

# Prosecutors Working With Victim Advocate Groups



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16. Abstract The purpose of this monograph is to provide a resource tool that can be used by those in the impaired-driving community; specifically prosecutors, victims, and victim advocates. The monograph focuses on how prosecutors can work with victims and victim advocacy organizations as they prosecute impaired-driving cases.  <p><i>“Prosecutors Working With Victim Advocate Groups”</i> was developed for NHTSA by Mothers Against Drunk Driving (MADD), with technical assistance and input from the National District Attorneys Association (NDAA) – APRI National Traffic Law Center. MADD is one of the largest advocacy groups in the country. Its members work with prosecutors across the country on a daily basis. These advocates and victims have a unique ability to speak out in ways that prosecutors cannot. The NDAA is the oldest and largest professional organization representing criminal prosecutors in the world. Its members come from the offices of district attorneys, State attorneys, attorneys general and county and city prosecutors with responsibility for prosecuting criminal violations in every State and Territory of the United States.</p> <p>This monograph is based on the knowledge, information, ideas, and suggestions of these two groups, along with input from others within the prosecutorial community.</p>			
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# **Prosecutors Working With Victim Advocate Groups**

## **Introduction**

Daniel Gilmore<sup>1</sup> is a senior trial counselor with the State Attorney's Office serving Miami-Dade County, Florida. Mr. Gilmore is everything a prosecutor should be: skilled, prepared, honest, and compassionate. If you called Mr. Gilmore and asked him about one of his cases by case number, he probably would not be able to answer your question. If you provided him with the defendant's name, that may not help him. However, if you asked him about a specific crime victim or the victim's next of kin, he could tell you anything and everything you would want to know. Mr. Gilmore does not organize his cases by number or defendant. That is not how he thinks. He organizes his cases by victims and their next of kin because they are of utmost importance to him.

Unfortunately, the criminal justice system does not always work that way. We live and work in a system that assigns numbers to defendants and "scores" offenses. This very system focuses on defendants who have the right to remain silent, the right to an attorney, and the right to a trial. If something goes wrong, a defendant has the right to appeal his or her case, even when the defendant's attorney made the mistake.

Victims of crime are confronted with a system that is set up largely to guarantee the rights of defendants. They are thrust into the criminal justice system during what may be the worst time of their lives. Most people have little knowledge of the system and consequently think cases are or should be about what is right and wrong, when in reality cases are about what is legal and illegal. Although the legal system strives to make these one and the same, it is not always successful in doing so.

Like many public servants, prosecutors are generally underpaid, overworked, and underappreciated. Many of them work long hours for far less money than they could make in the private sector. Thus, prosecutors are often motivated by their desire to serve and protect their communities. However, because of large case loads and professional priorities many do not work with victims of crime as well as they could.

This monograph was developed to assist those in the impaired-driving community -- specifically prosecutors, victims, and victims' advocates -- by serving as a useful resource tool, focusing on prosecutors working with victims and victim advocacy organizations as impaired-driving cases are prosecuted in the criminal justice system.

## **For Prosecutors**

Anyone who is injured or suffers loss because of another person's criminal activity is a crime victim. Crime victims often are severely traumatized by the incident because typically the harm occurs suddenly, unpredictably, and unnecessarily. Friends and family are also directly affected by the crime as are others, such as witnesses, law enforcement personnel, and first responders.

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<sup>1</sup> Name has been changed to protect the privacy of the prosecutor referenced. All other details are factual.

## Understanding Victims' Motivations

Crime victims have many needs that prosecutors should consider or address.

**Safety:** Many crime victims are fearful and insecure. Even in impaired-driving cases, they may be afraid of defendants or their families. More likely, they may be nervous about testifying because they view it as a form of public speaking. They may also be afraid that if they do testify they will be either ridiculed or ignored. Prosecutors should respect these feelings and be ready to reassure the victims. Additionally, prosecutors should provide victims with resources to help them prepare for the courtroom experience and present victim impact statements. Having an office-wide policy and resources for victim services can greatly assist with meeting the victims' needs.

**Stability and Support:** Stability is, in the mind of many victims, intimately intertwined with safety. Many crime victims are so traumatized that they are unable to handle the ramifications of their injury or a loved one's death. They may not be able to tend to their own well-being or other things they need to do until a sense of stability or equilibrium is restored. Prosecutors should be sensitive to this and help to direct them to mental health counselors or other professionals who can help them.

**Access and Information:** Many crime victims want to participate in the criminal justice process, but are not sure how to do so. Prosecutors should make every effort to explain the justice process so that victims know whom to contact for their specific issues. Victims also typically need information and may feel excluded if they are not fully advised. Many victim/prosecutor disputes can be traced to a failure to meet expectations. Setting reasonable expectations about results, access, and information is key to avoiding these disputes.

### Providing Information to Victims

#### Maricopa County Attorney's Office

It is never too early to include victims in the process. In Maricopa County, Arizona, a victim advocate contacts the victim as soon as a criminal complaint is filed against a defendant. This victim advocate explains victims' rights, the criminal justice process, and gives them information about how to participate in the process. This initial contact allows the victims to get information and get their questions answered.

