REPORT OF THE
VIRGINIA STATE CRIME COMMISSION ON

Victims and Witnesses Of Crime

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 62

COMMONWEALTH OF VIRGINIA
RICHMOND
1990

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COMMONWEALTH of VIRGINIA

VIRGINIA STATE CRIME COMMISSION

General Assembly Building

IN RESPONSE TO
THIS LETTER TELEPHONE
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ROBERT E. COLVIN
EXECUTIVE DIRECTOR

January 16, 1990

TO: The Honorable L. Douglas Wilder, Governor of Virginia, and Members of the General Assembly:

House Joint Resolutions 48 and 184, agreed to by the 1988 General Assembly, directed the Virginia State Crime Commission to continue the study authorized by HJR 225 (1987), which charged the Crime Commission "to evaluate the effectiveness of current services provided to victims and witnesses of crime throughout the Commonwealth of Virginia and make any recommendations the Commission finds appropriate." Because several of the issues required extensive legal analysis which could not be completed within the first year, and other issues arose over the year, the Commission agreed to continue its examination of victims and witnesses of crime pursuant to §9-125 of the Code of Virginia.

In completing the directives of HJR 48 and HJR 184 (1988), I have the honor of submitting herewith the study report and recommendations on Victims and Witnesses of Crime.

Respectfully submitted,

Elmon T. Gray
Chairman

ETG:sc

Subcommittee Studying

VICTIMS AND WITNESSES OF CRIME

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VIRGINIA STATE CRIME COMMISSION

SUBCOMMITTEE STUDYING ISSUES PERTAINING

TO CRIME VICTIMS AND WITNESSES

I. AUTHORITY FOR AND MEMBERSHIP OF THE STUDY

This report is a continuation of the studies called for by House Joint Resolution 225 (1987), sponsored by Delegate V. Thomas Forehand, Jr., of Chesapeake and Delegate John G. Dicks III of Chesterfield, and House Joint Resolution 48 (1988), sponsored by Delegate Clifton A. Woodrum of Roanoke. The earlier resolution produced House Document 10 (1988) and the later one, House Document 8 (1989). Although the Commission did not sponsor a formal resolution to continue the study into 1989, members felt that several unresolved issues merited more detailed examination and, pursuant to authority granted by §9-125 of the Virginia Code, conducted this study.

In addition, House Joint Resolution 184 (1988), sponsored by Delegate Howard E. Copeland of Norfolk, requested the Joint Legislative Audit and Review Commission (JLARC), in its study of the Division of Crime Victims' Compensation (CVC), to review the claims process and to consider transferring CVC to the Department of Criminal Justice Services (DCJS). The resolution also directed the Crime Commission to assist in studying the treatment of victims in the criminal justice system. (See Appendix A for authorizing legislation.) The JLARC report recommended that CVC submit to the Crime Commission on May 1, 1989, and November 1, 1989, a report on its progress in implementing the JLARC recommendations for improving the operation of CVC.

Membership on the subcommittee remains the same as for the 1988 study and is listed in the preliminary pages.

II. EXECUTIVE SUMMARY

A. Background

On January 16, 1990, the full Crime Commission adopted the report and recommendations of the subcommittee studying victims and witnesses of crime. This report is a continuation of the crime victim-witness studies created by House Joint Resolution 225 (1987), House Joint Resolution 48 (1988), and House Joint Resolution 184 (1988). It considers four issues: a testimonial privilege for sexual assault and domestic violence counselors; courtroom attendance for victims or their survivors; profits from crime laws; and crime victims' compensation.

B. Issues

The primary questions surrounding the first three issues were constitutional: Would enactment of such laws violate defendants' first, fifth, sixth, and fourteenth amendment rights? Literature and case law suggest that testimonial privileges and courtroom attendance laws can be structured and

applied in such manners that neither the victims' nor the defendants' rights suffer. Other states now have testimonial privileges for sexual assault/domestic violence counselors. Seventeen states entitle a victim or his representative to be present in the courtroom during the trial. Although literature is replete with articles assailing the constitutionality of "Son of Sam" laws, case law upholds them; and forty-three states and Congress have enacted them.

Victims' compensation issues had been extensively studied by the Joint Legislative Audit and Review Commission and reported on in House Document 17 (1989). Consequently, this report only summarizes the findings of that investigation and, pursuant to House Joint Resolution 184, reviews the Division of Crime Victims' Compensation responses to the JLARC recommendations, which dealt with funding, program management, and administrative placement. Appendix B of this report is the Industrial Commission's detailed transmittal letter accompanying its final response to JLARC recommendations. Crime Commission legislative proposals focus on program management to expand eligibility coverage, raise the funeral reimbursement award, and ensure confidentiality of information CVC receives from law-enforcement agencies.

C. Recommendations

1. Testimonial Privilege for Sexual Assault and Domestic Violence Counselors

Postpone introducing legislation to enact a limited privilege for sexual assault and domestic violence counselors. The privilege would have extended to qualified crisis center workers who had undergone at least 30 hours of appropriate counseling training. It was limited by requirements that counselors report suspected child abuse and neglect pursuant to §63.1-248.3 and the intent to commit a felony. Standards for qualified sexual assault crisis counselors submitted by Virginians Alligned Against Sexual Assualt, VAASA, appears as Appendix E. The postponement was requested by VAASA.

2. Courtroom Attendance

Amend §19.2-265.1 (exclusion of witnesses) to permit a victim, a parent or guardian of a minor victim, or the parent of a homicide victim to remain in court during the trial. The entitlement to remain in court rests with the judge, who makes the decision outside the jury's presence.

3. Profits from Crime

Enact a profits from crime law to delay, restrict, or prevent the criminal author's receipt of profits gained through the publication, in any form, of accounts of his crime. The proposed legislation requires notice to interested parties, an opportunity for the defendant to show cause why his profits should not be escrowed, escrow by the Division of Crime Victims' Compensation, filing of a civil suit by the victim, and disposition of funds after a five-year period or, if longer, after the final disposition of a civil suit against the defendant or the final disposition of the defendant's appeals. If the victim does not sue for the proceeds, and after the expiration of the previously

mentioned periods, the defendant will receive twenty-five percent and the Criminal Injuries Compensation Fund will receive seventy-five percent of the profits.

4. Crime Victims' Compensation

a. Amend §19.2-368.3 (powers and duties of the Industrial Commission) to restrict the use of information received by CVC to the purposes specified in the section and to permit latitude for the submitting agencies as to the extent and form of the information submitted. This recommendation ensures confidentiality of records.

b. Amend §19.2-368.4 (persons eligible for awards) to enable any victim to collect from CVC so long as the award will not unjustly enrich the offender even if the victim resides with or is married to the offender. Eligibility is also extended to Virginians who are victimized in states having no CVC program eligible pursuant to VOCA guidelines. These changes bring Virginia's statute into compliance with the new VOCA eligibility requirements and are essential if Virginia is to retain substantial federal grants to the CVC program.

c. Amend §19.2-368.11:1 (amount of award) to raise the victim funeral expense reimbursement from $1500 to $2000.

d. Amend §19.2-368.2 (definitions) to include in the definition of "victim" robbery, abduction, and attempted robbery and abduction victims. This amendment allows these victims to collect counseling expenses from CVC when their injury is emotional and not necessarily physical.

III. SCOPE AND PURPOSE OF THE STUDY

In addition to the issues relating to the Division of Crime Victims' Compensation, facing the subcommittee this year were two carry-over issues and one new topic:

- A testimonial privilege for sexual assault and domestic violence counselors, carried over from House Document 10 (1988);
- Courtroom presence of victims and witnesses during trial, carried over from House Document 8 (1989); and
- The profits from crime law, also known as "Son of Sam," "no profit," "nonprofit," and "notoriety for profit" laws

Before the subcommittee acted on the questions of counselor privilege and the presence of victims and witnesses in the courtroom during trial, the members wanted to examine more closely other states' laws and case law, and to allow counselors time to formulate a definition of "counselor" that would not exclude the volunteers essential to the treatment of sexual assault and domestic violence victims. Citizen testimony, particularly from the parents of Sandy Cochran, a Virginia state trooper killed in the line of duty, convinced the subcommittee to include criminal profits laws in the final study of crime victim-witness issues.

A fourth issue, crime victims' compensation, came under the subcommittee's continued scrutiny as a result of House Joint Resolution 184 (1988).

IV. ACTIVITIES OF THE SUBCOMMITTEE

In addition to reviewing information from 1987-1988 public hearings, the subcommittee updated its nationwide survey of victim laws, examined constitutional and case law regarding the current issues, reviewed progress on improvements within the Division of Crime Victims' Compensation and considered several JLARC recommendations as partial bases for proposed legislation, heard additional testimony and held four 1989 meetings (July 28, August 14, September 19, and November 14) before submitting to the full Crime Commission its final crime victim-witness report on December 19, 1989.

V. BACKGROUND

Responding to a national movement for improved treatment of victims and witnesses by the criminal justice system, the subcommittee studied, in the past two years, a number of the issues that occupied the 1982 President's Task Force on Victims of Crime and for which the National Association of Attorneys General, in cooperation with the American Bar Association, created model legislation. These include such topics as crime victims' compensation, funding of victim-witness services, victim input in sentencing and parole processes, confidentiality of designated victim counseling, the feasibility of a victims' Bill of Rights, separate waiting areas for prosecution and defense witnesses, hospital protocol for sexual assault victims, and courtroom attendance for victims and witnesses. Among the most far-reaching of the legislation enacted as a result of Crime Commission work are the following measures.

A. House Document 10 (1988)

The most significant changes brought about by this study were improvements in financing the Criminal Injuries Compensation Fund, whose revenues had not kept pace with the number of claims filed. Other issues, which were closely tied to various constitutional rights, were continued for more detailed study.

1. Crime Victims' Compensation: Virginia Code Sections 19.2-368.2, 19.2-368.11:1, and 19.2-368.18 were amended to raise court assessments from $15 to $20 for Class 1 and 2 misdemeanors and to $30 for felonies, to be disbursed to the Criminal Injuries Compensation Fund; to assess drunk drivers $20 in court costs and to include their victims in victims' compensation coverage; and to delete the $100 deductible for claims, so that no claims of less than $100 are paid, but if a claim amount is between $100 and $15,000, the full amount of the claim will be paid (House Bill 399, Patron: Woodrum).

2. Employer Intercession: Virginia Code Section 18.2-465.1 was amended to prohibit employers from penalizing victims and witnesses for absence from work due to required court attendance (House Bill 412, Patron: Stambaugh).

3. Model Victim Assistance Program: Section 19.2-11.1 was added to establish minimum standards for Victim Assistance Programs which receive state

funding administered by the Department of Criminal Justice Services. (House Bill 410, Patron: Stambaugh).

Other accomplishments include relocating the Crime Victims' Compensation Division's telephone listing from "Industrial Commission" to "Crime Victims' Compensation," and revising the Crime Commission's publication, Hospital Protocol for Treatment of Sexual Assault Victims, and updating the Crime Commission's publication, "Sexual Assault: A Handbook for Victims."

B. House Document 8 (1989)

The 1989 report reflects outstanding progress in alleviating the problems that victims and their advocates brought to the subcommittee's attention. The laws enacted in 1989 statutorily expand the victim's participation in legal processes, augment his sense of control over the outcome of the trial, and increase victim protection.

1. Victim Input Into Parole Decisions

a. Virginia Code Section 19.2-299 was amended to require probation and parole officers to send written notification to victims of personal offenses that they have the right to submit parole input information to the Parole Board and to receive notice of hearing and release dates from the Board (House Bill 1372, Patron: Stambaugh).

b. Virginia Code Section 19.2-299.1 was amended to require, upon request of the attorney for the Commonwealth and with the consent of the victim, victim impact statements in cases of abduction, malicious wounding, robbery, and criminal sexual assault. Capital crimes, because of the Booth v. Maryland and Harris v. Maryland decisions regarding cruel and unusual punishment, fall outside the purview of victim impact statement laws. In Virginia, for crimes other than those cited, victim impact statements remain discretionary with the court (House Bill 1374, Patron: Stambaugh).

2. Victim-Witness Protection

a. Virginia Code Section 19.2-269.2 was amended to allow judges, on motion of the defendant or the attorney for the Commonwealth, to prohibit disclosure of the current address or telephone number of a victim or witness if the court determines the information to be immaterial to the trial (House Bill 1373, Patron: Stambaugh).

b. Virginia Code Section 53.1-160 was amended to require the Department of Corrections, on written request of any victim of the offense for which the prisoner was incarcerated, to notify the victim of the prisoner's forthcoming release (House Bill 1371, Patron: Stambaugh).

c. House Joint Resolution 282 (Stambaugh) reminded localities to provide separate waiting areas for witnesses for the prosecution and for the defense and to include separate witness rooms in their plans for new courthouses.

House Documents 10 (1988) and 8 (1989), the Crime Commission's 1987 and 1988 annual reports respectively, contain further discussion of these measures

as well as of ancillary legislation recommended by the Commission members or proposed by other legislators.

C. House Document 17 (1989)

House Document 17 is the JLARC study of the Division of Crime Victims' Compensation. Its twenty-six recommendations focus on expediting claims, clarifying appeal procedures, solving problems CVC has experienced in management and in collecting information, and finding alternative sources for CVC revenues (Appendix B).

