

## Preventive Measures

- Notify record holders that you represent the child-victim when you undertake representation
- Instruct record holders that they are not to disclose any information relating to the child-victim client


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Two Types of Subpoenas for Documents	
Direct Subpoenas	Third-Party Subpoenas
<ul style="list-style-type: none"><li>• These subpoenas request information from the child-victim or from the child-victim's parents</li><li>• Rarely sent to the child-victim's attorney</li></ul>	<ul style="list-style-type: none"><li>• These subpoenas request information from third parties<ul style="list-style-type: none"><li>○ Third parties may include:<ul style="list-style-type: none"><li>➤ Cellular phone providers</li><li>➤ Schools</li><li>➤ Hospitals</li><li>➤ Clinics</li><li>➤ Mental health providers</li></ul></li></ul></li></ul>
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- Utah R. Crim. P. 14(b)(3).
- *State v. Gonzales*, 125 P.3d 878 (Utah 2005).

### Bases to Quash a Subpoena

- No right to pretrial discovery
- Relevance/Harassment
- Privacy Grounds
- Right to Refuse Discovery
- Statutory Privileges



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Bases to Quash: *No Right to Pretrial Discovery*

Under federal law, defendants do not have a constitutional right to pretrial discovery in a criminal case.

- *Weatherford v. Bursey*

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- *Weatherford v. Bursey* 429 U.S. 545 (1977).
- *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

Bases to Quash:  
*Relevance/Harassment*

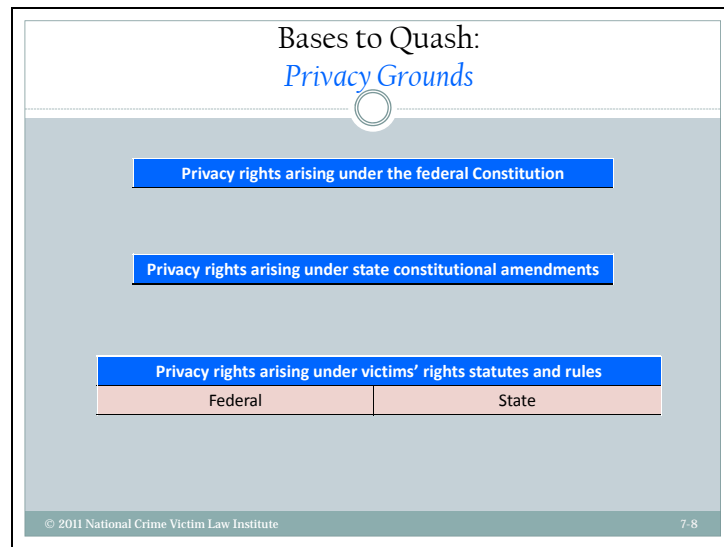
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Defendants must have a clearly articulated basis for believing the information sought is relevant and exculpatory

- No “fishing expeditions” are allowed
- Jurisdictions vary quite a bit in how much is enough
- Usually a hunch that “there might be something there” is not enough to justify disclosure

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- *United States v. Nixon*, 418 U.S. 683 (1974).
- *State v. Kalakosky*, 852 P.2d 1064 (Wash. 1993).
- *State v. Blake*, 63 P.3d 56 (Utah 2002).
- *State v. Green*, 646 NW 2d 298 (Wis. 2002).
- *State v. Fowler*, 200 P.3d 591 (Or. Ct. App. 2009).



Specific statutory authority allowing an opportunity to move to quash or refuse discovery

- **Federal law**
  - Rule 17(c)(3)
- **State laws**
  - Check your local rules
  - Consider child-victims' constitutional or statutory right to refuse discovery (discussed on next slide)

*Don't consider these laws in a vacuum*  
*Protections exist in multiple places*

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- Federal Rules of Criminal Procedure Rule 17(c)(3).
- 18 U.S.C. § 3771.

Bases to Quash:  
*Right to Refuse Discovery*

- A growing number of states explicitly recognize that victims have the right to refuse discovery in a criminal proceeding

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- Cal. Const. art. I, § 28.
- Or. Const. art. I, § 42.



