

2003

# Due Process - Prosecutorial Implications of a Victim's Right to Be Heard: Court Upholds Victim's Right to Be Heard at Important Criminal Justice Hearings

Gina Warren

Texas A&M University School of Law, [gswarren@law.tamu.edu](mailto:gswarren@law.tamu.edu)

Follow this and additional works at: <http://scholarship.law.tamu.edu/facscholar>

 Part of the [Law Commons](#)

---

## Recommended Citation

Gina Warren, *Due Process - Prosecutorial Implications of a Victim's Right to Be Heard: Court Upholds Victim's Right to Be Heard at Important Criminal Justice Hearings*, 34 Rutgers L.J. 1173 (2003).

Available at: <http://scholarship.law.tamu.edu/facscholar/213>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact [sphillips64@law.tamu.edu](mailto:sphillips64@law.tamu.edu).

DUE PROCESS—PROSECUTORIAL IMPLICATIONS OF A VICTIM’S RIGHT TO BE HEARD: COURT UPHOLDS VICTIM’S RIGHT TO BE HEARD AT IMPORTANT CRIMINAL JUSTICE HEARINGS. *State v. Casey*, 44 P.3d 756 (Utah 2002).

Gina Warren\*

I. INTRODUCTION

In *State v. Casey*,<sup>1</sup> the Supreme Court of Utah was presented with questions regarding a victim’s right to be heard at a change of plea hearing and standing to appeal an adverse ruling in relation to his right to be heard, as well as the appropriate form of notification and invocation of such rights. By relying heavily on the plain language of the Victims’ Rights Amendment of the Utah Constitution,<sup>2</sup> the Utah Victims’ Rights Act<sup>3</sup> and the Utah

---

\* J.D. Candidate, Rutgers University School of Law—Camden, May 2004; B.S., University of Arizona, 1996.

1. 44 P.3d 756 (Utah 2002).

2. The Utah Victims’ Rights Amendment states:

To preserve and protect victims’ rights to justice and due process, victims of crimes have these rights, as defined by law:

To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process;

Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court; and

To have a sentencing judge, for the purposes of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges.

Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney’s fees, or for dismissing any criminal charge, or relief from any criminal judgment.

The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide.

The Legislature shall have the power to enforce and define this section by statute. UTAH CONST. art. I, § 28.

3. In pertinent part, the Utah Victims’ Rights Act states:

(1) The bill of rights for victims and witnesses is:

(a) Victims and witnesses have a right to be informed as to the level of protection from intimidation and harm available to them, and from what sources, as they

Rights of Crime Victims Act,<sup>4</sup> the court held that the victim: “(1) had the right to appeal the district court’s rulings related to his right to be heard, (2) had the right to be heard upon request at defendant’s change of plea hearing, and (3) properly invoked his right to be heard by informing the prosecutor he wished to speak.”<sup>5</sup>

This Comment focuses on the court’s analysis of Utah’s victims’ rights statutes as well as the Utah Constitution in determining what rights, if any, a victim has to be heard at “important criminal justice hearings.” In addition, this Comment will explore trends in victims’ rights legislation<sup>6</sup> as well as

participate in criminal justice proceedings . . . Law enforcement, prosecution, and corrections personnel have the duty to timely provide this information in a form that is useful to the victim.

(b) Victims and witnesses, including children and their guardians, have a right to be informed and assisted as to their role in the criminal justice process. All criminal justice agencies have the duty to provide this information and assistance.

(c) Victims and witnesses have a right to clear explanations regarding relevant legal proceedings; these explanations shall be appropriate to the age of child victims and witnesses. All criminal justice agencies have the duty to provide these explanations.

....

(i) Victims and witnesses have the right to timely notice of judicial proceedings they are to attend and timely notice of cancellation of any proceedings. Criminal justice agencies have the duty to provide these notifications. Defense counsel and others have the duty to provide timely notice to prosecution of any continuances or other changes that may be required.

UTAH CODE ANN. § 77-37-3 (1999).

