ombudsman office.

The said ombudsman office shall be empowered to investigate, educate, mediate, and intervene, as provided by law, when violations are alleged of the Ohio victim rights constitutional, statutory, and / or rule provisions. The ombudsman office shall have standing to file writs, petitions and motions on behalf of victims and in the interest of justice in the trial court of record, and presumptive trial court, and the Ohio Court of Claims as defined herein.

(4) The victim rights appellate division of the Ohio Court of Claims shall have jurisdiction to accept motions, petitions, and writs relating to alleged violations of victim rights in constitutional, legislative, and rule provisions, and to provide all forms and manner of review, mandamus writs, injunctive relief, and other actions as allowed by law. The Court of Claims shall enumerate the procedures and rules for fair, prompt and timely review and adjudication of victim rights violation allegations submitted by an attorney, prosecutor, or the Ohio Victim Rights Ombudsman office.

(5) In any appeal in a criminal case, the government may assert as error the trial court's denial of any crime victim's right in the proceeding to which the appeal relates.

(6) In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may motion for bail decisions and negotiated plea agreements to be reviewed by the trial

court when precedent rights to be informed, present, heard, safety considered, and restitution ordered have not been accorded, and when:

- (a) The victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
- (b) The victim petitions the appeals court or the Ohio Court of Claims for a writ of mandamus or injunctive relief within 10 days; and
- (c) In the case of a plea, the accused has not pled to the highest offense charged.”

**F) Summary – Victims will have the right to restitution through a mandatory restitution law that requires collection and payment in a comprehensive and timely manner into the Ohio Restitution Fund, from which all victims (except businesses) are promptly paid (up to \$10,000).** The Committee agreed that a lack of restitution right is clearly wrong. Even if law enforcement or Victim Advocate submits a clearly documented restitution report to a prosecutor, the prosecutor can chose not to submit it to a judge. A judge with such information is not required to consider a restitution request, order restitution, or enforce a restitution order. This obligation is the universal moral right known to every culture around the world - a thief should pay the victim back. Restitution is not a penalty, it is reimbursement, and it can be adjusted over time without double jeopardy incurring for the offender.

The arguments heard against mandatory restitution are that it won't work or will drown the justice process. To combat those views, the bulk of the concepts are from laws enacted by other states and in federal law and noted below parenthetically (e.g., "Florida").

Using the Vermont model, a State of Ohio Restitution Fund is recommended to collect restitution from all offenders and be the first payer for all victims. This comprehensive approach is based on the core principal that restitution must be victim-centered, and consequently the process of collection must provide prompt payment to victims (with a \$10,000 limit per victim).

The Committee unanimously recommends these concepts to OVWA:

### **Proposed Ohio Revised Code Mandatory Restitution Law**

A victim of a crime has the right to receive a criminal court order for full restitution as part of the disposition of a criminal charge or juvenile delinquency proceeding against the offender if the offender is convicted, found delinquent or agrees to pay restitution, for:

- 1) Damage or loss caused directly or indirectly by the defendant's offense;
- 2) Damage or loss related to the defendant's criminal episode, scheme, conspiracy or pattern, and;
- 3) This right shall be accorded as follows:

#### **A) Preservation of Assets** (property cannot be sold or given away to avoid paying restitution)

- 1) Prosecutors shall have the right to petition the court to enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order if, in the prosecutor's judgment, there is a substantial likelihood that a conviction will be obtained and restitution will be ordered.
- 2) Upon receiving the petition the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any action necessary to preserve the availability of property which may be necessary to satisfy an anticipated restitution order. Any order is good for up to 90 days. The court shall preserve the availability of property under the following criterion:
  - a) The prosecutor demonstrates that there is a substantial likelihood that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution order under this chapter; and
  - b) That provision of notice would jeopardize the availability of the property to satisfy any restitution order or judgment.

- c) The temporary order in this Subsection (3) expires not more than ten days after it is entered unless extended for good cause shown or the party against whom it is entered consents to an extension.
- 3) A hearing concerning an order entered under this section shall be held as soon as possible, and prior to the expiration of the temporary order.

#### **B. Determination of Restitution**

- 1) The State shall present evidence relevant to the issue of restitution, but does not represent persons who have suffered pecuniary damages. (Arizona)
- 2) The court shall determine the proper amount of restitution by a preponderance of the evidence. (Florida) The court may modify the amount, on its own motion or on the motion of the prosecuting attorney, the victim or victims, or the defendant. If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least 10 days prior to the proceeding held to decide the motion. (California)
- 3) The court shall consider a victims request that no restitution be ordered or a reduced amount be ordered and a victims request that the defendant make restitution by means other than the payment of money. (Alaska)
- 4) Restitution shall be ordered for any economic loss, which the victim actually suffers. The existence of a policy of insurance covering the victim's loss shall not absolve the defendant of the obligation to pay restitution. (Idaho)
- 5) The court shall not, in ordering the amount of restitution, consider the defendant's ability to pay restitution. (Alaska)
- 6) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts (Utah). The court shall determine restitution based upon a reasonable relationship to the victim's loss (Ohio-State v. Marbury, (1995) Cuyahoga App. No. 67929, 104 Ohio App. 3d 179, 661 N.E.2d 271; 1995 Ohio App. Lexis 2097). The court shall order restitution for medical and related professional services and devices relating to physical or mental health care. The court shall order restitution for a victim who was deprived of property and the value it could have incurred during that time including lost wages. The court shall also determine the amount of restitution when the victim(s) are absent, provide incomplete information, or are otherwise unable to provide receipts or other conclusive documentation. When restitution is received by the court, or any portion thereof, and is un-payable to the victim, that restitution shall be ordered to be paid to a third party, including but not limited to a non-profit crime victim service organization (as defined in ORC 2305.236) or the Ohio Victim Compensation Fund.
- 7) The court shall determine the amount of restitution known at the time of disposition and sentencing so the offender knows the extent of his or her obligation. (Ohio-State v. Ray, Scioto App. No. 04CA2965, 2006 Ohio 853; 2006 Ohio App. Lexis 745, 2006 Ohio 853). The court shall determine the amount of restitution prior to, at the time of, or at a delayed sentencing hearing specific to determining the restitution. Should additional information or obligations be submitted subsequent to adjudication, the court shall consider such a motion by preponderance of the evidence and amend the restitution order accordingly.