**Input:** Many victims express that control has been taken away from them when the victimization occurred. One way to help a victim regain control is encouraging them to participate in the justice process. In most States, victims are constitutionally or statutorily *entitled* to receive notice of proceedings and an opportunity to be heard in court. Even in those States that do not guarantee these rights, prosecutors should facilitate input from victims.

Some prosecutors are concerned that working with victim groups may undermine their perceived objectivity and create a "conflict of interest." As law enforcement officials, prosecutors are expected to protect the community and promote justice, which is impossible without considering the needs of victims.

## Speaking With Victims

Most people have little experience talking with people they do not know about traumatic events. Individuals acting with the best of intentions can harm victims simply by saying the wrong things. Our internal guidelines about treating those as we would want to be treated do not necessarily work because emotions are subjective.

Conversations with victims should seek to fulfill their needs for safety, stability, information, and input. Beyond that, prosecutors should be compassionate and respectful and should listen actively – hearing not only what is said, but also the desires and needs that underlie the statements. Finally, expectations must be managed.

### What Can I Possibly Say to Them?

Nobody expects prosecutors to be social workers. However, there is an expectation that prosecutors treat victims with the respect they deserve and try to help them cope. Just as you can influence a jury through proper presentation and word choice, you can ease a victim’s pain by addressing them properly. Choosing the right words isn’t always easy, so we’ve compiled a sample list of what seems to work best:

Desired Effect	Words to Live By
Creating safety	○ We will try to make you as comfortable as possible
Show empathy	○ I’m sorry this happened to you ○ This must have been very difficult for you
Validating a victim’s feelings	○ It is okay to grieve. It is okay to cry
Relieving guilt <sup>2</sup>	○ It wasn’t your fault ○ You could not have prevented this
Managing expectations	○ There are things we can do and things we can’t do ○ I’d like nothing better than to tell you that I can do X, but it’s important to understand that Y is more likely. There are no guarantees.

### Managing Expectations Around Plea Agreements

Victims typically have little understanding of how the criminal justice system works. Their perceptions may be shaped by television shows like *Law and Order* or *CSI*. Most victims want their day in court and believe that plea agreements are a compromise and only benefit defendants. They do not care about your caseload and may feel that you don’t consider them important if the case doesn’t proceed to trial.

It is imperative that you speak with them realistically about the role that plea agreements have in the system, the risks of going to trial,<sup>3</sup> and the benefits of any plea you may offer. By including them in the process as early as possible and educating them appropriately, you can avoid many problems.

<sup>2</sup> Survivors often experience feelings of guilt even though they could not have avoided the incident.

<sup>3</sup> Young prosecutors sometimes try to reassure victims by telling them that they expect to win at trial. This needlessly heightens expectations. Unfortunately, as most experienced prosecutors know, there is no such thing as an “unloseable” case. When these cases are lost, it can be devastating for the victim. Please be realistic in all conversations.

It has been said that the pen is mightier than the sword. Just as words can soothe a victim, words can crush them. Even the most sensitive and caring people may say the “wrong thing.” For example, many people refer to DUI crashes as “accidents.” This diminishes the fact that a preventable crime has occurred and someone should be held responsible for the crime. Below, find a list of tactics and phrases we strongly recommend *against* using:

Tactic	Words that Hurt
Overstating your empathy	<ul style="list-style-type: none"> <li>○ I know how you feel<sup>4</sup></li> <li>○ I could never survive what you are going through</li> </ul>
Denying emotions	<ul style="list-style-type: none"> <li>○ You need not feel that way</li> <li>○ Don’t cry</li> </ul>
Pushing recovery	<ul style="list-style-type: none"> <li>○ Time heals all wounds</li> <li>○ You’ve got to move on</li> </ul>
Diminishing Loss	<ul style="list-style-type: none"> <li>○ At least your child didn’t suffer</li> <li>○ You’re lucky that you survived</li> </ul>

### Creating an Office-Wide Commitment to Victims

Prosecutor offices should always consider a “victims first” philosophy. A commitment by senior management will lead to a commitment throughout the agency. Management should draft appropriate mission statements and guidelines for handling cases involving victims. At a minimum, they should establish policies ensuring that prosecutors:

- Respond quickly, respectfully, and compassionately to all victims;
- Refer victims to support services when necessary;
- Educate victims about the criminal justice system and how their individual cases will be handled;
- Provide referrals for victim compensation programs and counseling opportunities;
- Provide written material to victims explaining their rights and responsibilities;
- Speak to victims about their loss and what they would like to see accomplished with their cases *prior* to making a plea offer whenever possible;
- Advise victims if they are going to offer a plea with fewer or lesser penalties than the victims want;
- Provide victims an opportunity to address the court, when appropriate;
- Prepare victims for the courtroom experience; and
- Timely notify victims about all court proceedings so that the victims may attend.

By having these common sense steps in writing and institutionalized, it sets them as a priority for the office and establishes that this commitment is important. Prosecutor offices with sufficient resources should hire full time victim advocates and counselors who are specially trained to meet victims’ needs. At the least, material for victims (in the relevant languages for the area) should be made available.

