



Inviting Victim Participation in Plea Agreements

Crime Victims' Institute

at the Criminal Justice Center at Sam Houston State University

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Guilty pleas account for over 90% of felony convictions in state courts.¹ In order to provide crime victims with a chance for meaningful participation in the criminal justice process, they must be afforded the opportunity to be involved during plea negotiations and related proceedings.

With the enactment of victims' rights legislation, crime victims have been able to take a more active role in criminal proceedings. By sharing their experiences about how a crime has affected their lives and presenting their views about appropriate sentencing for offenders, victims have come to play an increasingly essential role in the administration of justice. Victims in many states, however, have not been able to fully exercise the rights provided them by law.

In states where victims have been invited to provide input into plea agreements, that input typically occurs at two stages of the criminal justice process:

1. when conferring with the prosecutor during plea bargaining, and
2. when addressing the court, either orally or in writing, before the entry of the plea.

Depending on the law of a particular state, a victim may be given the opportunity to comment on the proposed plea at either or both of these stages.

Conferring With Prosecutors

Prosecutors are required to consult or confer with victims about plea bargaining or negotiated plea agreements in the following states.

Colorado
Kentucky
Mississippi
Missouri
Nebraska

New Hampshire
North Dakota
Ohio
Vermont
Wisconsin

However, the degree of participation varies widely from state to state. Laws in those states do not clarify what "consult" and "confer" mean in this context.²

In other states, conferring is limited to notifying, informing, or advising victims of a plea bargain or agreement that has already been reached before presenting the proposed plea to the court.^{3, 4} As a general rule, there are few procedural guidelines about the prosecutor's responsibilities to confer in these types of laws, thereby leaving their implementation largely to the discretion of the prosecutor.

Having a Voice When a Plea Is Entered

The impact of an offense on a victim is an important consideration in determining the appropriateness of a plea agreement. A third of the states, *including Texas*, permit the victim to be heard, either orally or in writing, at plea entry proceedings.⁵ In Texas only written victim impact testimony is permitted when deciding on a plea agreement. In Missouri,

...[p]rior to the acceptance of a plea bargain by the court, ...the court shall allow the victim of such offense to submit a written statement or appear before the court personally or by counsel for the purpose of making a statement.⁶

...from the Director

Victim impact statements provide crime victims and their families with an opportunity to participate in the criminal justice process. These statements may be either written or oral and are most commonly introduced at the sentencing stage of judicial proceedings. Every state provides for this kind of input. The majority of states also allow victim input at the parole hearing of an offender. Less common is the practice of allowing victim impact statements when plea bargains are negotiated. Even though a written victim impact statement may be available to the prosecutor and judge, there is no way to know to what extent it is reviewed prior to reaching such agreements.

Many state laws permit victim impact statements to be oral and/or written, but in several states the statement may also be made by means of videotape, audiotape, or other electronic means. This provision can be particularly helpful for victims who wish to give input to a parole board, but are unable to attend the parole hearing because of distance, work, or other obligations.

In most states, a defendant has the right to contest assertions made in the victim impact statement. This is most often limited to objecting to factual statements in the statement. In a few states, the defendant or defense counsel may have the right to cross-examine the victim about the impact statement.

This Legislative Brief is presented to summarize the issues and concerns of crime victims about participating in the plea negotiation process. Too often they report being told about a plea agreement only after it is reached. It is hoped that this information will be helpful in developing public policy that encourages participation of victims in the criminal justice system.

Glen Kercher
Director of the Crime Victims' Institute

Although Kansas only requires prosecutors to inform victims of the nature of a plea agreement, victims have the right to have their views and concerns heard throughout the criminal justice process and to have those views and concerns brought to the court's attention when personal interests of the victim are affected.⁷ In a few states such as *Texas*, a written impact statement may be submitted early in the criminal justice process and used by the court when the plea agreement is presented. Rhode Island victims have the right to prepare a written impact statement for insertion in the prosecutor's case files.⁸ The statement is submitted for court review, or the victim is given a chance to address the court before the plea is accepted.⁹ Similarly, the same victim impact statement attached for use by Georgia prosecutors may be used by the judge when considering a plea agreement.¹⁰ In Texas,

*...[b]efore accepting a plea of guilty, ...the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.*¹¹

Presenting the Views of Victims to the Court

As an alternative to—and, in some states, in addition to—permitting the victim to address the court or submit a victim impact statement, the prosecutor must inform the court of the victim's position on the plea agreement.