VI. ISSUES

A. Testimonial Privilege for Sexual Assault and Domestic Violence Counselors

Counselor privilege laws, which protect from disclosure information revealed by a client to a therapist during professional treatment, generally include the following characteristics:

- They base their definition of "confidential communication" on John Wigmore's criteria for confidentiality.
- Whether or not they require licensure and/or compensation for the therapist, they require at least a certain number of hours (usually 40) of training in counseling victims, that the counselor be "engaged" in a victim treatment center, that the counselor be supervised by a professional (a licensed or certified practitioner), and that the confidential communication be part of professionally recognized treatment.
- The counseling center cannot be part of a law-enforcement agency.
- They exclude from the privilege any information regarding child abuse, perjury, evidence that the victim is about to commit a crime, or records regarding the communication if the victim sues the counselor or agency.
- Fifty percent provide for in camera review, upon motion of prosecution or defense, to determine if the information is material to the case.
- They protect identifying information about the counseling center.
- Depending on the state, the counselor or victim claims the privilege, but only the victim can waive it.

1. Existing Law

a. Federal provisions: Research did not uncover any federal law or rule

strictly governing privileges for psychotherapists. Stephen R. Smith, in the Kentucky Law Journal, observes that Federal Rule of Evidence 501 provides for a different rule of evidence depending on whether a case is based on state law (a diversity case) or federal law (a federal case). In cases in "'which state law supplies the rule of decision, the privilege shall be determined in accordance with State law.' In federal cases, to which federal law applies, privileges are governed 'by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.' Therefore, even in states with strong privileges, federal cases in federal court may not have any medical or psychotherapy privilege at all."[1]

In the federal Victims of Crime Act, 42 U.S.C. §3789g stipulates that "no recipient of assistance under the provisions of this title shall use or reveal any research or statistical information furnished under this title by any person and identifiable to any specific private person for any purpose other than the purpose for which such information was obtained in accordance with this title. Such information and copies thereof shall be immune from legal process and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings." Persons violating this provision are subject to a fine of up to $10,000. In addition, 42 U.S.C. §10604 allows the federal government to terminate or suspend payment of VOCA funds to any state that fails to comply with the act.

Although the Federal Register for May 18, 1989, reports that VOCA guidelines issued pursuant to the statutes should assure the confidentiality of information that victims reveal to crisis intervention counselors working for victim services programs receiving funds authorized under VOCA, interpretation of the statue remains open to question.

b. State Law: Depending on point of view, the last few years have brought either slow but steady progress or slow but steady erosion. In 1987, twelve states had counselor privilege statutes; by 1988, sixteen had the privilege; and currently, according to the Crime Commission's most recent survey and the U.S. Department of Justice's 1986 proposed model legislation for crime victims, twenty-three states have enacted some form of such privilege. Most states, whether by statute or rule of evidence, have limited the privilege to licensed or certified therapists, including social workers.

Massachusetts (Ch. 233, §20J) and Michigan (§2157) have chosen another method to protect confidential communications, refusing to admit as evidence communications to sexual assault and domestic violence counselors without prior written approval of the victim. A number of other states, e.g., California (§1035.4-8), Connecticut (Public Act 429), Illinois (Ch. 8, §8031), Iowa (§236A), Maine (Title 16, §53-A), Minnesota (§595.02), New Hampshire (§173), New Jersey (§2A), New Mexico (§31-25-1ff), Pennsylvania (§5945.1), Utah (§78-24-8), Washington (§70.125.065), and Wyoming (§§1-12-16 and 14-3-210), all specifically mention sexual assault and domestic violence counselors, rape crisis counselors or victim counselors in their privilege laws. Indiana's Code (Ch. 6, §35-37-6-1ff) particularly includes volunteers of victim counseling centers. Although Pennsylvania law does not mention "volunteers" per se, §5945.1 grants the privilege to the sexual assault counselor, defined as "a person who is engaged in any office, institution or

center defined as a rape crisis center under this section, who has undergone 40 hours of sexual assault training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault." Hence, the Pennsylvania statute defines counselor by training and "engagement" with a center, not by licensure, certification, or compensation. The North Carolina legislature has just begun a two-year study of domestic violence, rape, and battered women which may examine privilege for these victims' counselors.

c. Virginia Law: At this point, Virginia has no counselor privilege statute that applies to criminal cases. Virginia law, however, recognizes the validity of privilege statutes for counselors in §8.01-400.2, which establishes a psychotherapist privilege in civil cases, but the counselor, social worker, or psychologist must be licensed; item 23 of §2.1-342 (the Freedom of Information Act) exempts from the act but not from evidence "confidential records, including victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses;" and §18.2-67.7 (Virginia's rape shield law) declares inadmissible, in criminal cases, "general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct." The judge, however, may determine that the evidence is admissible. Virginia law also recognizes the validity of privileges in criminal law. Section 19.2-271.5 grants a priest penitent privilege for the accused "where such person so communicating (in confidence and to the minister in his professional capacity) such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted." None of the protections, of course, necessarily include information victims reveal to counselors during treatment.

2. Objections to Counselor Privilege

Opponents to a counselor privilege argue that such a provision violates a defendant's Sixth Amendment right to confront adverse witnesses and to have compulsory process for obtaining witnesses in his favor. Fifth and Fourteenth Amendment guarantees to due process may also be incidentally nullified.

According to a 1987 Suffolk Law Review case comment by Kathryn A. O'Leary, even in camera review does not meet the requirements of the Sixth Amendment.[3] She discusses Commonwealth v. Two Juveniles, 397 Mass. 261, 491 N.E. 2d 234 (1986) in which the Massachusetts Supreme Court considered whether two codefendants accused of rape were entitled to an in camera inspection of privileged communications between the victim and her sexual assault counselor, regardless of the victim's absolute privilege against disclosure of the communication. When the victim went to the hospital after the rape, she talked with the hospital's sexual assault counselor. The defense attorney for the boys sought an in camera inspection of the records of the visit to determine if they contained exculpatory evidence. The trial judge refused, finding the counselor privilege absolute. On appeal, the Massachusetts Supreme Court did not consider the constitutionality of the issue raised by the absolute privilege, but "held that a determination of the statute's constitutionality first requires fully litigated factors and then, if the defendant can make a required preliminary showing of a legitimate need for

access to that communication it is within the trial judge's discretion to resolve the matter." The court rejected the defendants' assertion that in any case involving a privilege "at least some of the communication will be relevant and materially related to the crime, and that the mere possibility that the communication might aid the accused is sufficient to overcome the privilege."[4] The court concluded that exceptions to the privilege must be determined case by case.

O'Leary feels that this decision creates a "double hurdle" that defendants must overcome "to vindicate their right to confrontation. Defendants must make an undefined preliminary showing of need for the privileged communication before a trial court will consider exercising its discretion and examine the information in camera." Moreover, once the court has examined the information, the court alone decides if it will be helpful to the defendant.[5]

Another case, Pennsylvania v. Ritchie, 1347 U.S. 18 (1987), also challenged the counselor privilege's comportment with the Sixth Amendment. Pennsylvania §5945.1, which carries an in camera review provision, exempts sexual assault counselors' child abuse records from disclosure. When Ritchie was convicted of sexually abusing his thirteen-year-old daughter and his case was appealed to the United States Supreme Court, it was found that the trial court did not inspect the records and that the records of the Children and Youth Services Department could have contained information that might have changed the outcome of this trial, i.e., that his Sixth Amendment right to obtain witnesses and information in his favor and his Fifth and Fourteenth Amendment rights to due process had been compromised. As a result, the Supreme Court, while agreeing that "a defendant's right to discover exculpatory evidence does not include the unsupervised authority to search the State's files and make the determination of the materiality of the information," found that:

> "(a.) Due process requires in camera inspection of the privileged communications by the trial court.
>
> (b.) Evidence contained in the privileged materials which is material to the defense (must) then be made available to the defendants.
>
> (c.) If the defendants request specific information from within the privileged information, the trial court does not have unlimited discretion in deciding whether to (release it to the defense)."[6]

These opinions, the court felt, would ensure a fair trial by protecting the defendant's right to relevant information, the victim's right of privacy, and the state's interest in protecting the confidentiality of certain information.

With regard to item (c.), O'Leary notes that "(t)he court recognized the inherent difficulties in requesting unseen information but nevertheless rejected the notion that privileged information be treated similarly to evidence precluded from trial by rape shield laws by giving defendants access to the material before arguing for its admissibility."[7]

Hence, O'Leary defines three objections to a counselor privilege, regardless of in camera inspection:

a. The defense must establish a right of access to a right, e.g., prove that the evidence is material to the trial.

b. The court alone decides if the evidence will be helpful to the defendant, i.e., the judge may well be unfamiliar with the "theory of defense" and as a result fail to recognize the importance of seemingly insignificant or irrelevant information.

c. There are no consistent guidelines for relevance, and determinations of relevance are left to case-by-case decisions.[8]

3. Support for Counselor Privilege

Advocates of the privilege contend that the in camera provision satisfies Fifth, Sixth and Fourteenth Amendment requirements and, as shown in the Two Juveniles and the Ritchie cases, the U.S. Supreme Court seems to agree. Not only do the two decisions uphold the privilege, but the Ritchie case upholds it with reference to a governmental agency, the Pennsylvania Children and Youth Services Department. As part of the decision quoted earlier, the Supreme Court in its Ritchie decision affirmed that "(t)o allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the States' compelling interest in protecting child abuse information."

An Illinois Supreme Court case, People v. Foggy, 500 N.E. 2d 1026, 1991, app. 3d 599, 102 Ill. Dec. 925, (1988) tested the constitutionality of the Illinois absolute counselor privilege. Leslie Foggy, convicted of aggravated criminal sexual assault and unlawful restraint, appealed his conviction because the trial court refused to conduct an in camera hearing involving a rape crisis counselor's records. The Illinois Supreme Court affirmed the conviction, holding that "the trial court's refusal to conduct in camera hearing to examine communication made between rape victim and rape crisis counselor, to determine whether records provided source of impeachment, based on absolute statutory privilege of confidentiality of communications between rape victims and rape counselors did not violate defendant's due process rights or his confrontation rights."

Proponents argue that much of the information revealed to counselors is as sensitive and potentially damaging to their clients as sexual molestation information is to children and that such information does not include the victim's every thought, emotion or moment of life history. Public examination, particularly in the atmosphere of a courtroom, it is argued, produces injury to the victim without preserving or advancing the defendant's constitutional guarantees.

In addition, proponents argue that to require confidential information conforming to Wigmore's criteria be publicly revealed violates the victim's right to privacy. In a Virginia case, Farish v. Commonwealth, 2 Va. App. 627 (1986), the court ruled to protect individual privacy. Raymond Eugene Farish appealed his conviction of rape and forcible sodomy when the court refused to

order production of the victim's psychiatric records. The Court of Appeals upheld the conviction, finding "that the defendant failed to demonstrate that the records were material to his defense, and that for this reason, his need for the material was outweighed by the public policy against allowing him to bring out potentially embarrassing and unrelated details of the victim's personal life."

More sweeping in its protection of privacy rights is Griswold v. Connecticut, 381 U.S. 479 (1964), which proclaims "the specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance." The decision particularly focuses on the Ninth Amendment, which affirms that "(the) enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," and remarks that Madison, who introduced the amendment, and other framers of the Constitution feared that without this clause, or with a list of specific rights, other valuable ones not cited would be destroyed, abridged, or ignored.

Less theoretical responses appear in the National Association of Attorney General's (NAAG) model legislation, which notes that the nature of the information a privilege would protect is often hearsay and hence inadmissible anyway. Detailed factual information often is not relevant to treatment and not pursued during treatment. As a result, NAAG continues, counselors might know relatively little about the facts of the case, which facts could be furnished by other witnesses (See Upjohn Co. v. United States, 449 U.S. 383 (1981)) and would not be protected under the statute. In addition, protecting identifying information about the counseling center can be essential to protect the victim and is generally of no value in criminal investigations.[9]

Advocates for counselor privileges raise a subsidiary question: Should the privilege be absolute, whereby no information conveyed in counseling can be disclosed in court, or should the privilege be limited by provisions for in camera review, or confession of intent to commit felonies? As mentioned previously, approximately half of the privilege statutes are absolute and half are restricted. Case law is also divided, with, for example, Commonwealth v. Two Juveniles, Davis v. Alaska, and Matter of Pittsburgh Action Against Rape supporting a limited privilege; and Farish v. Commonwealth of Virginia and Illinois v. Foggy supporting an absolute privilege.