Bases to Quash: <i>Statutory Privileges</i>	
Federal recognizes	States vary
<ul style="list-style-type: none"><li>• Attorney-Client</li><li>• Spousal</li><li>• Psychotherapist-Patient</li></ul>	<ul style="list-style-type: none"><li>• Attorney-Client</li><li>• Spousal</li><li>• Psychotherapist-Patient</li><li>• DV-SA Counselor-Victim</li><li>• Physician-Patient (although often just civil)</li><li>• Clergy-Penitent</li><li>• School-Student</li><li>• Accountant</li></ul>
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How strong is your privilege?

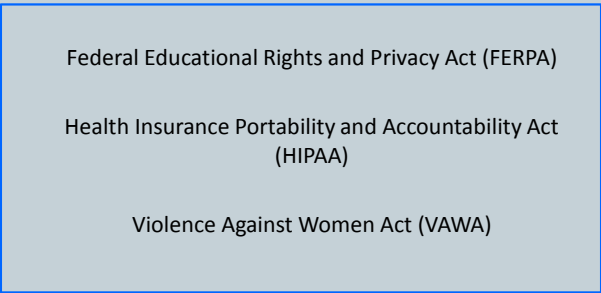
Absolute Privilege	Diluted/Qualified Privilege
<ul style="list-style-type: none"><li>• Illinois, Indiana, Colorado, Pennsylvania</li><li>○ Facially prohibit disclosure absent waiver, including <i>in camera</i> inspection</li></ul>	<ul style="list-style-type: none"><li>• Diluted<ul style="list-style-type: none"><li>○ Absolute on face, but case law narrows the privilege</li></ul></li><li>• Qualified<ul style="list-style-type: none"><li>○ Use under some circumstances is contemplated</li></ul></li></ul>

Outlier: Massachusetts  
If defendant establishes good cause, defendant's attorney can inspect documents.

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- *In re Subpoena to Crisis Connection, Inc.*, No. 19S05-1012-CR-678 (Ind. Sup. Ct. June. 23, 2011).
- *State v. Hummel*, 483 N.W.2d 68 (Minn. 1992).
- *Farish v. Commonwealth*, 346 S.E.2d 736 (Va. Ct. App. 1986).
- *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006).
- *State v. Pinder*, 678 So. 2d 410 (Fla. Dist. Ct. App. 1996).

Bases to Quash: *Other Statutory Protections*



Federal Educational Rights and Privacy Act (FERPA)

Health Insurance Portability and Accountability Act (HIPAA)


Violence Against Women Act (VAWA)

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- Federal Educational Rights and Privacy Act, 20 U.S.C. § 1232g.
- *Frazier v. Fairhaven School Committee*, 276 F.3d 54 (2002).
- *D.L. v. Unified School Dist. No. 497*, 270 F. Supp. 2d 1217 (D. Kan. 2002), *rev'd in part on other grounds*, 92 F.3d 1223 (10th Cir. 2004).
- 42 U.S.C. § 201.
- 45 C.F.R. § 164.512(e).
- 42 U.S.C. § 13925(b).

Third Party Subpoenas: What if you <i>do not know</i> about the subpoena?	
<u>Court has records</u>	<u>Defense / Prosecution has records</u>
<ul style="list-style-type: none"><li>• Move the court to return the records to the child-victim</li><li>• Exclude evidence from the proceedings</li><li>• Argue that <i>in camera</i> review is a privacy invasion</li></ul> <div><ul style="list-style-type: none"><li>• Fed. R. Crim. P. 17(c)(3)</li><li>• <i>State v. Gonzales</i></li></ul></div>	<ul style="list-style-type: none"><li>• Demand turn over of the documents to the child-victim</li><li>• Exclude evidence from the proceedings</li><li>• Remove attorney from case</li><li>• Seek sanctions</li><li>• Potential ethics violations</li></ul>
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- Fed. R. Crim. P. 17(c)(3).
- *United States v. Bradley*, Crim. No. 09-40068-GPM, 2011 WL 1102837 (S.D. Ill. Mar. 23, 2011).
- *United States v. Taylor*, No. 06-cr-20030, 2009 U.S. Dist. LEXIS 67322 (Jul. 29, 2009).
- *United States v. McClure*, Nos. CR 08-100-WBS, CR 08-270 WBS, 2009 WL 937502 (E.D. Cal. Apr. 7, 2009).
- Fed. R. Crim. P. 17 advisory committee's notes.
- *State v. Gonzales*, 125 P.3d 878 (Utah 2005).
- *In re Taylor*, OSB No. 09-20, Order Approving Stipulation for Discipline (Or. Sept. 18, 2009).



