

**MEMORANDUM**

TO: File
FROM: NCVLI
RE: Minnesota Crime Victims' Rights To Meaningful, Support Persons; To Choose Support Persons, Including System-Based, Victim-Witness Coordinators; And To Continuity With Their Support Persons.
DATE: February 22, 2019

The information in this memorandum is educational and intended for informational purposes only. It does not constitute legal advice, nor does it substitute for legal advice. Any information provided is not intended to apply to a specific legal entity, individual or case. NCVLI does not warrant, express or implied, any information it may provide, nor is it creating an attorney-client relationship with the recipient.

ISSUE PRESENTED

Do Minnesota crime victims have a right to choose a support person, including a system-based, victim-witness coordinator, to accompany them during criminal justice proceedings?

SHORT ANSWER

Yes. Victim-witness coordinators, in practice, often serve as support persons to crime victims. Crime victims have myriad rights, including rights to protection and fairness that require that crime victims have meaningful, support persons; a support person of their choice; and continuity in their support persons. Child-witnesses, testifying for the prosecution, in select cases have an explicit right to select a meaningful, support person irrespective of whether the support person is also a witness. If the selected, support person is a witness for the prosecution, the onus is on the prosecutor or the victim's counsel to present evidence to the court, through a noticed motion, that the request is aligned with the child-witnesses wants and needs. While defendants or courts can attempt to rebut this right, Minnesota Statutes, section 631.046, subdivision 1 is a remedial statute that is liberally construed in favor of child-witnesses' needs. Similarly, witnesses, testifying for the prosecution in any case that involves any element of criminal sexual conduct, have an explicit right to have a meaningful, support person irrespective of whether the support person is also a witness. If the selected, support person is a witness, the motion procedure outlined in Minnesota Statutes, section 631.046, subdivisions 1-2 applies. Subdivision 2 should also be viewed as a remedial statute and liberally construed to support witnesses' needs, as any other interpretation would result in treatment inconsistent with the legislative intent. Further, any defense tactics aimed at isolating crime victims from their support persons or intimidating crime victims from proceeding with a case may warrant sanctions or constitute professional misconduct.

DISCUSSION

I. CRIME VICTIMS HAVE A RIGHT TO A MEANINGFUL, SUPPORT PERSON.

A. Victim-Witness Coordinators, In Practice, Are Support Persons To Crime Victims; And Crime Victims Rights' To Protection And Fairness Support Continuity With A Meaningful, Support Person.¹

Crime victims' rights to protection and fairness require continuity with a meaningful, support person. *See, e.g.*, Minn. Stat. Ann. § 631.045 (authorizing courts, in cases involving minors, to close courtrooms if “necessary to protect a witness or ensure fairness”); Minn. Stat. Ann. § 595.02, subdiv. 4 (authorizing courts, in cases involving children under the age of 12, “to minimize . . . trauma to the child . . . testifying in the courtroom setting and, where necessary, to provide a setting more amenable to securing the child witness’s uninhibited, truthful testimony”); Minn. Stat. Ann. § 611A.035, subdiv. 2 (providing that “[n]o victim or witness providing testimony in court proceedings may be compelled to state a home or employment address, telephone number[] or the date of birth of the victim or witness on the record in open court unless . . . relevant”); Minn. Stat. Ann. § 611A.034 (requiring court-implemented safeguards, such as “victim escorts” when a separate waiting area is not accessible); Minn. Gen. R. Prac. 4.02(e)(iii)-(iv) (limiting visual or audio coverage of victims during criminal proceedings);

¹ While explicitly discussing another jurisdiction, commentators have recognized this supportive relationship of victim-witness coordinators. *See Lisa Rule, The Victim Witness Coordinator--A Partner in the Criminal Justice Arena*, 40 Advocate 10 (1997) (explaining that victim-witness coordinators “provide support to victims and witnesses”). As one of the first points of contact, victim-witness coordinators establish a rapport and provide continuity by keeping victims informed throughout the criminal justice process and by providing referrals, among other tasks. *See Id.* (informing victims is a “way[] that a victim coordinator can help victims feel like they have control over their situation[,]” and feel safe). Victim-witness coordinators also support victims in court. *See Id.* (explaining victim-witness coordinators can attend criminal proceedings as “[i]t can be very traumatic for a victim . . . to face their assailant in court and testify with this person being only a few feet away”).