B. Victim-Witness Courtroom Attendance

LeRoy L. Lamborn, in a 1987 article in the Wayne Law Review, closely analyzes the problem of courtroom attendance for crime victims and witnesses. Most of the information here derives from his discussion.[10]

The courtroom attendance laws allow, under various conditions, victims and/or witnesses to remain in court as the trial takes place. While no one seeks to promote witness contamination, virtually all agree that abuses exist in the judicial procedure for excluding witnesses, primarily as a result of a defense strategy that designates victims' family members as witnesses and then has them perfunctorily excluded from the trial. According to Lamborn, courtroom attendance statutes have attempted to remedy the problem in three ways:

- Allow the victim to remain in court throughout the trial.
- Allow the victim to remain in court after he has testified.
- Grant the judge discretion to allow the victim to remain in court.[11]

1. Existing Law

a. Federal Provisions: According to Lamborn, Rule 615 of the Federal Rules of Evidence "grants parties to proceedings an absolute right to exclusion of witnesses. Although some states have adopted the form of this rule, they have retained the common law attitude that permits judicial discretion in excluding witnesses. On the other hand, 'while the burden of persuasion is said to be on the party seeking exclusion, in practice the motion is granted almost as a matter of course.' Rule 615 does not authorize exclusion of three categories of persons: (1) a party who is a natural person, (2) an officer or employee of a party who is not a natural person designated as its representative by the attorney, and (3) a person whose presence is shown by a party to be essential to the presentation of the party's case. The third category has served as the basis not only for expert witnesses remaining in the courtroom, but for victims and parents of child victims attendance as well." (See State v. Eynon, 250 N.W. 2d 658 (Ne. 1977), in which the victim of Eynon's rape and attempted burglary was improperly excluded).[12]

With regard to order of witness appearance, Federal Rule of Evidence 611(a) stipulates that "'(t)he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.'"[13]

Although the recommendations of the President's Task Force on Victims of Crime in 1982 lack the force of law, they do promote nationwide standards of treatment of crime victims and witnesses. Recommendation 18 urges judges "to allow the victim and a member of the victim's family to attend the trial, even if identified as witnesses absent a compelling need to the contrary." Heeding the recommendation, the National Conference of the Judiciary on the Rights of Victims of Crimes promulgated "Recommended Judicial Practices," a brochure which espouses victim participation in all stages of the trial, the presence of the victim's advisor in the courtroom with the victim without participating in the judicial proceedings, and the presence of the victim or his family in the courtroom when permitted by law and when it will not interfere with the defendant's right to a fair trial. The Judicial Council of Virginia and the Judicial Conference of Virginia also adopted its "Statement of Principles and Recommended Judicial Practices to Ensure Fair Treatment of Crime Victims and Witnesses."

b. State Law: According to the Crime Commission survey and Lamborn's 1987 Wayne Law Review article, seventeen states now permit victims, their families, and/or witnesses to remain in the courtroom under specific conditions (Alabama, §15-14-50 through §15-14-57; Arkansas, §28-1001, Title 16; California, Penal Code §1102.6; Georgia, §38-1703.1; Maryland, Article 27, §620; Michigan, §780.761; Mississippi, §99-36-5; Nevada, §178.571; New Hampshire, Rule of Evidence 615 amendment; New Mexico, §31-24-1 through §31-24-7; North Dakota, §12.1-34-02(11); Ohio, §§2943.041 and 2945.04J;

Oregon, §40.385; South Carolina, §16-3-1530(C)(8); South Dakota, §23-24-7; Texas, Criminal Procedure Code, art. 56.02(b); and Washington, §7.69.030(10).

Alabama and Arkansas grant the right explicitly; New Hampshire and Oregon grant it implicitly in a new exception to the rule for excluding witnesses; Michigan, South Dakota, and Washington grant the victim the right to be present at the trial after he has testified; California, Georgia, Maryland, Mississippi, New Mexico, North Dakota, South Carolina, and Texas grant the judge the discretion to allow the victim to be present throughout the trial. Nevada allows a support person for the prosecuting witness to remain in court. Ohio's laws generally grant victims the right to be present at all stages of the proceedings so long as their presence does not compromise the defendant's constitutional rights. The Ohio legislature is also considering Senate Joint Resolution 6, which proposes a constitutional amendment guaranteeing victims that right.

c. Virginia Law: Section 19.2-265.1 requires that in criminal cases the court "may upon its own motion and shall upon the motion of either the attorney for the Commonwealth or any defendant...(exclude) every witness..." This statute exempts the defendants and agents of corporations or associations from the statute "as a matter of right," but does not exempt a person whose presence is shown by a party to be essential to the presentation of the party's case (the third exception listed in Rule 615 whereby victims have been allowed to attend the trial). Senate Bill 308 (1988) and Senate Bill 627 (1989), which would have allowed victims and/or witnesses, at the judge's discretion, to remain in the courtroom, were defeated.

2. Objections to Exclusion of Witnesses

Dean Wigmore characterizes the exclusionary rule as "one of the greatest engines that the skill of man has ever invented for the detection of lies in a court of justice." Hence, opponents' most basic objection is that witnesses, including victims as witnesses, allowed to remain in the courtroom would be contaminated, whether consciously or unconsciously, intentionally or unintentionally, by testimony of other witnesses and so destroy the possibility for a fair trial.

The possibility for a fair trial is further eroded, opponents continue, by the presence of a victim's friends and family, whose demeanor may influence the jury.

The potential compromise of a fair trial raises at least three constitutional issues. The Sixth Amendment guarantees defendants the rights to confront and cross-examine witnesses, to counsel and to trial by impartial jury. Opponents argue that the courtroom presence of victims and witnesses denies the defense his best means of revealing inconsistencies in testimony. Moreover, calling witnesses or victims to the stand early and then allowing them to remain in court not only hinders the defense attorney's ability to expose lies and inconsistencies, but may prevent him from pursuing an unexpected line of defense and thereby from providing effective counsel to the accused.[14] Finally, jury members made hostile to the defendant by the presence of a victim's family and friends do not constitute an impartial jury.

Lamborn cites two cases which successfully contested the failure to exclude or separate victims. In United States v. Wade, 388 U.S. 218 (196 where witnesses identifying men in a line-up were not separated, the cou held that "each witness should be required to (identify the suspect) separately and should be forbidden to speak to another witness until all of them have completed the process."

In the second case, Commonwealth v. Lavelle, 419 N.E. 2d 1269 (Penn. 1980), the Pennsylvania Court of Appeals affirmed that "(a)fter listening to the testimony of witnesses who previously testified that the defendant was (the culprit), the tellers could have been influenced to testify with a firmer conviction of their recollection of the defendant's physical characteristics and of his identity as the perpetrator of the crime, and could have been less likely to admit doubt about their identification than they would have admitted if they had been sequestered."[15]

3. Support for Exclusion

Advocates for courtroom attendance laws agree with all of the above. They are, they affirm, seeking justice and a fair trial, and do not wish to create a victim of the legal system.

As to the exclusion of witnesses as a right, Dean Wigmore notes that "a few courts concede that sequestration is a demandable right. But the remainder, following the early English doctrine, hold it grantable only in the court's discretion; declaring usually, however, that in practice it is never denied, at any rate in a criminal case."[16] Allowing the "essential person," Rule 615's third exception, to remain in court is left to the judge's discretion. Lamborn suggests, therefore, "that although the accused might not have an absolute constitutional right of exclusion, he might have a constitutional right to exercise to the judge's discretion on the issue."[17] Hence, the constitutional right to automatic exclusion of the victim or his family remains open to question.

This interpretation comports with the position taken by supporters of courtroom attendance laws: that exclusion be open to judicial discretion rather than granted as a matter of constitutional right. In a word, victims and witnesses expect the rule to be applied in "good faith," not "automatically...without regard to the reasons for its existence -- as in the case of defendants' subpoena of the parent who was not present during the murder of his child." Citing the President's Task Force Report, Lamborn observes "that the 'defendant's subpoena of members of victim's family with no intention of calling them is "an abuse of the subpoena process and such subpoenas can be challenged and quashed."'"[18]

Nevertheless, Alabama's courtroom attendance law was challenged in Crowe v. State, 486 So. 2d 351 (Ala. 1984). Here, the Alabama appeals court held that no constitutional rights of the appellant were abridged because of the victim's widow being seated at the prosecutor's table.

Arkansas' court attendance law has also withstood constitutional challenge in Stephens v. State, 720 S.W. 2d 301 (Ark. 1986). In this case, David Stephens was convicted of aggravated robbery, kidnapping, and being a felon in

possession of a firearm. He appealed, alleging that the victim's presence in the courtroom deprived him of the right to a fair trial. The Arkansas Supreme Court, however, ruled that allowing the victim of crime to remain in the courtroom during trial, when material parts of her testimony were based on her own knowledge and could not have been influenced by previous testimony, was not so fundamentally and inherently unfair as to deprive defendant of a fair trial.

With regard to the order of appearance of witnesses, Rule 611 (a) already allows judges to "exercise reasonable control over the order of interrogating witnesses and presenting evidence." Two cases, Geders v. United States, 425 U.S. 80 (1976), and Brooks v. Tennessee, 406 U.S. 605 (1972), held that the trial judge "may determine generally the order in which parties adduce proof."[19] Consequently, the practices of calling victims, if at all practicable, to testify first and of requiring the defense and the prosecution to submit to the court's determination of order of presentation are neither new nor untested.

In practice, advocates contend, victims are seldom recalled to the stand as witnesses and, hence, only rarely would they be influenced by subsequent testimony. Should they be recalled, testimonial influence could be countered by "jury instruction and the closing argument of the defense counsel that in assessing the credibility of the victim the jury may consider the effect of his having heard the testimony of other witnesses."[20]

Supporters affirm that their primary goal is to halt the abuse of labeling a person a witness when he is not, thereby causing undue anguish when he is banished from court proceedings that are of immense importance to him. Since such people are witnesses only by designation rather than by fact, permitting them to remain in the courtroom does not contravene the defendant's right to confront witnesses. Since the investigation and pretrial discovery have already established that they do not have any knowledge of the crime, the defendant's right to cross-examination and counsel will not be breached by their presence during the trial. Moreover, their distance from the crime makes their involvement in evidentiary or defense strategy surprises unlikely.

With regard to prejudicing the jury, supporters point out that family members may sit anywhere that any member of the public may sit unless the individual state law specifies otherwise. Consequently, there need not be any reason for jurors to know their identity. In addition, should victims or their families behave in a disruptive or prejudicial manner, judges have the discretion under common and statutory law to remove them, just as they may remove from the court the defendant and his supporters for similar behavior.

C. Profits from Crime

Profits from crime laws prevent, limit, or delay criminals' receipt of profits gleaned from the sale of their accounts of their crimes. In response to the David Berkowitz murders and his $200,000 contract with McGraw-Hill, the New York legislature enacted the first "Son of Sam" law in 1977. Since then, forty-three other states and Congress have adopted similar legislation. While the measures vary in wording and individual provisions, they generally encompass the following characteristics:

- The publisher or person making the contract must turn over any money due the accused or convicted person to a state agency, the attorney general, the state treasurer, or the crime victims' compensation board.

- The agency establishes an escrow account for the victim, the victim's family, or the crime victims' compensation fund.

- To avoid due process challenges, the law may require notice to the accused or criminal that the state is going to escrow his money and that the person show cause why the state should not do so (South Dakota).

- The agency must advertise, in papers in the county or municipality in which the crime occurred and in surrounding jurisdictions, that escrowed funds will be available to the victims of that particular crime. The notice period is generally once every six months for five years after establishment of the account.

- To collect, the victim usually must file a civil suit against the criminal, or the court may order restitution to be made from the proceeds.

- The victim usually has five years to file suit.

- If the accused is found innocent, all money in the account is returned to him.

- If the accused is found guilty but the victim files no claim and no claims are pending after five years from the time the funds are escrowed, the criminal usually receives the money. Washington, however, retains fifty percent of the profits for the crime victims' compensation fund.

- The accused may use profits for legal defense.

- A closing section usually declares void any action taken by the defendant, such as creating a power of attorney, to defeat the purposes of the law.

1. Existing Law

a. Federal Law: Chapter 232A (Special Forfeiture of Collateral Profits of Crime), Title 18, §3681 of the United States Code prohibits convicted criminals from profiting from the sale of their accounts of their crimes. The law does not prohibit publishers or authors other than the perpetrator or his assigns from profiting from their endeavors. Unlike some state laws, the federal law distributes the escrow account to the crime victims' compensation fund at the expiration of the five-year statute of limitations, remitting no gains to the criminal.

b. State Law: Despite numerous scholarly articles assailing the constitutionality of Son of Sam laws, Congress and 43 states have, as mentioned earlier, enacted laws that attempt to restrict criminals from profiting from their offenses. Although most states' laws differ but slightly, a few include nonconforming provisions. California's §13967(a) allows the court to consider "any economic gain derived by the defendant as a result of the crime" when setting the amount of fines imposed for felony convictions. Indiana requires the person contracting with the felon to pay ninety percent of the proceeds to the state, and permits the offender to petition the state to release funds not only for legal defense, but to relieve his indigence (§16-7-3.7). Maine's nonprofit law requires prisoners to pay twenty-five percent of any income generated from any source to the victims of their crimes (17-A, §1330(2)). Mississippi's law (§99-38-1 et seq.) allows the felon or his minor children to have the money after five years. Nevada, in §217.265, establishes a property lien on three-quarters of the criminal profits, and Washington retains fifty percent of the profits for its crime victims' compensation fund at the end of five years and disburses the other half to the defendant. Only Kansas, New Hampshire, North Carolina, North Dakota, Vermont, Virginia and West Virginia have not enacted profits from crime legislation.

c. Virginia Law: In 1986, House Bill 817, which would have prohibited criminals from profiting from their crimes, was introduced but did not pass.