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<sup>4</sup> Regardless of what other cases you have handled or experiences you have had, every person’s loss is unique.

Finally, prosecutor offices should join with local advocacy groups who can support their activities and ensure that victim needs are met. These groups will not only provide support, but they also can serve as a liaison between you and the crime victim. These groups should also be involved in the creation of office protocols for working with victims. This not only creates a sense of buy-in from these groups, but it also opens up opportunities to serve victims that the office may not be aware of on its own.

Compassion fatigue can occur when people are so inundated with emotionally affecting information that they reach their saturation point and become numb or desensitized. A prosecutor's job is not easy; listening to victims describe their feelings of pain and loss on a continual basis can be extremely draining and lead to vicarious stress. Compassion fatigue can happen to anyone and, in fact, is normal. It can be managed through awareness, proper pacing, and rest. Prosecutor offices should train employees on these stress relief tactics and monitor them for symptoms of compassion fatigue and on-the-job burnout.

### **Model Collaboration: Arizona Voice for Crime Victims**

The Arizona Voice for Crime Victims (AVCV) operates a comprehensive victim services Web site and, along with the Arizona State University (ASU) College of Law, the Crime Victims Legal Assistance Project (CVLAP). CVLAP won the United States Department of Justice's 2005 Professional Innovation in Victims Services Award for good reason.

AVCV is a public-private partnership that includes government officials, businessmen, and advocates. AVCV's Web site, <http://www.voiceforvictims.org/>, gives users a comprehensive overview of the criminal justice system, Arizona laws and rules of court, articles and briefs published by the Arizona Attorney General's Office, victims rights caselaw, news updates, a glossary of terms, contact information for pertinent agencies and groups, and instructions on how to obtain police reports. The Web site also provides various legal forms for victims and their representatives, including:

- notices
  - for appearance of victims' counsel and neighborhood associations (as community crime victims);
  - of the victim's intent to be present and heard at court proceedings;
  - of the victim's assertion of right to privacy and request for a corresponding in camera (private) hearing on the issues;
- requests for
  - compensation;
  - notification of criminal proceedings, disposition, and release;
- motions for an order
  - requiring the State and defense to serve the victim with all documents filed in court;
  - allowing the presence of a support person in court;
  - allowing a community or other advocacy group to appear as amicus curiae ("friend of the court");
  - excluding spectators from hearing or trial;
  - for a speedy trial/acceleration of the trial date; and
  - of protection.

The Web site also provides contact information for the various agencies, groups, and organizations that provide victim assistance.

CVLAP is based at ASU. ASU law students ensure that victims understand their rights and represent them in court proceedings. These students have ably served several hundred crime victims.

The National Crime Victim Law Institute is promoting similar programs in other States including California, Maryland, New Mexico, and South Carolina.

### **Create a Community to Serve Victims**

Having an office-wide policy is necessary, but it is important that respect for victims' emotions and rights does not begin or end at the prosecutors' office. A community is necessary to help serve a victim, including first responders, law enforcement officers, prosecutors, victim advocates, victim groups, judges, investigators, and the victims themselves.

The goal behind creating a community for victims is to provide for continuity of services. In an ideal system, a victim will receive support from the time of the crime until they no longer need assistance (frequently even after the case has closed). Even if law enforcement and prosecutors have excellent victim services, there will still be issues if there is no communication between the offices – the victims will be unsure of who is helping them and important details may get lost in transitioning. E-mail systems can be set up to automatically notify victims of important events when they occur. They can also be used to transfer cases effectively from law enforcement to prosecutor and within an office. Additionally, joint training will ensure that all groups are working from the same basis and victims can expect consistent services throughout the process.

Other important members of a victim service community are victims' advocacy groups. Advocacy groups can provide prosecutors with invaluable political support, education and perspective. Their pain is real, their messages persuasive. Victim advocates can say and do things no politician, political group, or public official could without fear of reprisal and can assist prosecutors in several ways. Probably the most significant way advocacy groups can help prosecutors is by providing a rational mediator between the victim and the prosecutor –assisting with the explanation and understanding of legal terms to a layperson and explaining emotional desires in an understandable way.

Unfortunately, many prosecutors are reluctant to work with advocacy groups. They may perceive that advocacy groups may not “rationally” or “logically” consider law enforcement and prosecutor needs, priorities and limitations. They may also believe that developing and maintaining a close relationship with advocacy groups may generate an “appearance of impropriety or bias.” These prosecutors may miss an excellent opportunity to build bridges within their own communities.

### **Joining With Victims Organizations: Miami-Dade County State Attorney's Office Model Program**

The Miami-Dade County State Attorney's Office (SAO) developed a strong working relationship with the county's local MADD chapter in the early 1990s. The relationship provides an excellent model for how prosecutors and victims' advocacy groups can work together to accomplish mutual goals.