4. In pertinent part, the Utah Rights of Crime Victims Act states:

The victim of a crime shall have the right to be present at the important criminal or juvenile justice hearings . . . [and shall] have the right to be heard at the important criminal or juvenile justice hearings . . . and, upon request to the judge hearing the matter, the right to be present and heard at the initial appearance of the person suspected of committing the conduct or criminal offense against the victim on issues relating to whether to release a defendant or minor and, if so, under what conditions release may occur.

§ 77-38-4 (1) (1999 & Supp. 2001).

5. *Casey*, 44 P.3d at 766. The court also found that the trial court had remedied the situation when it informally reopened the plea hearing and considered the victim’s testimony. *Id.* However, this matter will not be directly addressed in this Comment.

6. As the court points out:

Utah is one of many states that afford rights to crime victims. In the early 1970s, a victims’ rights movement spread across the United States and focused on integrating victims of crime into the criminal justice process. Responding to this movement, many legislatures across the country enacted statutes affording victims a voice at critical stages of the criminal justice process.

the prosecutorial implications of a victim's right to be notified of, and heard at, the important hearings.

## II. STATEMENT OF THE CASE

The defendant was arrested and charged with aggravated sexual abuse of a child, which is a first degree felony in Utah.<sup>7</sup> Weeks after the defendant was charged, the prosecutor sent a letter to the victim's mother (M.R.'s mother) informing her that the defendant had requested a plea bargain which would reduce the charge from a first degree felony to a misdemeanor of lewdness involving a child.<sup>8</sup> Thereafter, M.R.'s mother met with the prosecutor and objected to the plea due to the strong evidence of guilt as well as the pure heinousness of the crime.<sup>9</sup> The prosecutor assured her that he would not agree to the plea.<sup>10</sup> "Nevertheless, the prosecutor subsequently offered to reduce the first degree felony charge to lewdness involving a child, a class A misdemeanor" and the defendant accepted it.<sup>11</sup> When M.R.'s mother learned of the plea, she contacted the prosecutor and requested that both she and her son be able to voice their opinions to the judge regarding how the defendant's acts affected their lives and how the plea was not appropriate.<sup>12</sup> The prosecutor never informed the district court of their desire to be heard, and the court allowed the defendant's plea without being aware of this fact.<sup>13</sup>

Thereafter, M.R. and his mother obtained legal counsel and filed a motion for a misplea as well as a motion to reject the plea bargain.<sup>14</sup> Both the prosecutor and the defendant filed motions to strike the pleadings claiming, *inter alia*, that the victim is not a party to the action and therefore lacks standing to set aside the plea.<sup>15</sup> The district court did not address the issue of standing, but instead informally reopened the plea hearing in order

---

*Id.* at 761 n.6 (citations omitted).

7. *Id.* at 758.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 759. Of note, the court "refused to be limited to the four-month sentence recommended in the stipulated plea agreement" due to the "'dramatic' reduction in the charge." *Id.*

14. *Id.*

15. *Id.*

to hear the victim's and his mother's statements.<sup>16</sup> The court reopened the case and allowed the testimony into the record, but it still accepted the defendant's plea to lewdness involving a child.<sup>17</sup>

M.R. appealed to the Utah Court of Appeals, which subsequently transferred the case to the Utah Supreme Court due to the "broad-reaching impact" of the case.<sup>18</sup> The Utah Supreme Court granted certiorari and held that not only did M.R. have standing to petition the court to be heard, he had "both a constitutional and statutory right to be heard at defendant's change of plea hearing."<sup>19</sup> The court held that M.R. had properly invoked his right to be heard when he informed the prosecutor of same.<sup>20</sup> Further, the court found the prosecutor had 1) violated M.R.'s rights under the Victims' Rights Act; 2) violated M.R.'s rights under the Rights of Crime Victims Act; 3) violated M.R.'s rights under the Utah Constitution; and 4) breached his duty as an officer of the court due to his failure to "bring relevant information to the court's attention."<sup>21</sup>

### III. HISTORY OF THE AREA

In 1987, the Utah Legislature enacted the Victims' Rights Act,<sup>22</sup> which included a Victims' Bill of Rights<sup>23</sup> declaring that these rights must be "protected by law in a manner no less vigorous than protections afforded criminal defendants."<sup>24</sup> Next, Utah's Victims' Rights Amendment was passed and subsequently ratified on November 8, 1994. The amendment took effect on January 1, 1995.<sup>25</sup> The Victims' Rights Amendment gave crime victims certain rights and "gave the Utah Legislature the power to 'enforce and define [its terms] by statute.'"<sup>26</sup> Thereafter, Utah's Legislature, acting under this authority, enacted the Rights of Crime Victims Act, which elaborated upon the Victims' Rights Amendment.<sup>27</sup>

---

16. *Id.*

17. *Id.* The district court noted its annoyance that the prosecutor did not inform the court of the victim's desire to be heard. *Id.*

18. *Id.* at 760.