2. Objections to Profits from Crime Laws

Richard Alan Inz, in the Columbia Journal of Law and Social Problems, argues that criminal profit laws violate §10 of Article 1 of the Constitution, the First, Fifth and Fourteenth Amendments, and implicit constitutional guarantees of the public's right to know information of public interest.[21] Stephen Clark, in the St. Louis University Law Journal, suggests that such laws violate the Copyright Act.[22]

a. U. S. Constitution, Article 1, §10 (Impairment of contracts): Requiring publishers to decide which crimes would fall under the purview of profit from crime laws and to determine whether or not they want to assume the responsibility for this decision impairs their ability to make contracts. Moreover, the loss of profits would chill defendants' interest in entering contracts.

b. First Amendment (Freedom of Speech and the public's right to know): Escrowing a defendant's profits discourages the exercise of his constitutional right to free speech. Moreover, it compromises the public's constitutionally implicit right to know by discouraging the criminal from publishing the account of his crime. In an obscenity case, Stanley v. Georgia, 394 U.S. 557 (1969), the court found it "well established" that the Constitution protects the "right to receive information and ideas, regardless of their social worth...(as) fundamental to a free society."

Opponents argue that heinous crimes are subjects of social interest and concern, more governed by Grosjean v. American Press Company, 297 U.S. 233 (1936) than Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Grosjean held that a tax imposed on certain newspapers (analogous here to the withholding of profits) had "the plain purpose of curtailing a selected group of newspapers" (those with a circulation greater than 20,000/week), and that it was "the heart of the natural right of the members of an organized society...to...acquire information about their common interests."

Accounts of crimes, which can be socially instructive, do not fall within the purview of the Chaplinsky ruling, in which the court observed that "it is well understood that the right of free speech is not absolute at all times and under all circumstances." The court goes on to provide examples of such instances: "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[23]

Inz cites a decision overturning an anti-picketing ordinance to suggest that the statute also violates the free speech provision by being too vague to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" (Grayned v. City of Rockford, 408 U.S. 104 (1972)).[24]

c. U. S. Constitution, Fifth Amendment (Deprivation of property without due process): Critics maintain that the law deprives defendants of their property without due process of law. Some states' laws do not include the right to notice and a hearing before the property can be escrowed. Arnett v. Kennedy, 416 U.S. 134 (1974), was a case in which an O.E.O. employee was dismissed without a hearing and, hence, "divested of his property interest" without due process. The Supreme Court stated that once a property interest is found, due process, which requires some form of notice and opportunity for hearing before property can be legally taken, must be afforded. In another decision, North Georgia Finishing, Inc., v. Di-Chem, Inc. (1975), the Supreme Court found that seizure of property to satisfy due process requires (1) notice and opportunity for early hearing, (2) participation of a judicial officer, and (3) allegation of specific facts that warrant the issuance of a writ.[25]

d. U. S. Constitution, Fourteenth Amendment (Equal protection of property): Opponents argue that "profit from crime" statutes deny equal protection to property in that a white collar criminal may garner profits from accounts of his crime, while violent criminals cannot.

In a 1972 case, Police Dept. v. Moseley, 408 U.S. 92 (1972), the Court ruled that when the denial of equal protection "plainly involves expressive conduct within the protection of the First Amendment,...discriminations...must be tailored to serve a substantial government interest." Inz opines that "(t)here is not substantial governmental interest in denying to victims of property or personal non-physical injury the availability of Section 632-A's provisions (New York's Son of Sam statute).[26] This loophole has apparently been closed and the amended law is now the basis for a suit. The Richmond Times Dispatch recently reported that R. Foster Winans is attempting to prevent the New York State Crime Victims' Board from escrowing the $17,000 in royalties that Trading Secrets: Seduction and Scandal at the Wall Street

Journal has earned.

e. Copyright Act: The Copyright Act (§201 (e)) states that "(w)hen an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer or exercise the rights of ownership with respect to a copyright, or any of the exclusive rights under a copyright, shall be given effect under this title except as provided under title 11 (involuntary transfers in bankruptcy cases)."[27]

Obviously, appropriating royalties violates the act when the Copyright Law makes no exceptions for how the profits were earned. Clark discusses this objection at length, and concludes that amending the act to permit involuntary transfer of royalties from criminals/authors to escrow agencies would be contrary to the public interest. He asserts that "...there may be public policy reasons for maintaining copyright protection for the criminal/author. Literary and artistic works may provide valuable contributions to the field of criminology, they may further the rehabilitation of the criminal, or they may aid in crime prevention. But if the criminal/author is deprived of financial motivation for creating his work, society will likely suffer from the loss of his potential contributions." [28]

3. Support for Profits from Crime Laws

Proponents feel that criminals should not continue to damage their victims by profiting from their crimes, regardless of the importance of constitutional protections which, they assert, are not curtailed by criminal profit laws anyway. Moreover, advocates point out, the Constitution was not designed to ensure that criminals derive profits from their crimes. In a century-old decision, Riggs v. Palmer, 22 N.E. 188 (1889), a case in which an heir poisoned his benefactor, the New York Supreme Court affirmed that "(n)o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong...or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statute." These principles were again applied in Pertie v. Chase Manhattan Bank, 307 N.E. 2d 253 (N.Y. 1973), where an heir murdered a donor and then attempted to collect the inheritance.[29]

Advocates also note that the statutes are similar to well-established civil attachment laws whereby a judgment creditor in a civil lawsuit may obtain an attachment order "of a defendant's assets where fraud, waste, concealment, flight or assignment is threatened and such assets are needed to satisfy the expected judgement." Stakeholder laws authorize a government agency to enforce the attachment on behalf of victims who would otherwise rarely have adequate notice or legal resources to pursue a civil attachment.[30]

In contrast to Inz, Joel Rothman, in a 1980 article in the Journal of Criminal Law, demonstrates that criminal profit laws enable "the equitable rights of the victim to be advanced while safeguarding the constitutional rights of the offender,"[31] and he tackles the adversaries on every point.

a. U. S. Constitution, Article I, §10 (Impairment of contracts): The statutes do not encourage or discourage the making of contracts between criminals and media representatives. In fact, Rothman alleges, reputable publishers that might otherwise refuse to contract with heinous criminals, might be persuaded to do so since the proceeds would go to the victims. Administering the profits would require no more effort to channel them to an escrow fund than to the criminal. Opponents of criminal profits statutes assert that publishers may be penalized for deciding wrongly that the profits should be paid to the criminal, rather than to the escrow agency. Rothman disagrees, pointing out that the statute is specific in revealing when to pay the royalties to the state: (1) when the publisher is "contracting for the reenactment of a crime or the expressions of an accused person's thoughts, feelings, opinions, or emotions regarding the crime...(and (2)) when the contract provides for payment to the offender who is charged or convicted of committing the crime which is the subject of the reenactment or expressions, or his representative or assignee."[32]

b. U. S. Constitution, First Amendment (Freedom of Speech and the public's right to know): Since the laws only affect profits, they arguably do not infringe on the offender's freedom of speech or the public's right to information. If the offender wants to publish his account, has found a publisher, and the publication expenses are not his, then his ability to publish is not economically limited. For many sensational crimes, and indeed for most other crimes, information is already amply available through news media. Moreover, the statutes limit neither the defendant's ability to express himself nor what he may say.

Courts, over the years, have separated profit-motivated speech from that which is not. For example, in Breard v. Alexandria, 341 U.S. 622 (1951), the Court upheld an ordinance prohibiting door-to-door solicitation of magazine subscriptions, concluding that, although the distribution of information is protected by the First Amendment, "the selling...brings into the transaction a commercial feature." In a 1978 decision, In re Primus, 436 U.S. 412 (1978), the Court reaffirmed the distinction between commercially motivated speech and "speech which seeks to advance beliefs and ideas. In that case, an ACLU attorney was charged with solicitation for offering to represent without charge a woman who had been sterilized as a condition for receiving public assistance funds." In upholding the lawyer, the Court specifically contrasted the case with Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), in which an attorney "had been charged with illegally offering to represent the victims of an automobile accident for his personal gain." In drawing the distinction, the Court stated that:

> "(n)ormally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is 'an associational aspect of "expression"...and other activity subject to plenary regulation by government ...' The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw..., but that is not reason for avoiding the undertaking."[33]

Rothman specifically refers to the previously described Grosjean case, and notes that reducing advertising revenues, a newspapers' prime income necessary to their existence, would put them out of business and hence destroy lines of communication.[34] This is arguably not applicable to publishers of criminal accounts, and it is contrary to the public interest to subsidize the criminal for his illegal activity.

Moreover, the failure to provide an inducement to speak differs from the creation of a barrier between the speaker and the public. The concept of freedom of speech presupposes a willing speaker; it does not require an inducement to speak: "If the withdrawal of an affirmative inducement to speak...is the only deterrence alleged, it suggests that the speaker is not in fact a 'willing speaker' who is being prevented from speaking." Despite profits from crime laws, communication channels remain open because no barrier is placed between the speaker and the public, and the public's right to know remains unimpaired.[35]

As to the allegation that free speech is collaterally impaired, Rothman discusses United States v. O'Brien, 391 U.S. 367 (1968), which found draft card burning to be protected by the First Amendment. As a result of the case, "the Court established a test to determine when government interests in regulating the 'non-speech' elements of a course of conduct justify incidental limitations on first amendment freedoms. First, the regulation must be within the constitutional power of government. Second, it must further an important or substantial government interest. Third, the government interest furthered by the regulation must be unrelated to the suppression of free expression. Finally, the incidental restriction on first amendment freedoms cannot be greater than is essential to the furtherance of that interest."[36]

Profits from crime laws, avers Rothman, clearly meet these standards:

- The state has the constitutionally granted power to regulate commerce within its borders.
- The government has a substantial interest in preventing unjust enrichment of criminal offenders.
- The interest is unrelated to the suppression of protected expression.
- Although some question remains about the necessity of the five-year limitations period, since most laws have a two or three year one, the longer period gives states extra time to find victims and for them to file claims.[37]

c. U. S. Constitution, Fifth Amendment (Deprivation of property without due process): Objections focus on some states' omission of notice and hearing requirements necessary to meet due process standards. As legislators have become more familiar with the legal tests that criminal profit laws must pass, notice of intent to escrow and an opportunity to show cause why the money should not be seized have been incorporated into the statutes. As mentioned earlier, the statutes can also be regarded as similar to the long-standing laws which enable states to hold property before a judgment has been

rendered. In one case, Fuentes v. Shevin, 407 U.S. 67 (1972), the Court established a test for prejudgment seizure of property: "First, the seizure must be directly necessary to secure an important governmental or general public interest. Second, there must be a special need for very prompt action. Finally, the state must keep strict control over its monopoly of legitimate force -- the person initiating the seizure should be a governmental official for determining, under the standards of a narrowly drawn statute, that the seizure is necessary and justified in the particular case."[38]

According to Rothman, criminal profit statutes meet these criteria: (1) The state has an interest in preventing offenders from profiting by their crimes; (2) if the publisher pays the profits to the criminal, he may disperse the funds before the victim can perfect his suit; and (3) the publisher is a disinterested party, since his profits remain unchanged whether the criminal or the state receives the royalties.[39]

d. U. S. Constitution, Fourteenth Amendment (Equal protection): As states have broadened their "profits from crime" laws to include felons of whatever stripe, Fourteenth Amendment objections have subsided.

e. Copyright Act: Copyright objections to criminal profit laws are essentially arguments concerning freedom of speech and deprivation of property, addressed earlier in the report.

The fact that the copyright law has not been amended or repealed, despite challenges, and that no court cases appear to have been brought under the Copyright Act would suggest that copyright objections are weak.

Assertions that the public "loses" whenever the criminal elects not to tell his story (for profit) are value judgments balanced by knowledge that the public has other channels to the information, that if the criminal is genuinely literary he will find another subject for creative expression, and that the potential for rehabilitation must be weighed against the anti-rehabilitative potential of rewarding a person for his crime.

D. Crime Victims' Compensation

Chapter 21.1 (§19.2-368.1 et seq.) of Title 19.2, enacted in 1976, establishes a Division of Crime Victims' Compensation (CVC) within the Department of Workers' Compensation (DWC) to administer a fund of last resort for those who suffer personal injury or death as a direct result of a crime. Since its creation, the Division has handled a steadily increasing number of claims each year. JLARC data in House Document 17 reveal that claims increased from 200 in 1980 to 900 in 1988, and that awards grew from a little over $400,000 in 1981 to nearly $1.6 million in 1987.

1. JLARC Report and Recommendations

House Document 17, the JLARC report, closely addresses funding, program management, and administrative placement of the Division.

a. Funding

As mentioned earlier in this and previous Crime Commission reports, funding has proved to be a continuing difficulty for the Division. Despite improved accounting procedures, a reserve fund that guarantees administrative funding for the Division, and increased court costs payable to CVC, funding has not kept pace with the amount of awards. Additionally, the amount of federal funding and its arrival time remain uncertain.

To remedy one financial uncertainty of the Division, JLARC recommended improving recordkeeping for appeal and administrative costs. JLARC also listed some options for increasing funds that are available for consideration by the General Assembly, e.g., increasing offender costs, assessing fines not only from felons and misdemeanants but from traffic-law offenders, transferring criminal profits and bail forfeitures to the Fund, using general funds, and charging court filing fees.

b. Program Management

JLARC'S findings often echoed testimony. Underlying the protracted turnaround time for claims are not only delays in receiving information, but an inadequate claim form that fails to explain to applicants CVC requirements for collateral resource and insurance data, for emergency awards, and for specifying the type of benefits requested. In addition, claimants and advocates were often confused by the language on the application form, unclear form letters, and the absence of information in general, a difficulty created by the lack of written guidelines.