Minnesota

If a victim is not present to express an opinion about a plea agreement, the prosecutor must tell the court any objections expressed by the victim.¹²

Arizona and Maine

Prosecutors are to inform the court of the victim's position on the plea, even when the victim is present and addresses the court at the time the plea is entered.¹³

Washington

Prosecutors must make reasonable efforts to inform the victim about the plea agreement and present any objections or comments the victim has to the plea agreement.¹⁴ This is done on the record.¹⁵

South Dakota

Prosecutors are required to disclose victims' comments on the record.¹⁶

Oregon

When the victim has requested notification and consultation regarding plea discussions, judges must ask the prosecuting attorney whether the victim is in agreement or disagreement with the plea.¹⁷ In this way, the objections and concerns of victims who are unable to address the court themselves will be available to judges who can make informed decisions on a proposed plea agreement.

Soliciting the Views of Victims

In at least 22 states, a prosecutor is required to obtain the victim's views concerning a proposed plea agreement.¹⁸ How those concerns are made known is not always spelled out.

Georgia

A victim's impact statement is attached to the case file and may be used by the prosecuting attorney during any stage of the proceedings against the defendant that pertain to plea negotiation.¹⁹

Illinois

Where practical, prosecutors are required to both consult with the victim and consider a written impact statement, if one has been prepared, before entering into a plea agreement.²⁰

South Dakota

Crime victims are permitted to provide their views both orally and in writing.²¹ Not only do victims have the right to offer written input into whether a plea bargaining agreement is proper, but also prosecutors must make a reasonable effort to provide them the opportunity to comment on the agreement terms.

Under this type of consultation law, crime victims are at least given an opportunity to inform the prosecutor's decision, although the terms and sentencing recommendations agreed to under a negotiated plea are still ultimately the decision of the prosecutor. Most states provide no means of insuring compliance with these laws, with the result that crime victims are still frequently left out of the plea agreement process.

Certifying Compliance With the Law

Even though many states give crime victims the right to consult with prosecutors concerning plea bargains, few have enforcement provisions in the laws to ensure compliance.

A few states have attempted to hold prosecutors accountable for compliance with such laws by requiring certification of prosecutors' efforts to confer with the victim.

Arizona

A court cannot accept a plea agreement unless—

1. The prosecuting attorney advises the court that reasonable efforts were made to confer with the victim about the negotiated plea.
2. Reasonable efforts were made to give the victim notice of the plea proceeding and to notify the victim that he or she has the right to be present and, if present, to be heard.
3. The prosecuting attorney is able to tell the court that notice requirements have been satisfied, and the victims' position, if known, on the negotiated plea is presented to the court.²²

Alabama and Indiana have similar laws.²³

Maine

The prosecutor is required to inform the court of any and all attempts to notify the victim of the plea agreement and any victim objections to the plea proposal.²⁴

Delaware

Prosecutors must state on the record that the victim has been notified of a plea agreement to a reduced charge and given

the opportunity to discuss the plea before it is presented to the court. If notification was impossible, the prosecutor must list the steps that were taken to inform the victim.²⁵

Oregon

The judge is responsible for determining whether the victim has asked to be notified and consulted regarding plea discussions.²⁶

Court certification of compliance efforts provides a system of checks and balances that can help preserve the right of a victim to consult on a plea without placing undue burden on the criminal justice process.

Addressing Misconceptions About the Right to Confer

Victims – “The right to confer gives them the right to veto a decision to plea bargain.”

Not true. No state has extended or interpreted a victim’s right to confer to be a victim’s right to control the prosecution of the case. Laws granting victims a right to confer merely provide them with an opportunity to be heard, giving them a voice, not a veto.

Prosecutors – “Mandatory consultation will undermine their prosecutorial discretion.”

Not true. Courts in several states have ruled that a victim does not have the unilateral right to start or stop a criminal prosecution. The victim’s wishes regarding prosecution, although important, are not determinative.²⁷

Victims can exercise their right to be heard without jeopardizing the prosecutor’s authority to negotiate a resolution to the case. Several court rulings suggest that differences between victim impact testimony as to sentencing and agreements in a negotiated plea recommendation do not constitute a violation of the agreement between the state and the defendant.^{28, 29}

Victim impact statements can influence the court’s decision to accept or reject a plea. By consulting with the victim throughout plea bargain discussions prosecutors are able to incorporate the victims’ concerns before presenting a plea proposal to the court. Reflecting these concerns in a plea agreement may enhance the probability that the plea agreement will meet with judicial approval.

Unrealistic expectations by victims can be reduced by educating them about the criminal justice process and the circumstances that might lead to a plea bargain. Victim/witness coordinators in prosecutors’ offices can help victims understand their consultation rights, including any related limitations. Also, victim service professionals can help victims prepare and submit impact statements that are useful to both the prosecutor and the court throughout the plea bargaining process.