19. *Id.*

20. *Id.*

21. *Id.* at 765.

22. UTAH CODE ANN. § 77-37-1 to -5 (1999); *see also supra* note 3.

23. *See supra* note 3.

24. § 77-37-1(1).

25. *See supra* note 2.

26. *Casey*, 44 P.3d at 761 (alteration in original).

27. *Id.*; *see also supra* note 4.

IV. THE COURT'S REASONING IN *STATE V. CASEY*

The Supreme Court of Utah relied upon constitutional and statutory interpretation of the Victims' Rights Act, the Rights of Crime Victims Act and the Victims' Rights Amendment of the Utah Constitution to find that M.R., as a victim: 1) had standing to appeal the district court's rulings related to his right to be heard;<sup>28</sup> 2) had the right to request to be heard at defendant's change of plea hearing;<sup>29</sup> 3) had properly invoked his right to be heard when he informed the prosecutor, and that the prosecutor had a duty to inform the court of the victim's request;<sup>30</sup> and 4) had a right to be heard at the change of plea hearing.<sup>31</sup>

The court reviewed the case de novo with "no deference to the district court's legal conclusions" because interpretation of the Utah Constitution and crime victim statutes "present[ed] questions of law."<sup>32</sup> "In accordance with the analytical hierarchy relative to constitutions and statutes, [the court] first examine[d] the textual language of the Victims' Rights Amendment and look[ed] secondly to the Victims' Rights Act and the Rights of Crime Victims Act."<sup>33</sup> Further, the court noted that in statutory interpretation there is no need to go beyond the plain textual language and meaning of the statute unless the statute is ambiguous.<sup>34</sup>

*A. A Victim's Standing to Appeal a District Court's Ruling Relative to His Right to be Heard Under the Rights of Crime Victims Act*

The first issue analyzed by the Supreme Court of Utah was whether a victim has standing to appeal a district court's ruling relative to his right to be heard.<sup>35</sup> "The Victims' Rights Amendment does not address" the issue, so the court turned to the Rights of Crime Victims Act, which "is on point."<sup>36</sup> The court resolved this issue quickly by reviewing the plain text of the Act, which states that "[i]f a person acting under color of state law willfully or wantonly fails to perform duties so that the [victim's] rights . . . are not provided, an action for injunctive relief . . . may be brought

---

28. *Id.* at 760.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 761.

33. *Id.*

34. *Id.*

35. *Id.* at 761-62.

36. *Id.*

against the individual and the governmental entity that employs the individual.”<sup>37</sup> Further the Act states that “[a]dverse rulings . . . brought by a victim of a crime or a representative of a victim of a crime may be appealed under the rules governing appellate actions, provided that no appeal shall constitute grounds for delaying any criminal . . . proceeding”<sup>38</sup> and that “[a]n appellate court shall review all such properly presented issues, including issues that are capable of repetition but would otherwise evade review.”<sup>39</sup> Pursuant to the plain textual language of the Act, the court determined “(1) that crime victims possess the right to appeal rulings on motions related to their rights as a victim and (2) that an appellate court must review appeals of such a nature.”<sup>40</sup>

*B. A Victim’s Right to be Heard at Defendant’s Change of Plea Hearing Under the Victims’ Rights Amendment and the Rights of Crime Victims Act*

Next, the Supreme Court of Utah looked at the plain textual meaning of the Victims’ Rights Amendment and the Rights of Crime Victims Act to determine whether a victim possesses a constitutional right to be heard at a change of plea hearing.<sup>41</sup> In pertinent part, the Victims’ Rights Amendment states that victims have a right, “[u]pon request, to be . . . heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court.”<sup>42</sup> In addition, the Rights of Crime Victims Act states in pertinent part that “[t]he victim of a crime shall have . . . the right to be heard at . . . important criminal . . . justice hearings.”<sup>43</sup> Since both the Utah Constitution and the Utah Code give victims the right to be heard at “important criminal justice hearings,” the question is whether a plea hearing is considered an “important criminal justice hearing.”<sup>44</sup>

The Utah Code defines an “important criminal justice hearing” as “any [felony criminal] court proceeding involving the disposition of charges

---

37. UTAH CODE ANN. § 77-38-11(1) (1999).

38. § 77-38-11(2)(b).