Minn. Stat. Ann. § 611A.021 (granting crime victims a right “to request . . . law enforcement . . . to withhold public access to data revealing the victim’s identity”).²

B. Children Who Witness Child Abuse, Crimes Of Violence And Assaults Have A Right To Select A Support Person Irrespective Of Whether The Support Person Is A Witness Or A Victim-Witness Coordinator.

A child-witness,³ testifying on behalf of the prosecution, in a child abuse, crime of violence or assault case has a right to choose a support person who may be present or in attendance during their testimony at an omnibus hearing or trial.⁴ *See* Minn. Stat. Ann. § 631.046, subdiv. 1. Such child-witnesses also have an express right to select a support person “whether or not [their selection is] a witness” for the prosecution.⁵ *Id.* The statutory provisions do not comment on and, therefore, do not bar selection of a defense witness or victim-witness coordinator as a support person. *Id.*

If the selected, support person is a witness for the prosecution, the court shall grant the child-witnesses’ request for that support person after the prosecutor⁶ presents evidence, through a

² Crime victims have a right to confidentiality right with community-based advocates and select counselors. *See, e.g.,* Minn. Stat. Ann. § 595.02, subdiv. 1(l) (prohibiting community-based “domestic abuse advocate[s] . . . [from] be[ing] compelled to disclose any opinion or information received from or about the victim without the consent of the victim unless ordered by the court” and after the court has considered the impact on the victim, the victim’s services as well as the victim’s relationship with the advocate); *id.* at subd.1(k) (prohibiting select sexual assault counselors from “disclos[ing] any opinion[s] or information received from or about the victim without the consent of the victim[,]” unless it pertains to neglect or termination of parental rights).

In addition, the Minnesota Rules of Professional Conduct has protections that can be used by third-parties confronted with various defense tactics. *See* Minn. R. Prof’l Conduct 4.4(a) (providing, “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay[] or burden a third[-]person[] or use methods of obtaining evidence that violate the legal rights of such a person”).

³ For purposes of this memorandum, the terms “child-witness” and “child-witnesses” includes child-victims.

⁴ Pursuant to Minnesota Statutes, section 631.046, subdivision 1, child abuse is defined in section 630.36, subdivision 2; crime of violence is defined in section 624.712, subdivision 5; and assault is defined in section 609.224 or 609.2242. Minn. Stat. Ann. § 631.046, subdiv. 1.

⁵ *Contra* Minn. R. Crim. P. 18.03 (allowing child-witnesses in need of support during grand jury testimony to have support persons so long as the support person does not participate in the proceeding or influence the testimony).

⁶ Crime victims’ counsel can assert victim’s rights for a support person.

noticed motion, that the child-witness: (1) wants the person present as a form of support; and (2) the support person's presence "will be helpful to the" child-witness, unless defendant or the court establishes that the support person poses a substantial risk of altering the child-witnesses' testimony. *Id.* Notably, Minnesota Statutes, section 631.046, subdivision 1 is a remedial statute that is liberally construed to support child-witnesses. *See State v. Ross*, 451 N.W.2d 231, 236 (Minn. Ct. App. 1990) (explaining that "remedial statutes[, such as section 631.046, subdivision 1,] are to be liberally construed[;]" and affirming the trial court's decisions regarding choice, placement and number of support persons for the witness (citing *State v. Moseng*, 95 N.W.2d 6, 8, 11 (Minn. 1959))). In addition, public policy supports victim-centered approaches that address victims' needs. *See* Minn. Stat. Ann. § 480.30, subdiv. 1(1) (mandating the "Supreme Court's judicial education program . . . include ongoing training for district court judges on child and adolescent sexual abuse, domestic abuse, harassment, stalking[] and related civil and criminal court issues[;]" including a component on victims' needs).