For prosecutors and judges, familiarity with the workings of victim impact and consultation laws enhances the effective implementation of these laws. Articulating the victim’s views on a proposed plea agreement to the court in a victim’s absence encourages a prosecutor to actively listen to the concerns and objections of a victim, unlike simply notifying or informing a victim after an agreement has been reached. At the same time, restricting a judge from accepting a plea agreement until the victim’s views have been made known and notification requirements have been met promotes enforcement of crime victims’ rights.

Wrestling with Enforcement

Relatively little case law addresses enforcement of a victim’s right to provide input for a negotiated plea. Laws in many states specifically prohibit remedial action for noncompliance with victims’ rights provisions or state that failure to observe such rights shall not be grounds for a change of sentence.³⁰

Promising Innovations

States can use creative means to ensure that victims’ voices are heard throughout the plea bargaining process other than compliance certification procedures.

Arizona³¹

- Judges are permitted to participate in plea negotiations
- The victim’s role in the plea bargaining process is clearly defined
- Victims are permitted to be present and heard during any settlement discussions attended by the defendant
- The prosecutor is required to confer with the victim and inform the court about the victim’s position
- The court must consider the victim’s views in deciding whether to accept or reject the negotiated plea.

Recommendations

1. Invite victims to be present and heard during any settlement discussions attended by the defendant.
2. When possible, invite input from victims either in writing or by personal appearance before a plea agreement is accepted by the court.
3. Require prosecutors to inform victims about a plea agreement to receive their input prior to it being accepted by the court.
4. When a victim is unable to appear before the court while a plea agreement is being considered, require the prosecutor to present the victim’s position on the plea agreement
5. Before a plea agreement is accepted by the court, require the prosecutor to certify that reasonable efforts were made to confer with the victim about the negotiated plea.
6. When a victim asks to be notified about an impending plea agreement and indicates a desire to consult with the prosecutor during those negotiations, require that victim/witness coordinators in prosecutors’ offices educate victims about the criminal justice process and their consultation rights.

Conclusion

To better incorporate victim input on negotiated plea agreements into the criminal justice process, concisely worded legislation that defines key terms can help avoid misconceptions by prosecutors and victims. Well-written statutory language that clarifies the prosecutor’s obligations toward victims encourages more consistent application of the right to confer for all victims. Moreover, certification of efforts to consult with victims before pleas can be accepted may be a valuable tool for ensuring compliance. Finally, criminal justice professionals should be familiar with laws governing victim input and should help victims understand their meaning.