39. § 77-38-11(2)(c).

40. *Casey*, 44 P.3d at 762.

41. *Id.*

42. UTAH CONST. art. 1, § 28(1)(b).

43. § 77-38-4(1).

44. *Casey*, 44 P.3d at 762.

against a defendant . . . [except for] unanticipated proceeding[s] to take an admission or a plea of guilty as charged to all charges previously filed or any plea taken at an initial appearance.”<sup>45</sup> Therefore, an “important criminal justice hearing” is any hearing or court proceeding which involves the “disposition of felony charges,” with two exceptions: 1) an initial appearance plea and 2) any proceeding where the defendant pleads guilty to initial charges brought against him.<sup>46</sup> Since the change of plea hearing, which was dispositive of a felony charge, fell within the definition of an important criminal justice hearing and did not meet one of the two exceptions (as it was not an initial appearance and the defendant was not accepting responsibility for charges originally filed), the court found that M.R. had a constitutional as well as a statutory right to be heard at a change of plea hearing.<sup>47</sup>

### *C. Proper Invocation of a Victim’s Right to be Heard at a Change of Plea Hearing*

The next issue addressed by the court was what notification is acceptable in order to invoke a victim’s constitutional right to be heard, and if notification is given to a prosecutor, what obligation does the prosecutor have to relay the victim’s request to the court.<sup>48</sup> “[N]either the constitution nor the code mandates how M.R.’s request must be submitted.”<sup>49</sup> Therefore, the court began its analysis with the Victims’ Rights Amendment, which states that the right to be heard is activated “upon request.”<sup>50</sup> The court found this language “ambiguous and undefined.”<sup>51</sup> As a result, the court broadened its analysis to include all “relevant factors” and sought “guidance from the statutes related to the Victims’ Rights Amendment (i.e., the Victims’ Rights Act and the Rights of Crime Victims Act).”<sup>52</sup>

In part, the Victims’ Rights Act states that “[v]ictims . . . have [the] right to be informed and assisted as to their role in the criminal justice process [and all] criminal justice agencies have the duty to provide this information and assistance.”<sup>53</sup> Further, the Act states that “[v]ictims . . . have a right to

---

45. § 77-38-2(5)(c).

46. *Casey*, 44 P.3d at 762-63.

47. *Id.* at 763.

48. *Id.*

49. *Id.*

50. UTAH CONST. art. I, § 28(b).

51. *Id.*

52. *Id.*

53. UTAH CODE ANN. § 77-37-3(1)(b) (1999).



clear explanations regarding relevant legal proceedings . . . [and all] criminal justice agencies have the duty to provide these explanations.”<sup>54</sup> The court considered prosecutors to be a part of a “criminal justice agenc[y]” as outlined in the Victims’ Rights Act with the “duty to provide [legal] explanations regarding relevant legal proceedings.”<sup>55</sup> Further, pursuant to the Rights of Crime Victims Act, the court held that a prosecutor’s duty to “assist” a victim, at the very least, includes the prosecutor forwarding the victim’s request to be heard at a change of plea hearing on to the district court.<sup>56</sup>

Lastly, the court analyzed Utah’s legislative intent in this regard and held that “[h]ad the Utah Legislature intended to require victims to petition the district court directly in order to invoke their right to be heard at plea hearings, it could have inserted the phrase, ‘upon request to the judge,’ into that sentence as well.”<sup>57</sup> Since the legislature did not insert this phrase, the court held that “a victim may deliver a request to be heard at a plea hearing to a prosecutor and that a prosecutor receiving such a request must convey it to the court.”<sup>58</sup> Therefore, the court found that M.R. had properly invoked his right when he informed the prosecutor of his desire to be heard, and that the prosecutor had failed in his duty to inform the court of the victim’s request.