MADD assists the prosecutors by:

- Helping the community prioritize DUI. Intangible concepts like safety and security are incapable of definition through statistics alone. MADD “puts a face” on otherwise bland numbers through creative media outputs and other measures;
- Providing grassroots support for enforcement. MADD is responsible, directly or indirectly, for the passage of many impaired-driving laws;
- Helping educate the public about the dangers of impaired driving. Thirty years ago, our society treated driving under the influence of alcohol or drugs cases as if they were civil infractions. Today, virtually everyone recognizes the crimes’ inherent risks. This ensures that judges and jurors treat these cases with the respect they warrant;
- Providing officers and prosecutors with the moral imperative they need to maintain their motivation. MADD conducts victim impact panels for first-time offenders and invites prosecutors to various memorials and victim-related ceremonies including its annual candlelight vigil. The SAO found that prosecutors who attended these types of events treated their cases much more seriously than their counterparts who did not. In fact, the office was so impressed with the impact of these programs on its prosecutors, that the office *required* all traffic court prosecutors to attend them;
- Supporting local officers and prosecutors with recognition at annual awards ceremonies;
- Providing individual support and group counseling to victims, enabling them to better understand and participate in the legal process.

Prosecutors assist victims by:

- Providing crime victims with the compassion and support they need and deserve;
- Prosecuting offenders and holding them accountable;
- Educating crime victims about the crime fighting and legal processes;
- Preventing future crimes; and
- Attending and speaking at MADD functions and participating in MADD ceremonies.

One thing your office can do for victims is to refer them to community resources for assistance. There are a few to which you may want to refer them:

- **Victims' advocacy organizations** can help provide support to victims;
- **Crime Victim Compensation Programs**;
- **Support groups** can also be helpful, as can **victim hotlines**;
- **Legal advocacy services** can help victims navigate the civil and criminal law system regardless of the ability to pay; and
- **Financial assistance in the form of restitution** is something the prosecutors' offices can help obtain; prosecutors can help victims document what restitution may be appropriate.

Prosecutors can recommend these resources out of their offices to help facilitate relationships with victims – it is excellent if they see you as a resource.

## **Creative Sentencing**

It is important for prosecutors to let victims know that they care about them. Prosecutors can achieve this through simple, seemingly small measures and creative sentencing. Victims (particularly next of kin) appreciate measures that commemorate the victims or mark the date of the incident. Examples include requiring the defendant to:

- Write a letter of apology;
- Serve a night in jail on the anniversary of the incident; be aware that many States may not allow this option;
- Donate to the victim’s favorite charity, school, or an advocacy group that provides victim support in the victim’s name or honor; be aware that court-imposed restitution may be restricted to compensation for the direct monetary losses to the victim or family only; and
- Speak to civic groups, schools, etc., about the incident.

Judges are often willing to entertain these types of requests, as they require little in terms of resources and victims quite often see these as giving meaning to a meaningless tragedy.

## **Resources for Prosecutors**

One key resource for prosecutors in most States is a Traffic Safety Resource Prosecutor (TSRP). A TSRP is an attorney from a particular State who is or becomes an expert in that State’s traffic and DUI related laws. He or she provides support to all of a State’s prosecutors to prosecute traffic safety violations effectively. A TSRP can help develop or can present trainings for all manner of traffic safety issues, including vehicular homicide or manslaughter cases. Contact information for each TSRP is available from the National Traffic Law Center.

The National Traffic Law Center (NTLC) is a national clearinghouse on impaired driving issues for prosecutors. The NTLC is a program of the National District Attorneys Association (NDAA). It publishes monographs on traffic safety issues, compiles brief banks, provides technical assistance to prosecutors, law enforcement, and other highway safety professionals, and maintains an online forum of traffic safety professionals that is helpful in impaired driving cases. You can find the NTLC at [http://www.ndaa.org/apri/programs/traffic/ntlc\\_home.html](http://www.ndaa.org/apri/programs/traffic/ntlc_home.html) and the NDAA at [www.ndaa.org](http://www.ndaa.org).

Other impaired-driving resources include:

- The Drug Evaluation and Classification Program at [www.decp.org](http://www.decp.org);
- The National Association of Prosecution Coordinators at [www.napcsite.org](http://www.napcsite.org);
- The National Highway Traffic Safety Administration at [www.nhtsa.gov](http://www.nhtsa.gov); and
- The National Sobriety Testing Resources Center: at [www.sobrietytesting.org](http://www.sobrietytesting.org).

As for resources in the community for victim services, the Office for Victims of Crime, which is part of the U.S. Department of Justice, is dedicated to helping the victims of crime. Their publications can help in creating office protocols and they also have a number of training materials online at [www.ojp.usdoj.gov/ovc/](http://www.ojp.usdoj.gov/ovc/).

Additionally, your State should have an office for crime victims, usually in the State attorney general's office, that can help you with State-specific details. The National Victims' Constitutional Amendment project at <http://www.nvcn.org/> also has State-specific details; it posts all of the State victims' rights constitutional amendments there. A word of warning: this will help you in determining what is legally right, not necessarily what is best, and thus is best viewed as a starting point for working with victims.

Other good victim resources are:

- Mothers Against Drunk Driving at [www.madd.org](http://www.madd.org);
- National Center for Victims of Crime at [www.ncvc.org](http://www.ncvc.org); and
- National Organization for Victim Assistance at [www.trynova.org](http://www.trynova.org).