Equal confusion existed in the appeal process. Applicants report they were not given enough explanation to understand why their claims were rejected or reduced. In some cases, as a result of an inadvertent effect of Jennings v. Division of Crime Victims' Compensation (1988), applicants formerly eligible for CVC reimbursement received no payments because their collateral resources exceeded $15,000. Because of unclear explanations of procedures for reopening claims and appealing decisions, claimants erroneously reported that the Director heard appeals on claims he had initially rejected.

Twenty-four of JLARC's 26 recommendations focus on program management. In general, JLARC recommended improved communication to victims through publication and dissemination of written program, policy and procedural guidelines; simplifying and clarifying forms claimants must complete; revising form letters in such a way that they solicit only necessary instead of extraneous information; and clearly indicating, in correspondence to victims and in publicity documents, critical deadlines. Recommendations for management improvement and, hence, reduced turnaround time include a review of documentation and forms to assure that only necessary information is solicited, establishment of deadlines, development of faster and improved adherence to office procedures for handling emergency claims, and development of a file checklist and automated file call-up system.

c. Administrative Placement

The JLARC study stated that "(m)ore states locate their crime victims' compensation program within their workers' compensation department or industrial commission rather than [in] other organizational structures. Many

states have also ensured that the structural placement allows for independent investigation, assessment, and decision-making for these types of claims. Virginia's placement of the CVC Division appears to parallel that of other states." JLARC staff reported that CVC's problems were unrelated to its placement, that CVC functions parallel those of DWC more closely than those of other agencies, that transfer alone would not solve the problems, and that a transfer would require additional funds. Hence, the study recommended no transfer.

2. Responses to JLARC's Recommendations

As Appendix B demonstrates, CVC has effected many of the recommendations; however, a number of them required statutory changes. Senate Bill 618, patroned in 1989 by Senator Clive L. DuVal 2d, a JLARC member, addressed recommendations 16, 18 and 19 respectively to restore reimbursement determination to its pre-Jennings method by amending §19.2-368.11:1 and 19.2-368.12; to require the Commission to review, not merely consider, appeals by amending §19.2-368.7; and to extend the time for filing appeals from twenty days to two years also by amending §19.2-368.7 (Appendix C).

Pursuant to Recommendation 23, which requires DWC to submit a progress report to the Crime Commission by May 1, 1989, and a final report by November 1, 1989, on the implementation of JLARC's recommendations, and to the previously cited authority granted by §9-125 and House Joint Resolution 184 (1988), the Crime Commission agreed to sponsor legislation to accomplish Recommendation 6, to clarify that family members of persons responsible for crimes are eligible for CVC reimbursement unless the award will unjustly enrich the offender. Two other amendments designed to expand CVC coverage have also been proposed. To retain eligibility for the VOCA funds to CVC, coverage must be extended to Virginians who are victims of crimes occurring outside of Virginia if the state in which the crime occurred does not have a victims' compensation program deemed eligible pursuant to VOCA guidelines. Testimony over the past two years revealed that injuries from crime include emotional as well as physical injury. Providing reimbursement for counseling seems essential if the Commonwealth, through CVC, is to fulfill its mission to provide "aid, care and support" to victims of crime (§19.2-368.1).

To enable CVC to expedite claims, the subcommittee determined that the Division must have more rapid access to confidential material belonging to law-enforcement agencies and medical examiners, but that the confidentiality of the material must not be compromised. The Crime Commission agreed to sponsor legislation to address these concerns. Hence, legislation must assure such agencies that they will not breach confidentiality by complying with CVC requests. To further expedite claims, testifiers suggested that, due to the extensive nature of information requests, the use of a file checklist would be most effective if commercially printed onto the front of the file, utilizing most of the area.

VII. FINDINGS AND RECOMMENDATIONS

Previous testimony from victims, as reported in earlier studies, has reflected dissatisfaction and disillusionment with the criminal justice

system and with crime victims' compensation procedures. This study, like those of 1987 and 1988, attempts to alleviate these problems through statutory changes; hence, the subcommittee recommends the following actions or legislation, all of which appears in Appendix D. The full Crime Commission met on January 16, 1990 and adopted the report and recommendations of the subcommittee studying victims and witnesses of crime.

A. Testimonial Privilege for Sexual Assault and Domestic Violence Counselors

At the January 16th meeting of the full Crime Commission, the subcommittee withdrew, at the request of Virginia Aligned Against Sexual Assault (VAASA), its preliminary recommendation to establish a limited testimonial privilege for sexual assault and domestic violence counselors. While the subcommittee and VAASA supported the concept; VAASA identified several difficulties in pursuing such legislation at this time and requested postponing action. The full Commission agreed with VAASA's request.

B. Courtroom Attendance

Amend §19.2-265.1 (exclusion of witnesses) to permit a victim, a parent or guardian of a minor victim, or the parent of a homicide victim to remain in court during the trial. The entitlement to remain in court rests with the judge, who makes the decision outside the jury's presence.

C. Profits from Crime

Enact a profits from crime law to delay, restrict, or prevent the criminal author's receipt of profits gained through the publication, in any form, of accounts of his crime. The proposed legislation requires notice to interested parties, an opportunity for the defendant to show cause why his profits should not be escrowed, escrow by the Division of Crime Victims' Compensation, filing of a civil suit by the victim, and disposition of funds after a five-year period or, if longer, after the final disposition of a civil suit against the defendant or the final disposition of the defendant's appeals. If the victim does not sue for the proceeds, and after the expiration of the previously mentioned periods, the defendant will receive twenty-five percent and the Criminal Injuries Compensation Fund will receive seventy-five percent of the profits.

D. Crime Victims' Compensation

1. Amend §19.2-368.3 (powers and duties of Commission) to restrict the use of information received by CVC to the purposes specified in the section and to permit latitude for the submitting agencies as to the extent and form of the information submitted. This recommendation ensures confidentiality.

2. Amend §19.2-368.4 (persons eligible for awards) to enable any victim to collect from CVC so long as the award will not unjustly enrich the offender even if the victim resides with or is married to the offender. Eligibility is also extended to Virginians who are victimized in states having no CVC program complying with VOCA guidelines. These changes bring Virginia's statute into compliance with the new VOCA eligibility requirements and are essential if Virginia is to retain substantial federal grants to the CVC program.

3. Amend §19.2-368.11:1 (amount of award) to raise the victim funeral expense reimbursement from $1500 to $2000, an increase that conforms CVC reimbursement to current funeral costs.

4. Amend §19.2-368.2 (definitions) to include in the definition of "victim" robbery, abduction, and attempted robbery and abduction victims. This amendment allows these victims to collect counseling expenses from CVC when their injury is emotional and not necessarily physical.

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2. Federal Register, 54; 95, 21499-21506 (May 18, 1989).

3. Kathryn A. O'Leary, "Case Comments: Defendants' Sixth Amendment Right to Confrontation - Sexual Assault Counselors," Suffolk University Law Review (Winter, 1987), 1222-1229.

4. Ibid., p. 1228.

5. Ibid., pp. 1228-29.

6. Ibid., p. 1229.

7. Ibid., p. 1229.

8. Ibid., P. 1229.

9. U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime. Victims of Crime: Proposed Model Legislation, Washington, D.C.(1986), p. I-6.

10. LeRoy L. Lamborn, "Victim Participation in the Criminal Justice System," Wayne Law Review, 34:97-220, Fall, 1987.

11. Ibid., pp. 162-166.

12. Ibid., p. 159.

13. Ibid., p. 163.

14. Ibid., pp. 157-58.

15. Ibid., pp. 159-60.

16. Ibid., p. 166.

17. Ibid., p. 159.

18. Ibid., p. 161.

19. Ibid., p. 163.

20. Ibid., p. 163.

21. Richard Alan Inz, "Compensating the Victim from the Proceeds of the Criminal's Story - The Constitutionality of the New York Approach," 14, Columbia Journal of Law and Social Problems, 93, 1978.

22. Stephen Clark, "The Son of Sam Laws: When the Lunatic, the Criminal, and the Poet are of Imagination All Compact," 27, St. Louis University Law Journal, 207, 1983.

23. Inz, pp. 106-110.

24. Ibid., p. 111.

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26. Ibid., p. 118.

27. Clark, p. 212.

28. Ibid., p. 231.

29. Paul S. Hudson, "The Crime Victim and the Criminal Justice System," 11, Pepperdine Law Review, 23; 47, 1984.

30. Ibid., p. 48.

31. Joel Rothman, "In Cold Type: Statutory Approaches to the Problem of Offender as Author," 71, Journal of Criminal Law, 255; 279 Fall, 1980.

32. Rothman, p. 264.

33. Ibid., p. 262.

34. Ibid., p. 263.

35. Ibid., p. 264.

36. Ibid., p. 269.

37. Ibid., pp. 269-270.

38. Ibid., p. 272.

39. Ibid., pp. 272-73.

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A. AUTHORIZING LEGISLATION

HP9059460

1987 SESSION
ENGROSSED

HOUSE JOINT RESOLUTION NO. 225

House Amendments in [ ] - February 8, 1987

Directing the Virginia State Crime Commission to study crime victim-witness services.

Patrons--Forehand and Dicks

Referred to the Committee on Rules

WHEREAS, public respect and support for the criminal justice system requires that it be perceived as balanced and fair, not only to those accused and convicted of committing crimes but also to those who are victims and witnesses of crimes; and

WHEREAS, protecting the rights of victims and witnesses of crime need not infringe upon the constitutional rights of those accused and convicted of committing crimes; and

WHEREAS, this Assembly, by way of prior enactments and resolutions, has previously affirmed its support for the rights of crime victims and witnesses; and

WHEREAS, there is a need to evaluate the effectiveness of current victim-witness services in view of the increasing number of bills introduced each legislative session dealing with victim-witness issues and to review various proposals that have been made regarding a "Bill of Rights for Victims and Witnesses of Crime"; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia State Crime Commission is directed to (i) evaluate the effectiveness of current services provided to victims and witnesses of crime throughout the Commonwealth of Virginia, (ii) to study the concept of a "Bill of Rights for Victims and Witnesses of Crime," and (iii) to make any recommendations the Commission finds appropriate.

The Commission shall employ whatever methods of inquiry it shall deem necessary including, but not limited to, the conducting of public hearings throughout Commonwealth and the employment of additional, temporary staff. The Department of Criminal [~~Justices~~ Justice Services], through its Victim-Witness Program section, shall lend its expertise and resources to the Commission in completing this study.

The Commission shall complete its study and submit its recommendations, if any, no later than December 1, 1987.

The direct costs of this study are estimated to be [~~$24,950~~ $8,315] and such amount shall be allocated to the Virginia State Crime Commission from the general appropriation to the General Assembly.

Official Use By Clerks	
Agreed to By The House of Delegates	**Agreed to By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the House of Delegates	Clerk of the Senate

1988 SESSION

LD4064325

HOUSE JOINT RESOLUTION NO. 48

Offered January 21, 1988

Directing the Virginia State Crime Commission to study crime victim-witness services.

Patrons—Woodrum, Guest, Ball, Van Landingham, Forehand, Moore, Stambaugh and Philpott; Senators: Anderson and Gray

Referred to the Committee on Rules

WHEREAS, public respect and support for the criminal justice system require that it be perceived as balanced and fair, not only to those accused and convicted of committing crimes but also to those who are victims and witnesses of crimes; and

WHEREAS, protecting the rights of victims and witnesses of crime need not infringe upon the Constitutional rights of those accused and convicted of committing crimes; and

WHEREAS, this Assembly, by way of prior enactments and resolutions, has previously affirmed its support for the rights of crime victims and witnesses; and

WHEREAS, the 1987 General Assembly directed the Virginia State Crime Commission to evaluate services to victims and witnesses of crime and make its recommendations; and

WHEREAS, the Commission conducted a thorough study and made legislative and administrative recommendations, but due to time constraints was unable to complete its examination of several specific complex issues related to victims of crime; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, that the Virginia State Crime Commission is directed to continue its examination of victim impact statements, victim input in the parole process, confidentiality of designated victim counseling, the right of victims' families to be present during the trial, and other issues as the Commission deems appropriate. The Commission shall complete its study and and submit its recommendations, if any, no later than December 1, 1988. The Commission may employ such means, including public hearings and the hiring of additional, temporary staff, as it deems necessary to complete the study. The Department of Criminal Justice Services, through its Victim-Witness Program section, shall assist the Commission in completing this study.

The costs of this study are estimated to be $4,920 and such amount shall be allocated to the Virginia State Crime Commission from the general appropriation to the General Assembly.

Official Use By Clerks

Agreed to By The House of Delegates		Agreed to By The Senate	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐
Date: _____		Date: _____	
Clerk of the House of Delegates		Clerk of the Senate	

§ 9-125. **Commission created; purpose.** — There is hereby created the Virginia State Crime Commission, hereinafter referred to as the Commission. The purpose of the Commission shall be, through the exercise of its powers and performance of its duties set forth in this chapter, to study, report and make recommendations on all areas of public safety and protection. In so doing it shall endeavor to ascertain the causes of crime and recommend ways to reduce and prevent it, explore and recommend methods of rehabilitation of convicted criminals, study compensation of persons in law enforcement and related fields and study other related matters including apprehension, trial and punishment of criminal offenders. The Commission shall make such recommendations as it deems appropriate with respect to the foregoing matters, and shall coordinate the proposals and recommendations of all commissions and agencies as to legislation affecting crimes, crime control and criminal procedure. The Commission shall cooperate with the executive branch of government, the Attorney General's office and the judiciary who are in turn encouraged hereby to cooperate with the Commission. The Commission will cooperate with governments and governmental agencies of other states and the United States. (1972, c. 766.)