## Motion to Quash Activity: Tony & Jeffrey Revisited

- 20 minutes total
- 10 minutes in small groups, 10 minutes for large group discussion

**Instructions:**

- Review the sample subpoena exhibit included in your materials
- Review the sample protections included in your materials
  - ✦ What private information is potentially implicated by the subpoena?
  - ✦ What arguments could Tony and Jeffrey's attorney(s) make?

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Release Conditions and Protective Orders

Module # 8

- ❖ Victims' Rights Implicated
- ❖ Types of Conditions

20 minutes

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## Victims' Rights Implicated

- To be heard
- To be treated with fairness, dignity, and respect
- To protection
- To notice
- To privacy

Additional jurisdiction-specific rights may also exist

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- Utah Const. art. I, § 28(1)(b).
- Ariz. Const. art. II, § 2.1(A)(4).
- Cal. Const. art. I, § 28(b)(8).
- 18 U.S.C. § 3771(a)(4).
- Utah Code Ann. § 77-38-4(1)(b).
- Ariz. Rev. Stat. § 13-4422.
- *Powell v. Alabama*, 287 U.S. 45 (1932).
- N.M. Const. art. II, § 24(A)(1).
- N.J. Const. art. I, ¶ 22.
- 18 U.S.C. § 3771(a)(8).
- 725 Ill. Comp. Stat. 120/4(a)(1).
- N.M. Const. art. II, § 24(A)(3).
- Cal. Const. art. I, § 28(b)(2).
- Cal. Const. art. I, § 28(b)(3).
- Conn. Const. art. I, § 8(b)(3).
- 18 U.S.C. § 3771(a)(1).
- S.C. Code § 16-3-1525(G).
- Alaska Stat. § 12.30.027(a).
- Colo. Rev. Stat. Ann. § 18-1-1001(1).
- Cal. Penal Code § 1202.05.
- Cal. Penal Code § 1203.1(i)(2).
- Md. Code Ann., Crim. Proc., § 5-201(a)(2).
- Utah Code Ann. § 77-36-2.5(3)(c).
- Mo. Const. art. I, § 32(2).
- 18 U.S.C. § 3771(a)(2).
- Idaho Code § 19-5306(1)(d).
- *Roe v. Wade*, 410 U.S. 113 (1973).
- *Whalen v. Roe*, 429 U.S. 589 (1977).
- Cal. Const. art. I, § 28(b)(1).
- 18 U.S.C. § 3771(a)(8).
- N.M. Stat. Ann. § 31-26-4.

Release Conditions and Protective Orders:  
*Introduction*

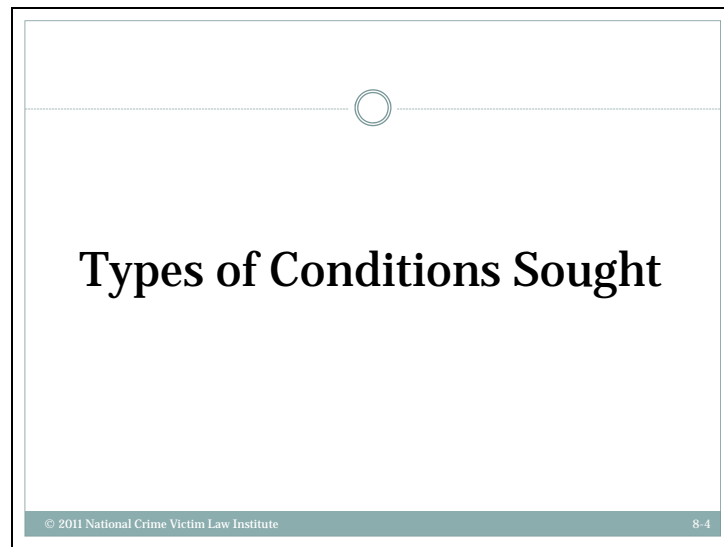
- Imposed as condition of post-arrest or post-conviction release
- Compelling government interests may justify the imposition of pretrial release conditions
  - Including the safety of child-victims

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- Ariz. Const. art. II, § 22(B).