## For Victims

Right now, you are going through what is probably one of the most difficult times in your life. It seems cruel that now is also the time you are going to have to navigate the criminal justice system. Fortunately, there are a number of resources you can draw from. In some cases, your local prosecutor's office will have a victim advocate office, staffed with a person or people who can be valuable resources to you. Your State should also have an office for crime victims, usually in the attorney general's office. Additionally, there are a number of victim advocacy groups that can help you:

- Criminal Justice Legal Foundation at [www.cjlf.org](http://www.cjlf.org);
- Mothers Against Drunk Driving at [www.madd.org](http://www.madd.org);
- National Center for Victims of Crime at [www.ncvc.org](http://www.ncvc.org);
- National Organization for Victim Assistance at [www.trynova.org](http://www.trynova.org).

### Victim Advocacy Groups

These are just some of the groups to which you can turn.

- Child Abuse Prevention Network: <http://child.cornell.edu>
- Concerns of Police Survivors: [www.nationalcops.org](http://www.nationalcops.org)
- Mothers Against Drunk Driving: [www.madd.org](http://www.madd.org)
- National Center for Missing and Exploited Children: [www.nationalcops.org](http://www.nationalcops.org)
- Parents of Murdered Children: [www.pomc.com](http://www.pomc.com)
- National Center for Victims of Crime: [www.ncvc.org](http://www.ncvc.org)
- Victims' Assistance Legal Organization: [www.valor-national.org](http://www.valor-national.org)

It is important that you know about the criminal justice system – the players and the process – so you can be prepared for what is coming.

### How to Work Within the System

Prosecutors do not represent victims in the same way that other attorneys represent their individual clients. Prosecutors represent the people as a whole. Still, your views are important to them. You can and should take advantage of every chance to meet with or speak to the prosecutor or victims advocate. These opportunities will be limited, so don't be a bystander; ask questions and seek answers. Ask the prosecutor:

- What is the defendant being charged with and why?
- What must the prosecutor prove in order to obtain a conviction (what are the elements of the crime)?
- What victim services and assistance are available to you?

We recommend that you ask the prosecutor to keep you apprised of all significant case developments and the schedule so that you may attend the court proceedings should you so choose. This will provide the basis for future discussions – prosecutors work with some victims

who want to be involved and some who do not, so it is important that you let the prosecutor know the level of involvement that you want.

## **Trial Decorum**

Court is open to the public. You, as a member of the public, are entitled to watch the trial. MADD encourages victims to appear in court and participate in the proceedings. In many States, the right to be present in the courtroom is protected either in the law or by the State constitution. Often, the defense will try to bar you from watching. If you are a fact witness, that is, you have evidence relevant to the proceedings, the defense may succeed at certain parts of the proceedings. If you are not a fact witness, the judge should permit you to watch.

If you appear in court, it is essential that you exercise appropriate courtroom decorum. You should:

- Refrain from speaking to the judge outside the presence of the attorneys. If you violate this rule, the judge may bar you from appearing or may remove himself or herself from the case.
- Refrain from speaking to any jurors or potential jurors. If you do, the judge may strike the juror or potential juror from the panel, bar you from the courtroom, hold you in contempt, and/or declare a mistrial.
- Try to maintain your composure. If you are unable to do so, the judge may exclude you from the trial. Accordingly, we recommend that you leave the courtroom immediately if you start to lose control of your emotions.
- Expect to hear upsetting testimony and see photographs that may depict painful images.
- Sit silently during trial. If you have questions or concerns during trial, write them down and give them to the prosecutor or victim advocate when possible.

## **Major Figures in Court and Their Roles in the Process**

### *Judges*

Judges are appointed or elected officials who preside over the courtroom activities. Judges act as decision-makers and interpret questions of law. In a bench trial, the judge decides the guilt or innocence of the defendant.

### *Prosecutors*

The prosecutors' titles vary according to jurisdiction. Common titles include:

- State Attorney,
- District Attorney,
- County Attorney,
- City Attorney,
- Town Attorney, or
- Solicitor.

Regardless of the title used, the prosecutor's role is the same: to expose the truth and seek justice. Prosecutors screen all criminal cases. The prosecutor may only proceed on a case in

which he believes he has proof beyond a reasonable doubt for each and every element of the crime charged. Prosecutors dismiss cases where they have “reasonable doubt” about the defendant’s guilt or there is insufficient evidence.

Prosecutors have a great deal of discretion in how they handle their cases. As a general rule, they may legally reduce charges or plea cases as they deem appropriate. Some States have attempted to restrict this ability by passing laws establishing sentencing guidelines, mandatory minimum penalties, or prohibitions on charge reduction.

Prosecutors bear the burden of proof during trial. In order to win, they must prove the defendant’s guilt “beyond a reasonable doubt.” This is the highest standard in the law. After a conviction, prosecutors can only recommend sentences to the court.