LD4245442

HOUSE JOINT RESOLUTION NO. 184

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Rules
on February 13, 1988)

(Patron Prior to Substitute--Delegate Copeland)

Requesting the Joint Legislative Audit and Review Commission and the Virginia State Crime Commission to study various aspects of the current system for compensating victims of crime.

WHEREAS, the Department of Criminal Justice Services currently administers 32 locally operated victim/witness programs; and

WHEREAS, in addition to financial and technical assistance, the Department also provides training for these local programs; and

WHEREAS, under the present system of compensation for victims of crimes, many recipients complain of extended delays in receiving compensation; and

WHEREAS, in its recent study, *Victims and Witnesses of Crime* (HD 10, 1988), the Virginia State Crime Commission reported that "both victims and victim assistance personnel find application and appeal procedures cumbersome and confusing"; and

WHEREAS, the Department of Criminal Justice Services may be a more appropriate agency for dealing with the disbursement of funds to individual recipients due to its history of advocacy in this area; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Legislative Audit and Review Commission is requested to study the transfer of the Division of Crime Victims Compensation to the Department of Criminal Justice Services and methods to expedite and improve the process by which claims are reviewed; and, be it

RESOLVED FURTHER, That the Virginia State Crime Commission is requested to study the treatment of crime victims and witnesses in the criminal justice system.

The reports and recommendations, if any, of the Commissions shall be submitted no later than December 1, 1988.

The costs of this study by the Virginia State Crime Commission are estimated to be $9,360 and such amount shall be allocated to the Virginia State Crime Commission from the general appropriation to the General Assembly

Official Use By Clerks	
Agreed to By The House of Delegates	**Agreed to By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
_____	_____
Clerk of the House of Delegates	Clerk of the Senate

B. DWC/CVC TRANSMITTAL LETTER

COMMONWEALTH of VIRGINIA

DEPARTMENT OF WORKER'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P O. BOX 1794
RICHMOND, VIRGINIA 23214

October 30,1989

The Honorable Elmon T. Gray
Chairman
Virginia State Crime Commission
General Assembly Building
910 Capital Street
Richmond, Virginia 23219

Dear Senator Gray:

The report of the Joint Legislative Audit and Review Commission (JLARC), review of the Division of Crime Victims' Compensation, House Document No. 17, asked the Department of Workers' Compensation to submit a final report to the Virginia Crime Commission by November 1, 1989 on the progress on implementing its recommendations.

Most of the of recommendations in the JLARC staff report has been accepted by CVC and have been implemented. These changes, and other initiatives taken by CVC, have enhanced the program and improved the efficient delivery of benefits to innocent victims of crimes. In addition, CVC has strengthened its association with victim witness coordinators and the Department of Criminal Justice Services.

This final report will discuss JLARC staff's recommendations in certain specific CVC program areas. A

complete appendix containing documents relating to each of the JLARC staff recommendations concludes the report.

The JLARC staff report focused on five aspects of CVC operations: public awareness, internal procedures, forms, statutory considerations, and program management. We will discuss each topic separately.

AWARENESS

The JLARC staff report emphasized the importance of developing public awareness of CVC in those areas of the state not served by victim witness coordinators. Our review of relevant statistical information showed that a statewide promotion of CVC would effectively serve all areas of the state. Brochures, posters, and informational cards and letters have been sent to all Commonwealth attorneys, magistrates, law enforcement agencies and hospital administrators. This information explained the program to them and asked their cooperation in referring victims to CVC.

One of the most effective resources for advising innocent victims of crime of CVC is informed and cooperative law enforcement personnel. The CVC director will continue to seek opportunities to speak at law enforcement training sessions and conferences. In addition, literature describing CVC was distributed at the recent State Fair.

A significant effort has been made to better inform claimants of the policies and procedures of CVC. The CVC program has revised the brochure which is sent to all persons who ask

about the program or file an application for benefits. CVC has received a positive response to the new brochure.

The application form has also been revised and contains information about the program. In order to insure that every claimant is aware of appellate rights, every letter which is sent awarding or denying a claim contains an informational sheet describing the procedure for review before the Industrial Commission and appeals to the Court of Appeals.

Victim witness coordinators have provided valuable assistance to CVC. The CVC director and staff have attempted to foster and maintain strong lines of communication between CVC and victim witness coordinators. CVC held training sessions and distributed written guidelines explaining the program's procedures. CVC has initiated meetings with the Victim Witness Task Force and these have proven to be an effective forum.

PROCEDURE

CVC has thoroughly reviewed all its procedures and the changes recommended by the JLARC staff report have been implemented. New guidelines and procedural manuals for claims handling have been written and existing manuals have been revised and updated. Staff are required to utilize a checklist for file review.

The amount of time it takes for an applicant to receive a decision after submitting an application has steadily decreased. The present average, 41 days, is one of the best in the United States. Because of the current case load and speedy processing time, it has not been necessary for CVC to implement an automated

call-up system. The program will change to an automated system when the circumstances warrant it.

When a claim is denied or an award reduced, the CVC director is providing more information to the applicant explaining the reason for denial or reduction. Where appropriate, the applicant is sent a copy of the relevant code section to explain an adverse decision. The director's decision letter fully explains the reason for the decision while maintaining the confidentiality of information obtained from law enforcement agencies.

The Director and other staff members have improved the program's procedures to insure prompt, informed responses to questions concerning decisions denying or reducing benefits.

CVC has directed special attention to the procedures used for processing emergency awards. The program has recently added a new computer program which will enable the Director to monitor and expedite claims seeking emergency awards.

Applications for emergency awards present difficult problems because the Code requires that a claim show probable entitlement and undue hardship. An applicant for an emergency award must show qualification for the program and documentation of lost wages before an emergency award can be entered. The speed with which an award can be made is dependent on the speed with which information is received from the Commonwealth's attorney, law enforcement agencies, medical care providers and employers. CVC staff tries to promptly obtain the needed information. To this end, the program has worked with sheriff and police departments

to identify "contact" persons within the departments so that information can be obtained by telephone.

The victim witness coordinators have also been advised of the required information and provided appropriate forms so that they may submit necessary information with an application for an emergency award.

CVC will continue to make the quick processing of emergency awards a high priority.

FORMS

All forms used by CVC have been reviewed and many have been revised. JLARC staff recommendations and those from the Victim Witness coordinators have been incorporated in the revisions. Consistent with these recommendations, the initial application has been reorganized and only the information needed for specific type benefits sought is required. All letters to claimants, health care providers, law enforcement agencies and employers have also been reviewed. Where possible letters requesting information have been organized in a check list style with appropriate sections of the Code of Virginia cited.

STATUTES

Two important statutory changes became effective July 1, 1989. Section 19.2-368.11.1, Code of Virginia was amended to permit the payment of cases precluded from an award by the decision of Jennings v. Division of Crime Victims' Compensation, 5 Va. App 536, 365 S.E. 2d 241 (1988). Payments were promptly made in accordance with the retroactive directions of the section. The second change involved Section 19.1-378.7 Code of

Virginia. That section was amended to allow for an extension of the 20 day limitation for filing a request for review when good cause can be shown.

After carefully considering the JLARC staff concern about the application of the family exclusion provision of §19.2-368.2, Code of Virginia, the Commission has concluded that the statute has been properly interpreted and applied. It should be noted that the Commission's interpretation allows for greater flexibility in awarding benefits and is consistent with new federal directives for receiving funding in 1990. Proposed legislation has been presented to the Crime Commission to assure that the section will comply with new requirements mandated by the Victims' of Crime Act and ensure continued federal funding.

The JLARC report suggested changing the current review process to require that every review request is first heard in a formal, evidentiary hearing by a Deputy Commissioner followed by the right of review before the Full Commission. Implementation of this suggestion would require an amendment to §19.2-368.7, Code of Virginia.

The Commission believes that the current review process best complies with the philosophy of the Crime Victims' Program and the legislative intent of §19.2-368.7 and §19.2-368.8, Code of Virginia. We believe the current process fosters the speedy resolution of claims and is consistent with the desire to emphasize the administrative aspects of the program while insuring that the due process rights of the victims are met.

To require a formal evidentiary hearing and opinion by a Deputy Commissioner in all cases followed by the right of review before the Full Commission would add an additional procedural step to the claimant's review process and further delay the receipt of benefits. A claimant would be required to present a case in a formal hearing where stricter compliance with evidentiary rules is required. This is inconsistent with the program' aim: administratively deciding cases as quickly as possible with the least formality.

In addition, contested decisions often involve issues that do not require the taking of additional evidence but only legal determinations. In such cases the Full Commission is the best forum for interpreting the law. In the small number of cases where the Commissioners require additional information, the cases are expeditiously referred for a hearing and returned for a prompt decision.

It should also be noted that the small number of cases any one Deputy Commissioner would hear increases the prospect that inconstancy in the application of the law would occur. The time required of personnel from the Department of Workers' Compensation to schedule and conduct the additional hearing would also increase administrative costs of the CVC program and indirectly decrease federal funding which is based on state expenditures less administrative costs.

MANAGEMENT

The Industrial Commission has delegated direct responsibility to the Chief Deputy Commissioner for the CVC.

This permits greater responsiveness to requests for policy or procedure clarification. To assure that the functions performed by personnel from the Department of Workers' Compensation are properly paid from CVC funds, quarterly time records are being kept. Written policies and guidelines for these employees are currently being developed. These will include specific instructions for activities performed by CVC.

The Director is closely monitoring the execution of procedures and staff productivity. To assure the CVC staff members are informed of the program's policies and procedures, regular training sessions have been instituted. Participation by staff members in meetings with Victims Witness Coordinators will also enhance working relationships.

CONCLUSION

The Crime Victim Compensation Program will continue to expeditiously, conscientiously and cost-efficiently serve innocent victims of crime. The Industrial Commission welcomes and appreciates the assistance provided by the Virginia State Crime Commission and the Joint Legislative Audit Review Commission and looks forward to the continued improvement in the refinement of the delivery of CVC services to the citizens of the Commonwealth.

Respectfully submitted,

William E. O'Neill, Chairman

Charles G. James, Commissioner

Robert P. Joyner, Commissioner

cc: Philip Leone, Director, JLARC

C. SENATE BILL 618 (1989)

1989 SESSION
ENGROSSED

SENATE BILL NO. 618

Senate Amendments in [ ] - February 3, 1989

A BILL to amend and reenact §§ 19.2-368.7, 19.2-368.11.1 and 19.2-368.12 of the Code of Virginia, relating to compensating victims of crime.

Patrons--DuVal, Andrews, Walker, Buchanan and Truban; Delegates: Moss, Putney, Stambaugh, Ball, Quillen, Wilson, Callahan, Parker, Murphy and Smith

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-368.7, 19.2-368.11.1 and 19.2-368.12 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-368.7. Review by Commission.--A. The claimant may, within twenty days from the date of the report, apply in writing to the Commission for ~~consideration~~ *review* of the decision by the full Commission ~~as provided by~~ § ~~65.1-97~~ . *The Commission may extend the time for filing under this section, upon good cause shown, for a period not to exceed two years from the date of the occurrence.*

B. Upon receipt of an application pursuant to subsection A of this section, or upon its own motion, the Commission shall review the record and affirm or modify the decision of the person to whom the claim was assigned. The action of the Commission in affirming or modifying such decision shall be final. If the Commission receives no application pursuant to subsection A of this section, or takes no action upon its own motion, the decision of the person to whom the claim was assigned shall become the final decision of the Commission.

C. The Commission shall promptly notify the claimant and the Comptroller of the final decision of the Commission and furnish each with a copy of the report setting forth the decision.

§ 19.2-368.11:1. Amount of award.--A. Compensation for Total Loss of Earnings: An award made pursuant to this chapter for total loss of earnings which results directly from incapacity incurred by a crime victim shall be payable during total incapacity to the victim or to such other eligible person, at a weekly compensation rate equal to sixty-six and two-thirds percent of the victim's average weekly wages. The total amount of weekly compensation shall not exceed $200. The victim's average weekly wages shall be determined as provided in § 65.1-6.

B. Compensation for Partial Loss of Earnings: An award made pursuant to this chapter for partial loss of earnings which results directly from incapacity incurred by a crime victim shall be payable during incapacity at a weekly rate equal to sixty-six and two-thirds percent of the difference between the victim's average weekly wages before the injury and the weekly wages which the victim is able to earn thereafter The combined total of actual weekly earnings and compensation for partial loss of earnings shall not exceed $200 per week.

C. Compensation for Dependents of a Victim Who Is Killed: If death results to a victim of crime entitled to benefits, dependents of the victim shall be entitled to compensation in accordance with the provisions of §§ 65.1-65 and 65.1-66 in an amount not to exceed the maximum aggregate payment or the maximum weekly compensation which would have been payable to the deceased victim under this section.