C. Witnesses In Cases Involving Criminal Sexual Conduct Have A Right To A Support Person Irrespective Of Whether The Support Person Is A Witness Or A Victim-Witness Coordinator.⁷

A witness, testifying on behalf of the prosecution, in a case that has any element of criminal sexual conduct has a right to have a meaningful, support person and a right to be accompanied by their support person for the entire omnibus hearing or any other pretrial

⁷ Minnesota Statutes, section 631.046, titled "[a]uthorizing presence of support person for minor prosecuting witness[;]" contains two subdivisions. Minn. Stat. Ann. § 631.046. Subdivision 1 ("[c]hild abuse and violent crime cases") specifies that the law applies to persons "under 18 years of age . . ." *Id.* at subdiv. 1. Subdivision 2 ("[o]ther cases") is silent as to age. *Id.* at subdiv. 2; *see also Masters v. Comm'r, Minnesota Dep't of Nat. Res.*, 604 N.W.2d 134, 137-38 (Minn. Ct. App. 2000) (explaining that "[t]he single-subject-and-title provision [of the state constitution] was not intended to prevent comprehensive legislation; accordingly, the provision should be given a liberal interpretation[;]" and, further, the title is not intended to be an index).

hearing.⁸ *See* Minn. Stat. Ann. § 631.046, subdiv. 2 (providing that, “[n]otwithstanding any other law, a prosecuting witness in any case involving criminal sexual conduct . . . may choose to be accompanied by a support[] person . . . at the omnibus or other pretrial hearing”). The witness also has a right to select a support person “whether or not [their selection is] a witness” for the prosecution or defendant.⁹ *See Id.* (excluding language that precludes a witness from selecting a defense witness or a victim-witness coordinator as a support person). If the selected, support person is a witness, the court shall follow the motion procedure outlined in Minnesota Statutes, section 631.046, subdivisions 1-2. *See* Minn. Stat. Ann. § 631.046, subdiv. 1-2 (explaining what the motion procedure entails and when it is applicable). Subdivision 2 should be viewed as a remedial statute akin to subdivision 1 and liberally construed to support victim-witnesses’ needs, as any other result would be unreasonable and absurd treatment for a witness testifying in a case involving criminal sexual conduct. *See* Minn. Stat. Ann. § 645.17(1)-(2) (determining the legislative intent, includes examining whether :“(1) the legislature does not intend a result that is absurd, impossible of execution[] or unreasonable; [and] (2) the legislature intends the entire statute to be effective and certain”).

⁸ Pursuant to Minnesota Statutes, section 631.046, subdivision 2, criminal sexual conduct is defined in “sections 609.342, 609.343, 609.344, and 609.345 . . .” Minn. Stat. Ann. § 631.046, subdiv. 2.

⁹ *Contra* Minn. Stat. Ann. § 260B.163, subdiv. 3 (granting victims in delinquency proceedings a right to support persons “not scheduled to be a witness”).

II. DEFENDANTS CANNOT CIRCUMVENT DISCOVERY RULES TO PRECLUDE VICTIM-WITNESS COORDINATORS FROM SERVING AS SUPPORT PERSONS.

A. Defendants Do Not Have a Right Of Surprise; And Defendants Must Disclose Discovery Immediately, Including All Persons It May Call At Trial And All Discovery Linked To Witnesses.

The Supreme Court of Minnesota explicitly provided that defendants do not have a right of surprise; thus, tactics aimed at isolating crime victims from their support persons or intimidating crime victims from proceeding with a criminal case are not supported by law. *See State v. Patterson*, 587 N.W.2d 45, 49, 51 (Minn. 1998) (instructing defense counsel, who “assert[ed] a non-existent right of surprise[,]” that he must comply with the rules of discovery); *see also Gale v. Cty. of Hennepin*, 609 N.W.2d 887, 891 (Minn. 2000) (explaining, in a tax related matter, that one of “[t]he objective[s] of our rules of discovery is . . . to discourage and prevent unjust surprise and prejudice at trial”); *id.* at 891 (explaining “[a]s we have stated, ‘trial by ambush’ fell out of favor in the courts of this state over 50 years ago”).