#### **C. Payment of Restitution**

- 1) Monies received from the defendant shall be applied first to satisfy the restitution order entered by the court and the payment of any restitution arrears. (Arizona)

- 2) If there is more than one victim of a crime, the court shall give priority to victims who are not organizational, insurance or governmental entities when ordering restitution (Minnesota), and pay restitution in the following priorities of payment: individuals, non-profit organizations, businesses, insurance recovery, and lastly to government entities.
- 3) Restitution shall be paid immediately and in full. (Florida) If the court determines that restitution is inapplicable or inappropriate when victims' losses have been requested or are known, the court shall make the reasons for the decision part of the court record. The court may grant permission for the payment to be made within a specified period of time or in specified installments. If the defendant fails to make one or more payments required under this section, the victim or the state on the victim's behalf may enforce the total amount remaining under the order of restitution. (Alaska) At sentencing or any time prior to the termination of the restitution obligation, the court may impose special payment directions upon the defendant or modify such directions. This court may direct 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. The length of time over which scheduled payments are established shall be the shortest time in which full payment reasonably can be made. In-kind payments may be in the form of the return of property, replacement of property, or, if the victim agrees, services rendered to the victim or a person or organization other than the victim.

The court may direct the defendant to repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds. The court may direct the defendant to surrender to the victim(s) named in the restitution order, any interest of the defendant in any non-exempt asset. The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property for restitution. (Federal - Letter from Professor Paul Cassell to Dennis Hastert and Vice-President Dick Cheney regarding: Proposed Improvement on Restitution Act Sec. 102. Amendments to 18 U.S.C. 3664(f)(5))

- 4) The restitution obligation is not subject to discharge in bankruptcy, whether voluntary or involuntary, or to any other statutory or common-law proceeding for relief against creditors. (Florida)
- 5) If the court orders restitution, the restitution shall be a judgment against the defendant which may be collected by the court by garnishment or other execution as on judgments in civil cases. (Kansas)
- 6) In the event that a court ordered restitution obligation (e.g. counseling, medical bills) has been awarded to the victim/claimant by the Ohio Victim Compensation Fund, that restitution amount shall be paid to the Ohio Victim Compensation Fund. (Ohio-Revised Code 2743.72 (E)) In the event of the death of the victim, the remaining restitution amount shall be paid to the (Ohio) Victim Compensation Fund. (Minnesota)
- 7) An order of restitution under this section does not limit any civil liability of the defendant arising from the defendant's conduct. (Alaska)
- 8) An order of restitution made under this section is a condition of the defendant's sentence and, in cases in which the court suspends all or a portion of the defendant's sentence; the order of restitution is a condition of the suspended sentence. (Alaska)
- 9) This section shall not be stayed if the defendant files a notice of appeal, and the payments may be held by the court pending the outcome of an appeal. (Arizona)

- 10) Any monies that are owed by this state to a person who is under a restitution order shall be assigned first to discharge the restitution order, including any tax refund that is owed to the defendant. (Arizona) When the court imposes or modifies payment directions the court may consider any substantial resources from any source, including inheritance, settlement or other judgment, to be applied to any outstanding restitution obligation. (Letter to Dennis Hastert and Dick Cheney from Professor Paul Cassell re: changes to Restitution Act. Sec. 102. Amendments to 18 U.S.C. 3664(f)(6)).
  - 11) When a person's means of identification or financial information was used without that person's authorization in connection with a conviction for any crime the sentencing court may issue such orders as are necessary to correct a public record that contains false information resulting from any violation of such laws. (Colorado)
  - 12) Notwithstanding any law, rule or regulation to the contrary, for the purposes of ensuring the payment of restitution the court shall retain jurisdiction over the offender until the amount of restitution ordered has been paid in full. The court shall:
    - a. Monitor the payment of the restitution to assure that payment is being made;
    - b. Hold a hearing if restitution is not being paid as ordered to determine why the restitution is not being paid.
    - c. Institute sanctions against the defendant if the restitution is not being paid and no good reason exists.
    - d. Not release the defendant from probation, supervision, or post release control until restitution has been paid in full. (Delaware)
- 2) The court shall authorize that funds and property confiscated at the time of arrest are to be applied to any restitution order(s), if the confiscated money is not already obligated by law.

**D) State of Ohio Restitution Fund** (Vermont model)

- 1) The Ohio Restitution Fund is established under the jurisdiction of the Attorney General to collect all court ordered restitution from offenders and deposit said restitution in the Ohio Restitution Fund, with the exception of amounts over \$10,000 which shall be passed on to the victims of record.
- 2) Businesses are not paid out of the Ohio Restitution Fund, unless and except, the business files the loss as individuals and as sole owner (defined to include married couples).
- 3) Victims are eligible for prompt payment of court ordered restitution from the Ohio Restitution Fund up to \$10,000.
- 4) The Ohio Restitution fund is authorized to report offenders' restitution debt to credit reporting agencies, obtain offenders' account information from financial institutions, and collect wage withholding as ordered by the court as part of the restitution payment order.