D. Compensation for Unreimbursed Medical Costs, Funeral Expenses, Services, etc.: Awards may also be made on claims , or portions of claims based upon the claimant's actual expenses incurred as are determined by the Commission to be appropriate, for (i) unreimbursed medical expenses or indebtedness reasonably incurred for medical expenses; (ii) expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the victim would have performed, for the benefit of himself and his family, if he had not been a victim of crime; (iii) expenses in any way related to funeral or burial, not to exceed $1,500; (iv) expenses attributable to pregnancy resulting from forcible rape; (v)

any other reasonable and necessary expenses and indebtedness incurred as a direct result of the injury or death upon which such claim is based, not otherwise specifically provided for

E. Any claim made pursuant to this chapter shall be reduced by the amount of any payments received or to be received as a result of the injury from or on behalf of the person who committed the crime or from any other public or private source, including an emergency award by the Commission pursuant to § 19.2-368.9

~~E.~~ *F.* To qualify for an award under this chapter, a claim must have a minimum value of $100, and payments for injury or death to a victim of crime, to the victim's dependents or to others entitled to payment for covered expenses *. after being reduced as provided in subsection E.* shall not exceed $15,000 in the aggregate.

§ 19.2-368.12. Awards not subject to execution or attachment; apportionment; reductions.—A. No award made pursuant to this chapter shall be subject to execution or attachment other than for expenses resulting from the injury which is the basis for the claim.

B. If there are two or more persons entitled to an award as a result of the death of a person which is the direct result of a crime, the award shall be apportioned among the claimants.

C. ~~Any award made pursuant to this chapter shall be reduced by the amount of any payments received or to be received as a result of the injury (1) from or on behalf of the person who committed the crime, (2) from any other public or private source, including an award of the Commission as an emergency award pursuant to § 19.2-368.9 of this chapter.~~

~~D.~~ In determining the amount of an award, the Commission shall determine whether, because of his conduct, the victim of such crime contributed to the infliction of his injury, and the Commission shall reduce the amount of the award or reject the claim altogether, in accordance with such determination; provided, however, that the Commission may disregard for this purpose the responsibility of the victim for his own injury where the record shows that such responsibility was attributable to efforts by the victim to prevent a crime or an attempted crime from occurring in his presence, or to apprehend a person who had committed a crime in his presence or had, in fact, committed a felony

[2. That the provisions of this act shall apply to any claim decided on or after April 1, 1988.]

Official Use By Clerks	
Passed By The Senate	**Passed By The House of Delegates**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
_____	_____
Clerk of the Senate	Clerk of the House of Delegates

D. PROPOSED LEGISLATION

LD0376325

HOUSE BILL NO. 292

Offered January 18, 1990

A BILL to amend the Code of Virginia by adding in Title 19.2 a chapter numbered 21.2, consisting of sections numbered 19.2-368.19 through 19.2-368.22, relating to profits from crime.

Patrons–Stambaugh, Forehand, Woodrum, Ball, Philpott, Guest, Moore, Morgan, Almand, Byrne, Brickley, Van Landingham, Plum, Cranwell, DeBoer, Finney, Abbitt, Harris, E.R., Jackson, Clement, Bennett, Croshaw, Reynolds and Marshall; Senator: Gray

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Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 19.2 a chapter numbered 21.2, consisting of sections numbered 19.2-368.19 through 19.2-368.22, as follows:

CHAPTER 21.2.

PROFITS FROM CRIME.

§ 19.2-368.19. Definitions.–For purposes of this chapter, the following terms shall have the following meanings unless the context requires otherwise:

"Defendant" means any person who pleads guilty to, is convicted of, or is found not guilty by reason of insanity with respect to a felony.

"Division" means the Division of Crime Victims' Compensation.

"Interested party" means the victim, the defendant, and any transferee of proceeds due the defendant under a contract, the person with whom the defendant has contracted, the prosecuting attorney for the Commonwealth, and the Division of Crime Victims' Compensation.

"Victim" means a person who suffers personal, physical, mental, emotional, or pecuniary loss as a direct result of a crime and includes the spouse, parent, child, or sibling of the victim.

§ 19.2-368.20. Order of special forfeiture.–The proceeds received or to be received by a defendant or a transferee of that defendant, from a contract relating to a depiction of his crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of the defendant's thoughts, opinions, or emotions regarding such crime shall be subject to forfeiture pursuant to Chapter 22 (§ 19.2-369 et seq.) of Title 19.2.

Upon motion of the attorney for the Commonwealth made at any time after conviction of such defendant or his acquittal by reason of insanity and after notice to the interested parties, a hearing upon the motion and a finding for the Commonwealth, the trial court shall order that such proceeds be forfeited.

An order issued under this section shall require that the defendant and the person with whom the defendant contracts pay to the Division any proceeds due the defendant under the contract.

§ 19.2-368.21. Distribution.–A. Proceeds paid to the Division under § 19.2-368.20 shall be retained in escrow in the Criminal Injuries Compensation Fund for five years after the date of the order, but during that five-year period may be levied upon to satisfy:

1. A money judgment rendered by a court in favor of a victim of an offense for which the defendant has been convicted or acquitted by reason of insanity, or a legal representative of the victim; and

2. Any fines or costs assessed against the defendant by a court of this Commonwealth.

B. If ordered by a court in the interest of justice, such escrow fund shall be used to:

1. Satisfy a money judgment rendered in the court hearing the matter, in favor of a victim of any offense for which the defendant has been convicted or for which the defendant has voluntarily and intelligently admitted his guilt, or a legal representative of such victim; and

2. Pay for legal representation of the defendant in criminal proceedings, including the appeals process arising from the offense for which such defendant has been convicted or acquitted by reason of insanity, if so ordered by a court of competent jurisdiction, after motion by the defendant on notice to all interested parties and opportunity for hearing. No more than twenty-five percent of the total proceeds in escrow may be used for legal representation.

C. At the end of the five-year period, the proceeds shall be released from escrow. Twenty-five percent of the funds shall be paid to the defendant and seventy-five percent paid into the Criminal Injuries Compensation Fund. However, (i) if a civil action under this section is pending against the defendant, the proceeds shall be held in escrow until completion of the action or (ii) if the defendant has appealed his conviction and the appeals process is not final, the proceeds shall be held in escrow until the appeals process is final, and upon disposition of the charges favorable to the defendant, the Division shall immediately pay any money in the escrow account to the defendant.

§ 19.2-368.22. Actions to defeat section void.—Any action taken by any person accused or convicted of a felony, whether by way of execution of a power of attorney, creation of corporate entities, or otherwise, to defeat the purpose of this section shall be void.

Official Use By Clerks	
Passed By	
The House of Delegates	**Passed By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
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Clerk of the House of Delegates	Clerk of the Senate

LD0156325

HOUSE BILL NO. 294

Offered January 18, 1990

A BILL to amend and reenact § 19.2-368.4 of the Code of Virginia, relating to crime victims' awards; eligibility.

Patrons–Stambaugh, Forehand, Woodrum, Ball, Guest, Moore and Almand; Senator: Gray

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-368.4 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-368.4. Persons eligible for awards.–A. ~~Except as provided in subsection B of this section,~~ ~~the~~ *The* following persons shall be eligible for awards pursuant to this chapter : *unless the award would directly and unjustly benefit the person who is criminally responsible:*

1. A victim of a crime.

2. A surviving spouse, parent or child, including posthumous children, of a victim of a crime who died as a direct result of such crime.

3. Any person, except a law-enforcement officer engaged in the performance of his duties, who is injured or killed while trying to prevent a crime or an attempted crime from occurring in his presence, or trying to apprehend a person who had committed a crime in his presence or had, in fact, committed a felony.

4. A surviving spouse or child, including posthumous children, of any person who dies as a direct result of trying to prevent a crime or attempted crime from occurring in his presence, or trying to apprehend a person who had committed a crime in his presence or had, in fact, committed a felony.

5. Any other person legally dependent for his principal support upon a victim of crime who dies as a result of such crime, or legally dependent for his principal support upon any person who dies as a direct result of trying to prevent a crime or an attempted crime from occurring in his presence or trying to apprehend a person who had committed a crime in his presence or had, in fact, committed a felony.

B. A person who is criminally responsible for the crime upon which a claim is based, or an accomplice or accessory of such person, shall not be eligible to receive an award with respect to such claim. ~~A member of the family of such person shall also be ineligible to receive an award except as follows: (i) a spouse who is a victim of crime prescribed by Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 and the victim prosecutes the offender, (ii) a spouse if there is a bona fide separation and the victim prosecutes the offender, (iii) incest cases, (iv) cases involving mental derangement, or (v) any case in which the terms of the award can be structured in a manner so that a criminally responsible person does not benefit from the award~~ .

C. A resident of Virginia who is the victim of a crime occurring outside Virginia and any other person as defined in subsection A who is injured as a result of a crime occurring outside Virginia shall be eligible for an award pursuant to this chapter if (i) the person would be eligible for benefits had the crime occurred in Virginia and (ii) the state in which the crime occurred does not have a crime victims' compensation program deemed eligible pursuant to the provisions of the federal Victims of Crime Act and does not compensate nonresidents.

LD0374325

HOUSE BILL NO. 295

Offered January 18, 1990

A BILL to amend and reenact § 19.2-265.1 of the Code of Virginia, relating to exclusion witnesses.

Patrons–Stambaugh, Forehand, Woodrum, Ball, Philpott, Guest, Moore and Almand; Senator: Gray

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Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-265.1 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-265.1. Exclusion of witnesses.–In the trial of every criminal case, the court, whether a court of record or a court not of record, may upon its own motion and shall upon the motion of either the attorney for the Commonwealth or any defendant, require the exclusion of every witness ; ~~provided, that~~ . *However,* each defendant who is an individual and one officer or agent of each defendant which is a corporation or association shall be exempt from the rule of this section as a matter of right. *A victim and, in the case of a minor victim, his parent or guardian, and the parents of a homicide victim may, in the discretion of the court, remain during the trial provided the determination by the court shall not be made in the jury's presence.*

Official Use By Clerks	
Passed By The House of Delegates	**Passed By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the House of Delegates	Clerk of the Senate

1990 SESSION

LD0127325

HOUSE BILL NO. 296

Offered January 18, 1990

A BILL to amend and reenact § 19.2-368.3 of the Code of Virginia, relating to powers and duties of the Industrial Commission.

Patrons–Stambaugh, Forehand, Woodrum, Ball, Philpott, Guest, Moore and Almand; Senator: Gray

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-368.3 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-368.3. Powers and duties of Commission.–The Commission shall have the following powers and duties in the administration of the provisions of this chapter:

1. To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of this chapter.

2. ~~To~~ *Notwithstanding the provisions of § 2.1-342 B (1), to* acquire from the attorneys for the Commonwealth, State Police, local police departments, sheriffs' departments, and the Chief Medical Examiner such ~~investigation~~ ~~and~~ *investigative results,* information and data as will enable the Commission to determine if, in fact, a crime was committed or attempted, and the extent, if any, to which the victim or claimant was responsible for his own injury. ~~This~~ *These* data shall include prior arrest records of the offender. *The use of such information received by the Commission shall be limited to carrying out the purposes set forth in this section, and this information shall not be disseminated further. The agency from which the information is requested may submit original reports, portions thereof, summaries, or such other configurations of information as will comply with the requirements of this section.*

3. To hear and determine all claims for awards filed with the Commission pursuant to this chapter, and to reinvestigate or reopen cases as the Commission deems necessary.

4. To require and direct medical examination of victims.

5. To hold hearings, administer oaths or affirmations, examine any person under oath or affirmation and to issue ~~summons~~ *summonses* requiring the attendance and giving of testimony of witnesses and require the production of any books, papers, documentary or other evidence. The powers provided in this subsection may be delegated by the Commission to any member or employee thereof.

6. To take or cause to be taken affidavits or depositions within or without the Commonwealth.

7. To render each year to the Governor and to the General Assembly a written report of its activities.

8. To accept from the government of the United States grants of federal moneys for disbursement under the provisions of this chapter.

Official Use By Clerks	
Passed By The House of Delegates	**Passed By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the House of Delegates	Clerk of the Senate

LD0130325

HOUSE BILL NO. 297

Offered January 18, 1990

A BILL to amend and reenact § 19.2-368.2 of the Code of Virginia, relating to definitions under the Criminal Injuries Compensation Fund.

Patrons–Stambaugh, Forehand, Woodrum, Ball, Philpott, Guest, Moore and Almand

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-368.2 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-368.2. Definitions.–For the purpose of this chapter:

"Claimant" means the person filing a claim pursuant to this chapter.

~~1.~~ "Commission" ~~shall mean~~ *means* the Industrial Commission of Virginia.

~~2. "Claimant" shall mean the person filing a claim pursuant to this chapter.~~

~~3.~~ "Crime" ~~shall mean~~ *means* an act committed by any person in the Commonwealth of Virginia which would constitute a crime as defined by the Code of Virginia or at common law. However, no act involving the operation of a motor vehicle which results in injury shall constitute a crime for the purpose of this chapter unless the injuries (i) were intentionally inflicted through the use of such vehicle or (ii) resulted from a violation of § 18.2-266.