Defendants have an obligation to provide discovery with enough time for the prosecutor and victim’s counsel “to make beneficial use” of the discovery; and defendants are prohibited from strategically revealing discovery at a later time to justify untimely notice of defense witnesses, such as a victim-witnesses coordinators. *See* Minn. R. Crim. P. 9.03, subdiv. 2(a), (c) (providing defendants must provide discovery “in time to afford counsel the opportunity to make beneficial use of it[,]” and defendants have an ongoing discovery obligation); Minn. R. Crim. P. 9.03, subdiv. 2(b) (mandating defendants, who learn of new “material, information[] or witnesses subject to disclosure . . .[,] must promptly notify the other party of what it has discovered and disclose it”); Minn. R. Crim. P. 9.02, subdiv. 1(3) (explaining that notice of defense witnesses is subject to discovery, without a court order, and “defendant[s] must disclose the names and

addresses of witnesses who may be called at trial” and within defense’s knowledge); *Patterson*, 587 N.W.2d at 50 (providing “[a]ll defense witnesses in a criminal case must be disclosed pursuant to [Minn. R. Crim. P.] 9.02”); Minn. R. Crim. P. 9.02, subdiv. 1(4)(a), (d) (mandating defendants disclose relevant, oral statements made by persons defendant anticipates calling at trial and to persons partaking in the defense; and mandating defendants disclose “[r]elevant written or recorded statements of the persons the defendant intends to call at trial”); Minn. R. Crim. P. 9.02, subdiv. 1(4)(b)-(c) (mandating defendants disclose (“[s]tatements of prosecution witnesses obtained by . . . persons participating in the defense within the defendant’s possession or control; [and] . . . [w]ritten summaries known to . . . defense of the substance of any oral statements made by prosecution witnesses to . . . persons participating in the defense, or obtained by the defendant at the defense counsel’s direction”).

B. Defendants Cannot Circuitously Obtain Non-Discoverable Information; And Defendants Cannot Use Victim-Witness Coordinators As Pawns In Discovery “Fishing Expeditions” Aimed At Isolating Or Intimidating Crime Victims.

Defendants cannot list members of the prosecution’s staff in order to circuitously obtain information otherwise non-discoverable; and defendants cannot use victim-witness coordinators as pawns in “fishing expeditions” to isolate crime victims from their support persons or to intimidate crime victims from proceeding with a criminal case.¹⁰ *See, e.g., State v. Glidden*, 459

¹⁰ Discovery violations may warrant sanctions; and “[t]rial courts have broad discretion in imposing sanctions. . . .” *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998). If a prosecutor or victim’s counsel files a noticed motion addressing discovery violations, relief can include a continuance, mandated disclosure of discovery, “any order [the court] deems just in the circumstances[,]” and, in some instances, contempt of court. Minn. R. Crim. P. 9.03, subdiv. 8; *see also* Minn. R. Crim. P. 9.03, subdiv. 8 (providing “[a]ny person who willfully disobeys a court’s discovery order may be held in contempt”); Minn. R. Prof’l Conduct 8.4(a), (c)-(d) (explaining that, among other acts, “[i]t is professional misconduct for a lawyer to: . . . violate or attempt to violate the Rules of Professional Conduct . . . ; engage in conduct involving dishonesty, . . . deceit[] or misrepresentation; . . . [or] engage in conduct that is prejudicial to the administration of justice”).

Notably, relief ordered must be meaningful. *See State v. Lindsey*, 284 N.W.2d 368, 374 (Minn. 1979) (providing “[t]he values sought to be achieved through reciprocal discovery will be attained only if the rules are properly observed, and to this end the trial courts must have the ability to make those obligations meaningful”).

N.W.2d 136, 139 (Minn. Ct. App. 1990) (emphasis omitted) (explaining that “due process does not require disclosure of everything that ‘might possibly influence a jury’ [and] [d]iscovery rules are not meant to be used for ‘fishing expeditions[]’” (quoting *State v. Hunter*, 349 N.W.2d 865, 866 (Minn. Ct. App. 1984))); Minn. R. Prof'l Conduct 3.4 (precluding defense attorneys from making frivolous, pre-trial discovery requests);¹¹ Minn. R. Crim. P. 9.01, subdiv. 3(1)(a) (prohibiting defendants from obtaining, “[u]nless otherwise provided by these rules, legal research, records, correspondence, reports[] or memoranda to the extent they contain the opinions, theories[] or conclusions of . . . the prosecutor’s staff or officials”); *id.* at subdiv. 3(1)(b) (prohibiting defendants from obtaining, “[e]xcept as provided in Rule 9.01, subdiv. 1(1) to (7), reports, memoranda[] or internal documents made by the . . . members of the prosecutor’s staff”); *see also State v. Galvan*, 374 N.W.2d 269, 270 (Minn. 1985) (explaining that the portion of a prosecutor’s notes that “contain the thoughts or opinions of the prosecutor” may be withheld).¹²