Notes

1. Bown, J., P. Langan, and D Levin (1999). *Felony Sentences in State Courts, 1996*. Washington, DC: Bureau of Justice Statistics. U.S. Department of Justice.
2. COLO. REV. STAT. § 24-4.1-303 (2001); HAW. REV. STAT. § 801D-4 (2000); KY. REV. STAT. ANN. § 421.500 (Banks-Baldwin 2001); MISS. CODE ANN. § 99-43-27 (2001); MO. REV. STAT. § 595.209 (2000); NEB. REV. STAT. ANN. § 23-1201 (Michie 2001); N.H. REV. STAT. ANN. § 21-M:8-k (2000); N.D. CENT. CODE § 12.1-34.02 (2001); OHIO REV. CODE ANN. § 2930.06 (Anderson 2001); WIS. STAT. § 971.095 (2000).
3. CAL. PENAL CODE § 679.02 (Deering 2001); IDAHO CODE § 19-5306 (Michie 2000); IOWA CODE § 915.13 (2001); KAN. STAT. ANN. § 22-3436 (2000); MD. ANN. CODE art. 27, § 770 (2000); OKLA. STAT. tit. 19, § 215.33 (2000); TENN. CODE ANN. § 40-38-103 (2001); WYO. STAT. ANN. § 1-40-204 (Michie 2001).
4. VT. STAT. ANN. tit. 13, § 5321 (2001).
5. ARIZ. CONST. art. II, § 2.1, ARIZ. REV. STAT. § 13-4423 (2000); COLO. REV. STAT. § 24-4.1-302.5 (2001); CONN. GEN. STAT. §§ 54-91C, -203 (2001); IDAHO CONST. art. II, § 16a, IDAHO CODE § 19-5306 (Michie 2000); IND. CODE §§ 35-35-3-2, -3 (2000); ME. REV. STAT. ANN. tit. 17-A, § 1173 (West 2000); MD. ANN. CODE art. 27 §§ 770, 781 (2000); MINN. STAT. § 611A.03 (2000); MO. CONST. art. I, § 32, MO. REV. STAT. §§ 557.041, 595.209 (2000); MONT. CODE ANN. § 46-18-115 (2000); N.H. REV. STAT. ANN. § 21-M:8-k (2000); N.Y. EXEC. LAW § 647 (Consol. 2001); OKLA. STAT. tit. 22, § 984.1 (2000); R.I. GEN. LAWS §§ 12-28-3, -4.1 (2001); S.D. CODIFIED LAWS § 23A-28C-1 (Michie 2001); TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon 2000).
6. MO. REV. STAT. § 557.041 (2000).
7. KAN. STAT. ANN. §§ 22-3436, 74-7333 (2000).
8. R.I. GEN. LAWS § 12-28-3 (2001).
9. R.I. GEN. LAWS § 12-28-4.1 (2001).
10. GA. CODE ANN. § 17-10-1.1 (2000).
11. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon 2000).
12. MINN. STAT. § 611A.03 (2000).
13. ARIZ. REV. STAT. § 13-4423 (2000); ME. REV. STAT. ANN. tit. 15, § 6101, tit. 17-A, § 1173 (West 2000).
14. WASH. REV. CODE § 9.94A.080 (2001).
15. WASH. REV. CODE § 9.94A.090 (2001).
16. S.D. CODIFIED LAWS § 23A-7-9 (Michie 2001).
17. OR. REV. STAT. § 135.406 (1999).
18. ALA. CODE § 15-23-64 (2001); ARIZ. REV. STAT. § 13-4419 (2000); CONN. GEN. STAT. §§ 54-91c, -203 (2001); DEL. CODE ANN. tit. 11, §§ 9405, 9411 (2000); FLA. STAT. ANN. § 960.001 (West 2001); GA. CODE ANN. §§ 17-10-1.1, 17-17-11 (2000); 725 ILL. COMP. STAT. 120/4.5 (2001); IND. CODE ANN. §§ 35-35-3-2, -5, -6 (Michie 2000); LA. REV. STAT. ANN. § 46:1844 (West 2001); ME. REV. STAT. ANN. tit. 15, § 6101, tit. 17-A, § 1172 (West 2000); 6 MICH. COMP. LAWS § 780.756 (2001); MINN. STAT. § 611A.03 (2000); MONT. CODE ANN. § 46-24-104 (2000); N.J. STAT. ANN. § 52:4B-44 (West 2001); N.Y. EXEC. LAW § 642 (Consol. 2001); N.C. GEN. STAT. § 15A-832 (2000); OR. REV. STAT. § 135.406 (1999); 18 PA. CONS. STAT. §§ 11.201, .213 (2001); R.I. GEN. LAWS § 12-28-3 (2001); S.D. CODIFIED LAWS §§ 23A-28C-1, 23A-7-8, -9 (Michie 2001); WASH. REV. CODE § 9.94A.080 (2001); W. VA. CODE § 61-11A-6 (2001).
19. GA. CODE ANN. § 17-10-1.1 (2000).
20. 725 ILL. COMP. STAT. 120/4.5 (2001).
21. S.D. CODIFIED LAWS §§ 23A-28C-1, 23A-7-8 (Michie 2001).
22. ARIZ. REV. STAT. § 13-4423 (2000).
23. ALA. CODE § 15-23-71 (2001); IND. CODE ANN. §§ 35-35-3-5, -6 (Michie 2000).
24. ME. REV. STAT. ANN. tit. 17-A, § 1173 (West 2000).
25. DEL. CODE ANN. tit. 11, § 5106 (2000).
26. OR. REV. STAT. § 135.406 (1999).
27. *State v. Johnson*, No. C4-92-2517, 1993 Minn. App. LEXIS 617 (Minn. App. June 9, 1993).
28. *Sharp v. Missouri*, 908 S.W.2d 752 (Mo. Ct. App. 1995).
29. *State v. Clark*, 566 A.2d 1346 (Vt. 1989).
30. For example, ARIZ. CONST. art. II, § 2.1; COLO. REV. STAT. § 24-4.1-303 (2001) (see specifically subsection (4)); DEL. CODE ANN. tit. 11, §§ 5106, 9405 (2000); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; N.H. REV. STAT. ANN. § 21-M:8-k (2000); N.Y. EXEC. LAW § 642 (Consol. 2001); OHIO REV. CODE ANN. § 2930.06 (Anderson 2001); S.D. CODIFIED LAWS §§ 23A-7-8, -9 (Michie 2001).
31. ARIZ. ST. R.C.R.P.R. 17.4 (2001).

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