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Justice for All: Victim Lost in the Legal Shuffle

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Justice for all: Victim lost in the legal shuffle

BY DANA HARRINGTON CONNER

Sept. 17 is Constitution Day, a national observance marking the signing of the Constitution on Sept. 17, 1787. Widener University School of Law and The News Journal have collected essays to honor Constitution Day. This year's theme is "your rights under the Delaware criminal justice system."



**your rights
on trial**

When most of us think about the Constitution of the United States of America in the context of criminal law we often think about the protections afforded to criminal defendants such as a criminal defendant's Fifth Amendment right against self-incrimination, as well as his Sixth Amendment right to effective assistance of counsel.

Today, however, I would like you to consider what, if any, protections are offered to crime victims.

When an individual is charged and prosecuted for an alleged crime, although the victim is often one of the most important witnesses to the case, the victim is not a party to the legal proceeding. As a result, the state, through the attorney general, has the power to decide how to handle

the matter.

The prosecutor chooses what charges, if any, should be filed, whether to offer the defendant a plea agreement or whether to take the matter to trial. If the prosecutor decides to take the matter to trial, it is the prosecutor who has the ultimate authority to decide what evidence to present and the witnesses who will testify.

Over the years I have encountered a great number of fine police officers, victim assistance workers and prosecutors who take very seriously their duty to protect the public.

Take for example the Victims' Bill of Rights, signed into law by then-Gov. Michael Castle on July 23, 1992. Under the bill, law enforcement should keep confidential the victim's personal information, a critical step toward keeping victims safe. In addition, the court shall provide to a victim on the day of any court proceeding, if available, a waiting area separate from the defendant. The precaution is based, in part, on the premise that abusers have a propensity to intimidate their victims, even in non-verbal ways, when placed in the same area with the victim while awaiting trial.

The Victims' Bill of Rights, however, has its own set of limitations when it comes to prosecutorial discretion. For example, the

bill recommends that the prosecutor confer with a victim before amending or dismissing a charge or accepting a plea. This provision is a critical safeguard for victims of violent crime who often have valuable information that should be considered in order to properly assess the risks inherent in any legal action to be taken; whether that choice is prosecution, plea, or dismissal.

This is not to say that the victim should have the ultimate authority to determine the outcome of every prosecution. What the drafters of the Victims' Bill of Rights clearly understood, however, was the importance of seeking, receiving and seriously considering the victim's opinion in an effort to do no additional harm through the criminal process.

The recommendation to confer with the victim, nevertheless, is simply a suggestion. The prosecutor has the freedom to choose not to speak with the victim, as well as the authority to disregard any information provided by the victim if the prosecutor decides to confer with victim. In fact, the statute specifically provides that a prosecutor's failure to comply with this provision of the law does not affect any agreement between the defendant and the state nor any course of action taken by the attorney general.

The law also provides immu-

nity to those who are tasked with enforcing the Victims' Bill of Rights, in essence diluting any protections the law would otherwise afford to victims.

As a result, the likelihood that the suggestion to confer with the victim will be followed in any given case depends primarily on the individual prosecutor assigned to the case. Regrettably, this lack of a mandate ignores victim autonomy, promotes distrust in our legal system, compromises victim safety and silences the victim.

Yet, most lawyers are specifically required to abide by a client's decisions concerning the objectives of the representation pursuant to the rules of professional conduct, and held accountable for any failure to meet their obligations. Lawyers are also required to communicate with their clients and keep them informed about the case. A crime victim, however, is not a client and therefore the prosecutor is not duty-bound to abide by these particular rules of our profession, as their protections do not flow to non-clients.

There are, however, other rules of professional conduct prosecutors must follow, just as any other attorney, or face possible discipline. One rule in particular, Rule 3.8 of the Delaware Lawyers' Rules of Professional Conduct, re-

lates exclusively to the special responsibilities of a prosecutor. The drafters of the rules that guide our profession understood the often contradictory responsibilities of the prosecutor; duty-bound to protect of the public and mandated to ensure that those accused of crimes are treated fairly by our system of justice.

In fact, the comments to the special prosecutor rule speak generally to the responsibility of a prosecutor to minister justice. Regrettably, the actual language refers solely to a prosecutor's duty to protect the rights of the criminal defendant and not to any additional duties to the victim or the public at large.

One might question the fairness of a system that fails to provide enforceable rights to victims of crime, as well as neglects to recognize any duty to a victim of crime in the very rules that guide our legal professionals.

In light of the foregoing, as you celebrate Constitution Day you may want to consider what, if any, changes could be made to protect crime victims and advance one of the most critical guarantees of our legal system — justice for all.

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