### *Defense Attorneys*

Defense attorneys represent people accused of crimes. Their job is to represent their clients zealously and achieve the best possible outcomes for them. They are permitted to represent clients whom they know are guilty (and frequently do), vigorously cross-examine witnesses they know are telling the truth, and take advantage of “loopholes” in the law.

Defense attorneys fall into three categories:

- Public Defenders (PDs): Like prosecutors, PDs are government employees. They represent defendants who face jail or prison time and cannot afford private counsel. These are sometimes called court-appointed counsel.
- Specially Appointed Public Defenders (SAPDs): SAPDs are private attorneys who are specially appointed on cases where the local PD’s office has a conflict of interest. This typically arises in cases where the PD’s Office represents co-defendants. This may happen in cases where an officer arrests both the driver and the passenger. It also occurs in cases where the PD’s office previously represented a witness who may be called by the prosecution.
- Private Attorneys: Private attorneys are hired by people who are charged with crimes to represent them. They are paid privately, but may receive public funds for investigative purposes if their clients are indigent.

All types of defense attorneys share the same obligations and responsibilities. No matter how nice they may be, remember that they represent the defendant. They are not there to help you or the State’s case.

Defense attorneys typically review all of the State’s evidence, gather and interview their own witnesses, negotiate pleas, and develop trial strategies. During trial, defense attorneys attack the State’s case and present the defendant’s case. Defense attorneys also advise their clients about testifying in trial.

## *Bailiffs*

Bailiffs maintain order in the courtrooms. Most bailiffs are hired by, and work for, judges. In some jurisdictions, the Sheriff's Office supplies deputies who serve as bailiffs.

## *Court Reporters*

Traditionally, court reporters (originally referred to as stenographers) type and transcribe all court testimony and arguments *verbatim*. In some jurisdictions, courts record their proceedings via cassette tape, CD, or DVD, but have them transcribed by court reporters.

## *Clerks*

Clerks maintain all court files, document the nature and outcome of all hearings, and maintain all evidence admitted during hearing or trial.

## *Probation Officers*

The Department of Probation, which sometimes is part of the Department of Corrections, monitors defendants placed on probation by judges. They ensure that the defendants comply with all terms and conditions and report back to the court. If a defendant violates his or her probation, the probation officer files a violation of probation and testifies about what took place. Defendants found guilty of violating their probation can be sentenced to the same penalties that they could have received after trial.

In some jurisdictions, a probation officer is present in court for all proceedings to act as liaison between the probation department, judge, and attorneys. When this is the case, the probation officer answers questions pertaining to probation.

## **The Process**

### ***Preliminary Hearing***

If an arrestee does not "bond out," he or she is entitled to a preliminary hearing, also known as a preliminary presentation, initial presentation, probable cause hearing, or bond hearing, usually within 24 hours of arrest. During this hearing, a judge advises the defendant of the charges and appoints a public defender if the defendant cannot afford an attorney. The judge also addresses bail and schedules the case for arraignment.

### ***Arraignment***

At arraignment, a judge or prosecutor formally notifies the defendant of the charges against him. Typically, the judge or prosecutor offers the defendant an opportunity to plead guilty or "nolo contendere" (Latin for "no contest"). In most jurisdictions, a nolo plea has the same legal ramifications as a guilty plea, except that it cannot be used against the defendant in a civil trial (if the judge adjudicates the defendant guilty, the conviction can be used against the defendant if the conviction involved a crime of moral turpitude, like theft or fraud, or any felony).

If the defendant enters a not guilty plea, the judge will set the case for trial or, in some jurisdictions, for report or conference. Report or conference is a date set before the trial date that would allow a plea agreement to be made before trial.

### ***Pre-Trial Conference***

Pre-trial conferences are periodic hearings held between arraignment and trial. At these hearings, motions, requests for continuance of trial, and evidentiary matters are addressed. Many judges use their conferences to ensure that the parties are preparing timely for trial.

### ***Trial***

The vast majority of criminal cases resolve by agreement between the parties, often referred to as plea negotiations. Only 2 or 3 percent of all cases go to trial.

For a basic description of how prosecutors try their cases, see [http://www.ndaa-apri.org/pdf/basic\\_trial\\_techniques\\_05.pdf](http://www.ndaa-apri.org/pdf/basic_trial_techniques_05.pdf).

### **Plea Agreements**

The vast majority of criminal cases end in a “plea agreement,” rather than a trial. A plea agreement is an agreement between the prosecutor and defendant that resolves a case. The plea negotiation is then presented to the court for its review. The court will then determine if the negotiated disposition may be entered. Many people believe that plea deals are a “bargain” only for defendants. That is not necessarily true. Like any agreement, plea agreements typically are reached when both sides achieve some measure of satisfaction. Prosecutors *must* negotiate most of their cases because the system is so supersaturated with cases that it would be physically impossible to try them all, or even a substantial percentage.

As a victim or next of kin, your opinion matters. We strongly encourage you to ask the prosecutor to apprise you of any plea negotiations and to inform him or her about what you would like to see done with the case and what you consider a minimally acceptable sentence. We also encourage you to appear in court whenever the defendant may enter a plea to ensure that your concerns are addressed.