~~4.~~ "Family," when used with reference to a person, means ~~(1)~~ *(i)* any person related to such person within the third degree of consanguinity or affinity, ~~(2)~~ *(ii)* any person residing in the same household with such person, or ~~(3)~~ *(iii)* a spouse.

~~5.~~ "Victim" means a person who suffers personal physical injury or death as a direct result of a crime *or who suffers personal emotional injury as a direct result of being the subject of a robbery, abduction or attempted robbery or abduction* .

Official Use By Clerks	
Passed By The House of Delegates	**Passed By The Senate**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the House of Delegates	Clerk of the Senate

LD0129325

HOUSE BILL NO. 298

Offered January 18, 1990

A BILL to amend and reenact § 19.2-368.11:1 of the Code of Virginia, relating to the amount of awards from the Criminal Injuries Compensation Fund.

Patrons–Stambaugh, Forehand, Woodrum, Ball, Philpott, Guest, Moore and Almand; Senator: Gray

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Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-368.11:1 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-368.11:1. Amount of award.–A. Compensation for Total Loss of Earnings: An award made pursuant to this chapter for total loss of earnings which results directly from incapacity incurred by a crime victim shall be payable during total incapacity to the victim or to such other eligible person, at a weekly compensation rate equal to sixty-six and two-thirds percent of the victim's average weekly wages. The total amount of weekly compensation shall not exceed $200. The victim's average weekly wages shall be determined as provided in § 65.1-6.

B. Compensation for Partial Loss of Earnings: An award made pursuant to this chapter for partial loss of earnings which results directly from incapacity incurred by a crime victim shall be payable during incapacity at a weekly rate equal to sixty-six and two-thirds percent of the difference between the victim's average weekly wages before the injury and the weekly wages which the victim is able to earn thereafter. The combined total of actual weekly earnings and compensation for partial loss of earnings shall not exceed $200 per week.

C. Compensation for Dependents of a Victim Who Is Killed: If death results to a victim of crime entitled to benefits, dependents of the victim shall be entitled to compensation in accordance with the provisions of §§ 65.1-65 and 65.1-66 in an amount not to exceed the maximum aggregate payment or the maximum weekly compensation which would have been payable to the deceased victim under this section.

D. Compensation for Unreimbursed Medical Costs, Funeral Expenses, Services, etc.: Awards may also be made on claims or portions of claims based upon the claimant's actual expenses incurred as are determined by the Commission to be appropriate, for (i) unreimbursed medical expenses or indebtedness reasonably incurred for medical expenses; (ii) expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the victim would have performed, for the benefit of himself and his family, if he had not been a victim of crime; (iii) expenses in any way related to funeral or burial, not to exceed ~~$1,500~~ *$2,000* ; (iv) expenses attributable to pregnancy resulting from forcible rape; (v) any other reasonable and necessary expenses and indebtedness incurred as a direct result of the injury or death upon which such claim is based, not otherwise specifically provided for.

E. Any claim made pursuant to this chapter shall be reduced by the amount of any payments received or to be received as a result of the injury from or on behalf of the person who committed the crime or from any other public or private source, including an emergency award by the Commission pursuant to § 19.2-368.9.

F. To qualify for an award under this chapter, a claim must have a minimum value of $100, and payments for injury or death to a victim of crime, to the victim's dependents or to others entitled to payment for covered expenses, after being reduced as provided in subsection E, shall not exceed $15,000 in the aggregate.

E. VAASA'S STANDARDS FOR SEXUAL ASSAULT CRISIS CENTERS

VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT

Standards for Sexual Assault Crisis Centers

ADOPTED July 31, 1989

SECTION I. DEFINITION

A sexual assault crisis center is a community-based program that provides free, specialized support services to persons who have been sexually assaulted, and to their families, regardless of race, color, creed, disability, sex, sexual orientation, age, parenthood, political affiliation, or financial status. A sexual assault crisis center protects confidentiality to the limit of the law, uses community volunteers and conducts a community education program. An integral part of all the work done by a sexual assault crisis center is the improvement of the various systems used by the persons who have been sexually assaulted, which includes promoting a multidisciplinary systems approach. Through public and allied professional education, centers strive to improve the various systems by providing information that creates a community atmosphere of understanding and support of persons who have been sexually assaulted, an atmosphere that does not discourage reporting.

SECTION II. PHILOSOPHY

Sexual assault crisis centers value empowerment and promote of the dignity and respect of all persons. Sexual assault crisis center specialized services have been developed based on the belief that the person who has been sexually victimized has the right to determine their own response to the assault. The immediate availability of crisis intervention and support services, facilitates the recovery from sexual assault. Sexual assault crisis intervention services will be provided at no cost to the recipient.

SECTION III. GOALS

1) To develop and promote procedures throughout the community which will:
   - reduce the physical and psychological trauma of sexual assault,
   - enhance treatment and recovery;

2) To implement a public education program which will:
   - dispel myths about sexual assault
   - promote support for persons sexually victimized
   - promote cooperation among allied professionals;
   - increase community awareness of sexual assault prevention/risk reduction techniques;
   - increase community awareness of services for persons sexually assaulted, and family members and friends;

3) To work toward criminal justice procedures which will:
   - increase the reporting of sexual assault,
   - increase arrests for sexual assault,
   - increase convictions for sexual assault.

SECTION IV. PROGRAM STANDARDS

A. SUPPORT SERVICES

1 The center shall provide 24 hour accessibility to crisis intervention services via a hotline staffed by a trained person. A trained person is defined as:

PREFERRED STANDARD: A sexual assault crisis center volunteer or staff person who has received a minimum of 30 hours of sexual assault crisis intervention training as identified in Section IV, I, or

MINIMUM STANDARD: A person whose role is to relay hotline calls to a volunteer or staff person and who has at a minimum been provided with a written protocol detailing how to respond supportively to a caller

Callers requesting telephone services shall be contacted by a sexual assault crisis center volunteer or sexual assault crisis center staff person within 15 minutes. from the time the call was received. Callers requesting accompaniment services shall be met by a sexual assault crisis center volunteer or sexual assault crisis center staff person within 60 minutes from the time the call was received.

2. The center shall provide accompaniment to court, hospital, Commonwealth's Attorney office and Victim/Witness office upon request.

3 The center will provide information and appropriate referrals to others.

4. The center will advocate for clients with police, criminal justice system, medical, mental health, schools, etc.

B. COMMUNITY EDUCATION SERVICES

1 At least three education programs will be presented to allied professionals annually

2. At least four community education programs shall be presented annually

C. CONFIDENTIALITY STANDARDS

1 Client files shall be locked.

2. When records, staff or volunteers are subpoenaed the center shall make every effort, within the limits of the law, to carry out the victim's desired response to the subpoena. The center shall first seek permission, after explaining the range of pro and con possibilities of disclosure to the person who the records or oral communications are about, to release information. If permission is granted, the center shall seek a written release of information which specifies what and to whom shall be released. If permission is declined, the center shall seek legal counsel and request a motion to quash the subpoena be filed. If the court declines to quash the subpoena, the center shall a seek an in camera inspection (in the judge's chambers) of the subpoenaed records or testimony

If the defense attorney issues the subpoena, the center shall inform the Commonwealth's Attorney and/or the victim's attorney

The center shall make every effort to have information disclosed by the center separated from the public record of the court proceedings.

3. Computerized client files shall be secured.

4. Use of cordless or cellular phones for confidential calls shall be prohibited.

5. Staff, volunteers, and anyone answering the hotline shall sign a confidentiality statement.

6. The center will report to Child Protective Services, suspicion of an identifiable child who is being abused or neglected by a caretaker. The center will develop a relationship with Child Protective Services to facilitate referral.

7. The center will develop a relationship with community allied professionals for referral and consultation for clients who are exhibiting dangerous behaviors to themselves or others and other mental health issues.

D. PRIVATE NON-PROFIT ORGANIZATION STANDARDS

1. The center shall be governed by a working Board of Directors of at least 7 members.

2. The Board shall be active through committees to address the following functions:

   a. Fund-raising to support center programs.
   b. Personnel to develop and maintain policies and procedures.
   c. Nomination to insure board recruitment and development.

3. The Board shall meet at least quarterly with a majority attending.

4. The following documents shall be maintained:

   Articles of Incorporation
   Bylaws
   Tax exempt status/or umbrella agency's
   tax exempt status
   Policy statements
   Personnel policies
   Affirmative Action Plan
   Organization Chart
   Current Job Descriptions
   Minutes of Board of Directors
   Financial records

E. PUBLIC NON-PROFIT ORGANIZATION STANDARDS

1. The organization shall commit to financially supporting the center and to expand the center proportionate to the requests for services and the needs of the community

2. The following documents shall be maintained:

   Organization's tax exempt status
   Policy statements
   Personnel policies
   Affirmative Action Plan
   Organization Chart
   Current Job Descriptions
   Financial records

F. PERSONNEL STANDARDS

1. Personnel policies will be developed and maintained.

2. The center will keep updated job descriptions for staff and volunteers. When applicable, the center will keep updated job descriptions for Board members and/or Advisory Committee members.

3. Staff and/or volunteers will participate in clinical case consultations. Staff will provide supervision for all volunteers. Staff and volunteers will meet for case consultations at least 6 times per year

4. New staff shall attend the volunteer training referred to in Section IV, I.

5. Direct service staff shall attend at least the number of hours equivalent to a half work week of continuing education per year

G. RECORD KEEPING AND COMPLIANCE WITH STANDARDS

1. Each center will complete its own program evaluation form and file it annually with VAASA. Centers will be given 6 months to correct deficiencies or certification will be withheld.

2. Statistics, as identified by the Board, shall be filed quarterly with VAASA.

3. To prevent fiscal instability arising from the withdrawal of a funding source, a center will have no more than 75% of its budget coming from any one source which requires periodic renewals.

H. PROGRAM MAINTENANCE STANDARDS

1. The center shall have an office.

2. There shall be a minimum of six case meetings with staff and volunteers per year

3. Daily assistance from staff to volunteers shall be provided.

4. Written records shall be kept on each client contact.

5. The center shall make anonymous reports to police upon the request of the victim.

6. The center shall recruit, screen, train and supervise all volunteers.

I. TRAINING STANDARDS

1. The center shall conduct a minimum of 30 hours of initial training for volunteers.

2. A written documentation of training attendance shall be kept for all volunteers and staff.

3. These essential topics shall be covered:

GENERAL

- Myths and Facts
- Definitions
- Counselor vulnerability feelings
- Sexism & consciousness raising
- Confidentiality
- Volunteer rights & responsibilities
- Policies & procedures
- Organizational structure

Racism
Classism
Personal/Professional issues for the volunteer
History of sexual assault
History of Center
Philosophy of Center

CRISIS INTERVENTION

Crisis Intervention
Advocacy
Case management & follow-up
Rape Trauma Syndrome
Non-judgmental responses
Listening skills
Goal setting
Referrals
Problem solving
Suicide
Beginning/ending calls & sessions
Decision making
Role playing

SPECIFIC POPULATIONS

Effects on Family/Friends
Incest
Child Sexual Assault
Sexual harassment
Acquaintance Rape
Gang Rape
Elderly
Same Sexual Assault
Persons with disabilities (physical, mental, emotional)
Lesbians, Gay men (homophobia)
Multi-cultural issues appropriate to local population
Marital Rape

MEDICAL

Medical issues and sexual assault (hospital protocols, P.E.R.K., S.T.D.s, A.I.D.S., & pregnancy)

LEGAL

Police Interview Questions
Police Investigation Procedures
Jurisdictions, False reports
Sexual Assault Laws
Legal Systems
Victim's Rights & Compensation
Advocate's legal responsibilities (confidentiality, Good Samaritan)
Subpoena of Advocate
Case Report Writing

4. Optional topics:

Offenders
Feminist theory
Burnout
Pornography

Prevention/Risk reduction issues:
- Avoidance
- Awareness of surroundings
- Empowering
- Changing attitudes
- Teaching your children

J. CERTIFICATION PROCESS

1 Standards Committee:

a. The Standards Committee shall be appointed by the Board of Directors, using Board approved criteria for selecting appointees. The Standards Committee shall be responsible for certifying that centers are in compliance with the Standards for Sexual Assault Crisis Centers

b.The Standards Committee shall consist of at least one VAASA member from each of the five regions: Northern Virginia, Tidewater, Central Virginia, Southwest Virginia, Shenandoah Valley Regions shall be revised when necessary as new centers open.

c.The Standards Committee shall develop recommendations for:
1) a self-evaluation form,
2)criteria for on-site certification visits,
3)criteria for Standards Committee appointments, and
4)appeal of denial of certification procedure. These recommendations shall be submitted to the Board for approval. Adopted recommendations will be subject to periodic review by the Standards Committee for Board action.

2. **Compliance:**

a. Every center shall conduct a self-evaluation involving the Board of Directors or governing body, staff and volunteers to be used as part of the certification process.

b. The second part of the certification process shall involve a site visit of each center by at least 2 Standards Committee members from outside their region every 3 years. Site visits shall be made the first year to 1/3 of the centers to be chosen by the Standards Committee with 1/3 to be visited by the second year and the remaining 1/3 the 3rd year

c. Initially each center shall have one year to come into compliance from the date of adoption of the standards. Subsequently, new centers will have one year to come into compliance with standards from the date that application is made for certification.

d. A certified center not meeting standards at their annual self-evaluation will have 6 months to come into compliance before loosing certification.