As for prosecutorial misconduct, the court found that the prosecutor violated M.R.’s rights when he failed to convey his desire to be heard as required by the Victims’ Rights Act and Rights of Crime Victims Act.<sup>59</sup> The court went on to find that the prosecutor also had a “duty to convey requests to be heard as officers of the court . . . [and] the prosecutor breached his duty as an officer of the court because he failed to bring relevant information to the court’s attention.”<sup>60</sup>

## V. THE AUTHOR’S ANALYSIS

Historically, victims have been overlooked, left in the dark, and have suffered further victimization by the American criminal justice system. While the United States Constitution affords rights and guarantees to a

---

54. § 77-37-3(1)(c).

55. *State v. Casey*, 44 P.3d 756, 763 (Utah 2002); *see also* § 77-37-3(1)(b)-(c).

56. *Casey*, 44 P.3d at 763.

57. *Id.* at 764.

58. *Id.* at 763-64.

59. *Id.* at 764.

60. *Id.* at 764-65.

criminal defendant, it provided little, if any, solace for a victim of a criminal act.<sup>61</sup> Further, the officers of the judicial system (i.e. police and prosecutors) with their extensive workloads, have had very little time to inform victims of the status of their cases or inform them of important hearing dates.<sup>62</sup> The result: victims were afforded little possibility of having a voice in the criminal process and have even felt victimized twice over by the conclusion of the process without obtaining closure.<sup>63</sup>

In an effort to combat these concerns, in 1982, President Reagan established the President's Task Force on Victims of Crime. The task force issued a Final Report that year recommending that federal and state legislations, as well as the judicial and executive branches, cooperate to afford crime victims greater access to, and participation in, criminal proceedings.<sup>64</sup> Since the issuance of the Final Report, there has been an "explosion of federal and state action [that has] largely centered on establishing and interpreting crime victims' rights to notice of and presence and hearing at critical stages of the criminal justice proceedings."<sup>65</sup> The trend among states to ratify victim-related constitutional amendments has thus far produced such amendments in twenty-nine states.<sup>66</sup> Further, Congress has been reviewing testimony as to a proposed Victims' Rights Amendment to the United States Constitution.<sup>67</sup>

---

61. See Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5th 343 (2001).

62. *Id.*

63. *Id.*

64. See Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victim of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 22 (1999).

65. *Id.*

66. *Id.* at 32 n.49; see also ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. XXIX; FLA. CONST. art. I, § 16; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13; KAN. CONST. art. XV, § 15; MD. CONST. art. 47; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.

67. S. REP. NO. 106-254, at 1 (2000). The proposed Victims' Right Amendment states in pertinent part:

SECTION 1. Each victim of a crime of violence, and other crimes that Congress may define by law, shall have the rights to notice of, and not to be excluded from, all public proceedings relating to the crime: To be heard, if present, and to submit a

*A. Implication of Victims' Rights Amendments upon Duties and Obligations of Prosecutors*

While there are definite positives in advancing victims certain rights and affording them access to formal involvement in criminal proceedings, this section will address the potential negative implications of a prosecutor's obligation and duty of "representation" of the victim throughout the proceeding, as well as possible recommendations for future clarity.<sup>68</sup>

In general, prosecutors have special responsibilities that differ from those of a private attorney.<sup>69</sup> "[T]he public prosecutor's role is to be an

written statement at a public pretrial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence; To the rights described in the preceding portions of this section at a public parole proceeding, or at a non-public parole proceeding to the extent they are afforded to the convicted offender; To notice of a release pursuant to a public or parole proceeding or an escape; To a final disposition of the proceedings relating to the crime free from unreasonable delay; To an order of restitution from the convicted offender; To consideration for the safety of the victim in determining any release from custody; and To notice of the rights to notice under this section are not violated if the proper authorities make a reasonable effort, but are unable to provide the notice, or if the failure of victim to make a reasonable effort to make those authorities aware of the victim's whereabouts prevents that notice.

*Id.*; see also Walker A. Matthews, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735, 743 n.75 (1998).