### **Types of Trial: Bench Trials and Jury Trials**

Defendants have the right to choose whether they will be tried by a jury or a judge (called a “bench trial”). If a defendant chooses a bench trial, a judge will become the trier of fact and hear the evidence and determine guilt. If the defendant chooses a jury trial, a group of community members will become the triers of fact and hear the case.

### ***Jury Selection***

In jury trials, the parties select the jury from a pool of potential jurors. In most States, the potential jury pool is comprised of either registered voters or licensed drivers.

## ***Questioning the Jurors***

During jury selection, a process called “voir dire,” the parties question the potential jurors. The purpose of the questioning is to identify jurors who cannot be fair to either (or both) of the parties. The process is analogous to a job interview. The parties may ask the potential jurors about themselves and their families’ contacts with the criminal justice system, beliefs about crime and punishment, employment and social history, and anything else that may be relevant to the juror’s ability to fairly assess the evidence.

## ***Challenges***

Both the State and the defense can challenge jurors whom they can prove (to a minimal degree) cannot be fair to their side for cause. Both the State and the defense have unlimited challenges for cause. The judge can excuse (dismiss) the potential juror or deny the cause challenge. Potential jurors who refuse to presume a defendant innocent or refuse to respect a defendant’s right to remain silent will be excused for cause. Both the State and the defense have a limited number of “peremptory” challenges. In most States, each party has three in misdemeanor cases and six in felony cases. The parties may exercise a peremptory challenge and excuse any juror they want, with or without any cause or justification, so long as they do not exercise the challenges in a discriminatory fashion.

Immediately after jury selection, judges provide jurors with preliminary instructions or guidelines.

## ***Opening Statements***

Attorneys for both parties typically deliver opening statements. The prosecutor speaks first. The opening statement is a critical element of any jury trial. The opening statement is the attorney’s first opportunity to tell the jury what happened. A proper opening statement addresses case facts, rather than argument. During opening statements, attorneys are not permitted to discuss how the facts fit the law, the credibility of witnesses, or reasons to accept certain evidence. These are arguments and objections should be rightfully sustained.

## ***Presentation of State’s Case***

Following the opening statements, the State presents its case. The prosecutor elicits testimony from witnesses and introduces physical evidence through “direct examination.” Defense counsel may (and usually does) cross-examine the witnesses. In most courts, the prosecution may “re-direct” the witnesses after cross-examination. After the State presents all of its witnesses and evidence, the State rests its case.

### ***Presentation of Defense Case***

After the prosecution rests, the defense may present a case. Most of the time, the defense will forego this opportunity. If the defense presents a case, defense counsel will proceed to call witnesses, with the prosecutor cross-examining the witnesses.

The defendant does not need to testify at trial. As noted above, the State bears the burden of proof. Jurors may not use a defendant's failure to testify against him or her.

### ***Closing Arguments***

During closing arguments, the State and defense argue their positions. The attorneys typically review the evidence and explain why the jury should find in their favor.

### **Judge's Instructions to the Jury**

After closing arguments, the judge advises the jury on the law and the options available to them in deciding the outcome of the case. The judge then tells the jury to commence deliberations.

### ***Return of Verdict***

After being instructed on the law, jurors retire to the jury room to deliberate. Before discussing the case, the jury selects a foreperson. The foreperson helps direct the discussions.

Jurors are instructed to reach a decision by applying the law to the facts. During deliberations, jurors discuss and review the evidence together. Jurors may ask to have testimony read back to them or to view physical evidence, including laboratory reports if admitted.

Jury deliberations are not open to the public. Accordingly, it is difficult (if not impossible) to know how the jury arrived at its decision in any given case.

Jury verdicts must be unanimous in criminal cases. Juries deliberate until they reach a unanimous verdict or determine that they cannot agree (a "hung jury"). If a jury "hangs," the judge will declare a mistrial and the case may be re-tried.

### ***Verdict or Judgment***

After trial, the judge announces a finding that the defendant is "guilty" or "not guilty." A finding of "not guilty" is *not* a finding of "innocence." Rather, it is a determination that the prosecution did not prove its case beyond a reasonable doubt.

Judges make "judgments" while jurors render "verdicts." The jury foreperson reads (or "publishes") the verdicts in open court.

If a judge or jury finds a defendant not guilty, the defendant is released. Because a person cannot be held in "jeopardy" for the same offense twice (the prohibition against "double jeopardy"), the case is permanently over.

If a judge or jury finds a defendant guilty, the judge will sentence the defendant (in some jurisdictions, most notably Texas, jurors sentence defendants). In most cases, judges reset significant cases for sentencing to allow additional testimony or evidence. In some of these cases (usually felonies), the judge may order a pre-sentence investigation (PSI) by the Department of Corrections or Probation.

### **Sentencing**

During the sentencing hearing, the State and the defense each recommend a sentence to the court. Often, they will present testimony and other evidence to support their positions. Indeed, the defense often appeals to the judge's sympathy by presenting witnesses (frequently relatives) attesting to the defendant's good character and family background. *We strongly recommend that victims participate in this process so that the court does not lose sight of how dangerous the defendant's actions were and/or the impact of his or her actions.*

### **Sentencing Options**

Judges have a significant amount of discretion in establishing sentences they want. A sentence is "legal" as long as it comports with minimum mandatory requirements and sentencing guidelines (which generally apply only to felony cases).