While Minnesota law provides that preclusion of evidence is a severe sanction, the Supreme Court of Minnesota has approved sanctions, such as preclusion of witnesses. *See State v. Vaughn*, 361 N.W.2d 54, 58-9 (Minn. 1985) (affirming “[t]he trial court[’s] conclu[sion] that this sanction [of preclusion] was justified because defense counsel had not complied with the discovery rules [regarding the “alleged” rebuttal witnesses] and because it was not clear that the evidence would help defendant significantly”); *Vaughn*, 361 N.W.2d at 58 (referring to *State v. Lindsey*, 284 N.W.2d 368 (Minn. 1979) as “[t]he leading case on the issue of sanctions”); *Lindsey*, 284 N.W.2d at 374 (providing “preclusion [of witnesses] was warranted”); *id.* at 373 (explaining when trial courts exercise discretion regarding the imposition of sanctions for discovery violations, the court should consider four factors); *see also Smith v. Magnetic Peripherals/CDC*, 418 N.W.2d 160, 160 (Minn. 1988) (providing preclusion as a sanction for non-disclosure “is not self-executing; and a party wishing to take advantage of the preclusion sanction should object to the untimely disclosure and to the presentation of evidence”).

¹¹ Not all relevant evidence is admissible. *See* Minn. R. Evid. 403 (explaining that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time[] or needless presentation of cumulative evidence”); Minn. R. Evid. 402 (explaining relevant evidence is generally admissible; and irrelevant evidence is inadmissible); *see also* Minn. R. Evid. 401 (defining “relevant evidence”).

¹² Prosecution and system-based advocates must comply with *Brady v. Maryland*, 373 U.S. 83 (1963). *See Brady v. Maryland*, 373 U.S. 83, 86 (1963) (hold[ing] that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”). “In Minnesota, the *Brady* rule is embodied in [Minn. R. Crim. P.] 9.01,

CONCLUSION

Crime victims' rights, *inter alia*, to protection and fairness as well as specific statutory provisions make clear that victims have rights to a meaningful, support person; to select a support person irrespective of whether they are a witness or system-based, victim-witness coordinator; and to continuity with support persons in order for the relationships to be meaningful. This right is explicit for child-witnesses testifying on behalf of the prosecution, in child abuse, crime of violence or assault cases. If the selected, support person is a witness for the prosecution, motion practice must be undertaken regarding the child-witnesses' desires and need for the support person. Similarly, witnesses testifying on behalf of the prosecution, in any case that involves any element of criminal sexual conduct, have an express right to have a meaningful, support person irrespective of whether the person is also a witness. Analogous motion practice is required if the selected, support person is a witness. Further, Minnesota statutes, section 631.046, subdivision 1, and arguably subdivision 2, are remedial provisions that should be liberally construed to support victims' needs for meaningful, support persons. In addition, defense tactics aimed at isolating crime victims from their support persons or intimidating crime victims from proceeding with a case may warrant sanctions or constitute professional misconduct.

subd[iv]. 1(6)." *State v. Glidden*, 459 N.W.2d 136, 138 (Minn. Ct. App. 1990); *see also* Minn. R. Crim. P. 9.01, subdiv. 1(6) (requiring disclosure of "[m]aterial or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt").

In an unpublished Minnesota Court of Appeals' opinion, the court explained which information concerning crime victims' mental health does not constitute *Brady* material. *See State v. Phillips*, No. A07-2396, 2009 WL 21625, at *2 (Minn. Ct. App. Jan. 6, 2009) (explaining that the therapist's concern about the impact testifying would have on the victim's "subsequent mental health" (not the impact on her testimony) was not only irrelevant for purposes of the victim's competency to testify but also "not the sort of exculpatory or impeaching evidence that the *Brady* rule requires prosecutors to disclose").