68. Other viable concerns with Victims' Bills of Rights, such as concerns that the critical balance of constitutional protections for criminal defendants will be compromised, including due process implications as well as a defendant's right to confrontation, will not be addressed in this Comment. For a discussion on this topic, see Zitter, *supra* note 61.

69. See Rule 3.8 of the Model Rules of Professional Conduct, which states:

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

....

(f) except for statements that are necessary to inform the public of the nature and

impartial minister of justice.”<sup>70</sup> Comment 1 of Rule 3.8 of the Model Rules of Professional Conduct states that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”<sup>71</sup> What is not clear is “whose justice or interests the prosecutor should represent.”<sup>72</sup>

The *Casey* court held that the victim has a constitutional and statutory right to be heard at important judicial criminal proceedings<sup>73</sup> and that it is the prosecutor’s duty and obligation to facilitate the victim’s voice.<sup>74</sup> At first blush, this might not appear to be a problem. However, in actuality the court’s ruling (in accordance with recent victims’ rights initiatives) could present an ethical problem for prosecutors.<sup>75</sup> Not only are prosecutors responsible for representing the State’s interests,<sup>76</sup> and upholding special obligations to defendants,<sup>77</sup> they are now obligated to represent the victim’s rights throughout the process.<sup>78</sup> It seems inevitable that a conflict of interest will arise and the prosecutor will be caught in the middle, unable to represent all divergent interests.<sup>79</sup>

The state, or society as a whole, is generally concerned with “liberty and due process, public order and safety, and governmental economy and efficiency,”<sup>80</sup> and the defendant is concerned with protecting his “liberty and due process interests.”<sup>81</sup> While there is potential for these two interests

---

extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

MODEL RULES OF PROF’L CONDUCT R. 3.8 (2002).

70. Matthews, *supra* note 67, at 740.

71. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1.

72. Matthews, *supra* note 67, at 741.

73. *State v. Casey*, 44 P.3d 756, 766 (Utah 2002).

74. *Id.* at 763.

75. *Id.*

76. “The government is thought to hold an interest both in public order and safety and in governmental efficiency.” Matthews, *supra* note 67, at 741-42.

77. “The defendant is typically identified with holding an interest in ensuring that his liberty is protected by due process . . .” *Id.* at 741.

78. “[T]he victim is usually identified with holding an interest in public order and safety.” *Id.*

79. *Id.* at 743.

80. *Id.* at 745.

81. *Id.* at 742.

to conflict, historically, “the defendant’s liberty and due process interests . . . [have] predominate[d].”<sup>82</sup> However, when a prosecutor is forced to also represent the victim’s interests, the victim is “generally only concern[ed] with public order and safety.”<sup>83</sup> As illustrated in *Casey*, a conflict of interest can surface when a prosecutor desires to make a plea agreement with a defendant that he feels is in the best interest of society as well as the defendant, and the victim objects to the plea.<sup>84</sup> Rule 1.8 of the Model Rules of Professional Conduct prohibits an attorney from making “an aggregated agreement as to guilty . . . pleas, unless each client gives informed consent, in a writing signed by the client.”<sup>85</sup> As Comment 13 of the rule points out, “[d]ifferences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer.”<sup>86</sup> The state might have an interest in judicial efficiency and governmental economy in entering into a plea with the defendant. However, the victim’s interest and desire most likely would not align with that of the state, and this could potentially create an ethical

82. *Id.*

83. *Id.*

84. M.R. and his mother were forced to hire independent counsel to represent their rights and interests, and the court found that the prosecutor was indeed derelict in his duties in not conveying relevant information to the court regarding M.R.’s request to be heard. *See State v. Casey*, 44 P.3d 756, 765 (Utah 2002).

85. Rule 1.8 of the Model Rules of Professional Conduct states, in pertinent parts:

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

....

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

MODEL RULES OF PROF’L CONDUCT R. 1.8 (2002).