Sentences typically include a combination of elements. Various elements that may be selected (ranked in order from most to least restrictive) include:

- Incarceration
  - Jail, for misdemeanors and felonies (if the sentence is less than the minimum qualifying sentence for prison);
  - Prison, for felonies only;
  - Work release. In some States, the judge (or the Department of Corrections) may permit the defendant to leave jail every morning and return every evening Monday through Friday.
- House arrest or community control;
  - House arrest and community control limit defendants' ability to leave their houses. House arrest or community control officers monitor the defendants' activities. Most of the time, judges permit defendants to leave their houses to go to work, participate in substance abuse programs or counseling, receive medical treatment, attend religious ceremonies, or buy necessities like food. They may be subject to electronic monitoring.
- Probation;
  - The judge may require the defendant to be monitored for a period of time. The nature and extent of this probationary period varies dramatically according to jurisdiction, the charge, and defendant. Judges may impose special conditions on defendants. The conditions must be linked to one or more of the crimes the defendants committed (such as sobriety).
- License restriction, suspension, or revocation;<sup>5</sup>
  - In all traffic cases, judges may completely suspend or revoke driver licenses.

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<sup>5</sup> The vast majority of courts do not view license suspensions or revocations as punishment. Rather, they view them as remedial measures designed to protect the public.

- Alternatively, in all traffic cases, the judge may limit a person’s driver license; for example, the judge may prohibit a person from driving except for employment purposes.
- In DUI cases, the judge may permit a defendant to drive, but require that the defendant refrain from driving any vehicle without an ignition interlock device.
- Vehicle sanctions;
  - The judge may impound or immobilize a vehicle, confiscate its tag, or impose other sanctions related to the vehicle.
- Assessment to determine whether the defendant has an alcohol or other substance abuse problem and, if necessary, treatment;
- Fines and fees;
  - Judges may assess fines against defendants. Fines are distributed to various entities according to statute or administrative rule.
  - Judges may also assess fees to reimburse the jurisdiction for costs incurred as a result of the offense, such as for interlock use and installation, assessment, etc.
- Donations;
  - In some jurisdictions, judges may order a defendant to make a donation to a charity. In DUI cases, some creative prosecutors and judges have required defendants to donate to the victims’ favorite charities on the monthly or yearly anniversaries of the crashes.
- Community service;
  - Judges may order defendants to perform a set number of community service hours.
- Court and other costs;
  - Most jurisdictions require judges to impose court costs in all cases. The costs generally are set by statute or administrative rule and are standardized. They are intended to compensate the system for the expense of litigation. Generally, the court costs do not come close to covering the full cost of prosecution.
- Adjudication;
  - When judges adjudicate someone guilty, the finding “counts” as a conviction.
- Withholding of adjudication;
  - In some jurisdictions and for some crimes, the judge may find a defendant guilty but withhold adjudication. If this happens, the finding of guilt “does not count” as a conviction or a “prior” for most purposes. Some States have statutes preventing judges from withholding adjudication in DUI cases.

### **The Appellate (Appeal) Process**

Defendants have a right to appeal any findings of guilt. This right is intended to protect people whose rights were violated or whose cases were mishandled. Unfortunately, virtually every defendant appeals every significant sentence.

The appeals process is fairly lengthy. Appellate judges issue rulings based on the record before them. In other words, they can only consider evidence and testimony introduced at trial. If a case is reversed, the case is usually “remanded” back to the trial judge for a new trial. Occasionally, an appellate court will dismiss charges because of insufficient evidence or an extreme violation of the defendant’s rights.

## Victim Impact Statements

Judges may consider all relevant facts and circumstances when sentencing offenders, including the impact that the offenders' conduct has on their victims.

Almost all States permit victims to make "victim impact statements." MADD encourages victims and next of kin to take advantage of any opportunity they have to address the court and help the judge understand the significance of the defendant's conduct.

Many victims find the opportunity to confront defendants and to explain the impact they have felt to be cathartic. It often is very difficult for a victim or next of kin to speak about his or her loss. If you choose to make a statement, we recommend that you prepare a written outline or statement to facilitate the presentation. We also recommend that you:

- Focus on the injury or loss, not the defendant;
- Refrain from attacking the defendant personally;
- Review the statement with the prosecutor and victim advocate to ensure that you do not say anything that may violate any rules of court; and
- Dress professionally when you deliver the statement.

Statements typically include:

- Up to five minutes describing the injury or loss;
- Up to five minutes describing the impact on other family members and/or the community; and
- Two to three minutes explaining what you (or the family) want and why.

This last part should be reasonable – work with the prosecutor to make sure what you are asking for is within the judge's power to grant. Although witnesses are required to behave appropriately in court, even the most cynical judges recognize how difficult talking about loss is and will give you some leeway. It is important to remember that respect and proper decorum must be maintained by all parties at all times.











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