86. *Id.* at cmt. 13. Rule 1.8 coincides with Rule 1.2 which states, in part: a lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

*Id.* at R. 1.2.

problem for the prosecutor if she “places [the] victims’ interests parallel with or ahead of that of society’s primary interest in protecting the defendants’ liberty and due process rights.”<sup>87</sup>

Further, in the event that victims’ rights initiatives “transform the public prosecutor into a private prosecutor of the victim’s interests,”<sup>88</sup> the prosecutor could be faced with a violation of the Model Rules of Professional Conduct, which require an attorney to maintain a duty of undivided loyalty to a client.<sup>89</sup> Rule 1.7 does not permit an attorney to represent a client if there is a “concurrent conflict of interest.”<sup>90</sup> This means that, if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client . . . or a third person[.]” the attorney is required to withdraw from representation or refuse to accept the case.<sup>91</sup> Comment 8 of the rule elaborates further as to identifying a potential conflict of interest. It states, in part, that:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.<sup>92</sup>

Therefore, “[i]f the prosecutor is forced by [victims’ rights legislation] to align with the victim . . . the prosecutor may be forced to be disloyal to society’s other interests” and violate the rules of ethics, and instead of “administering justice, the prosecutor thus is forced to administer the victim’s justice which, case by case, may be a different conception of justice than that of society.”<sup>93</sup>

---

87. Matthews, *supra* note 67, at 742.

88. *Id.* at 743.

89. Rule 1.7 of the Model Rules of Professional Conduct that states, in pertinent part: [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

MODEL RULES OF PROF’L CONDUCT R. 1.7.

90. *Id.*

91. *Id.*

92. *Id.* at cmt. 8.

93. Matthews, *supra* note 67, at 746.

*B. Recommendations to Curtail Prosecutorial Conflicts of Interest*

Since it appears that victims' rights legislation is becoming increasingly prolific in the United States, and since prosecutorial conflicts of interest appear to be a major concern, the next logical step is to address possible solutions to the ethical quandaries outlined above. One such possibility is to amend the Model Rules of Professional Conduct and afford "prosecutors with more valuable and specific ethical guidance" in this area.<sup>94</sup> Specifically, the rules could be amended to only allow prosecutors to represent a victim if the victim's interests do not conflict with the State's and defendant's interests and it is "obvious that she can adequately represent the interest of each."<sup>95</sup> Further, the rules could provide that as soon as a conflict arises, the prosecutor could "withdraw" from representation of the victim and private counsel could be appointed instead.<sup>96</sup>

A second possible solution would be to give the judiciary the responsibility of implementing the victims' rights legislation directly without diverting it through the prosecutorial office.<sup>97</sup> By assigning the responsibility to the judiciary, it would alleviate the conflict of interest concern with the prosecutor's office; however, it would most likely merely divert the prosecutor's conflict to the judiciary.<sup>98</sup> Like the prosecutor, judges are held to a standard of "impartiality and diligence"<sup>99</sup> and with the judiciary acting on behalf of the victim, there is a potential concern for judicial impartiality and tainting of that diligence.<sup>100</sup>

Finally, a last recommendation, and probably the most appealing one, would be to mandate that victims be appointed independent counsel from the commencement of the proceeding in a like manner as indigent defendants are appointed counsel.<sup>101</sup> The obvious benefit is that victims would be afforded their own counsel with undivided interests and prosecutors would not be confronted with conflict of interest issues.<sup>102</sup> Minor disadvantages include the expense of implementing the program as well as a potential to be more burdensome on the criminal justice system due to additional attorneys

---

94. *Id.* at 748.

95. *Id.* at 749.

96. *Id.*

97. *Id.* at 748.

98. *Id.*

99. *Id.*; see also CODE OF JUDICIAL CONDUCT Canon 3 (1990).

100. Matthews, *supra* note 67, at 748.

101. *Id.* at 750.

102. *Id.*

being involved in the process.<sup>103</sup> However, since it is both the state and federal legislature's desire to give victims a voice, it only makes sense to give the voice its own attorney.

## VI. CONCLUSION

Although affording victims a right to receive notice of, attend and be heard at, important criminal proceedings seems to promote justice as well as provide closure and dignity for the victim, an overwhelming concern is that prosecutors will be faced with unavoidable conflicts of interest in attempting to fulfill obligations to the victims. No doubt immediate attention will be required by both the judicial and legislative branches in order to resolve this matter.

---

103. *Id.* For additional discussion regarding possible solutions to the ethical problems presented in this comment, see *id.* at 747-51.