Restrictions on a defendant's ability to associate directly with the child-victim and others	
Association with the Victim	Association with Others
<i>State v. Garcia</i>	<i>People v. Wardlow</i>
<i>State v. Mitchell</i>	
Wash. Rev. Code § 13.40.215(5)	

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- *State v. Garcia*, 113 P.3d 406 (N.M. Ct. App. 2005).
- *State v. Mitchell*, 810 S.W.2d 733 (Tenn. Crim. App. 1991).
- Wash. Rev. Code § 13.40.215(5).
- *People v. Wardlow*, 278 Cal. Rptr. 1 (Cal. Ct. App. 1991).

Conditions prohibiting indirect contact with the child-victim


Contact through a third party

- *Arias v. State*

Contact using electronic means

- Facebook, telephone, texting, Internet, e-mail
  - *Commonwealth v. Myers*

*Make restrictions explicit*  
*Additional preventative measures may be appropriate*



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- *Arias v. State*, 751 So. 2d 184 (Fla. Dist. Ct. App. 2000).
- *Commonwealth v. Myers*, 78 Mass. App. Ct. 1112 (Mass. App. Ct. 2010).

### Geographic restrictions that prevent contact with a child-victim

- Generally upheld as long as they bear some reasonable relation to the underlying offense, public safety, or the rehabilitation of the offender
  - *United States v. Lowe*
  - *King v. State*
  - *People v. Watkins*

- Restrictions preventing presence in areas children commonly frequent
  - *United States v. Rearden*
  - *State v. Crocker*
  - Specify areas the child-victim frequently visits

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- *United States v. Lowe*, 654 F.2d 562 (9th Cir. 1981).
- *King v. State*, 574 So. 2d 1013 (Ala. Ct. App. 1990).
- *People v. Watkins*, 239 Cal. Rptr. 255 (Cal. Ct. App. 1987).
- *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003).
- *State v. Crocker*, 771 P.2d 1026 (Or. Ct. App. 1989).

Restrictions on a defendant's use of the Internet

*May be particularly appropriate when the crime against the child-victim involved the use of the Internet*

- *United States v. Tome*
- *United States v. Rearden*



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- *United States v. Tome*, 611 F.3d 1371 (11th Cir. 2010).
- *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003).

### Restrictions relating to a defendant's custody or family court-related obligations

- Agreements to abide by family court orders or support obligations
  - ✦ *State v. Proctor*
  - ✦ *Commonwealth v. Silva*
- Agreements to undergo mental health counseling, participate in necessary treatment/ medication plans, or attend parenting classes or anger management classes

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- *State v. Proctor*, Indictment No. 08-06-00450, 2011 WL 66598 (N.J. Super. Jan. 11, 2011).
- *Commonwealth v. Silva*, 935 N.E.2d 390 (Mass. Ct. App. 2010).



Child-Victims' Right to be Present

Module # 9

- Brief Overview of Constitutional and Statutory Rights
  - Law on Witness Exclusion
  - To Attend or Not to Attend?
    - Accommodations

20 minutes

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Constitutional & Statutory Rights	
Constitutional Right	Statutory Right
<ul style="list-style-type: none"> <li>A number of states, including: <ul style="list-style-type: none"> <li>Alabama</li> <li>Colorado</li> <li>Idaho</li> <li>Oregon</li> <li>Tennessee</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)</li> <li>Ariz. Rev. Stat. § 13-4420</li> <li>Md. Code Ann. Crim. Proc. § 11-102(a)</li> <li>Ohio Rev. Code § 2930.09</li> </ul>



- Ala. Const. art. I, § 6.01(a).
- Colo. Const. art. II, § 16a.
- Idaho Const. art. I, § 22(4).
- Or. Const. art. I, § 42(1)(a).
- Tenn. Const. art. I, § 35(3).
- 18 U.S.C. § 3771(a)(3).
- Ariz. Rev. Stat. § 13-4420.
- Md. Code Ann., Crim. Proc. § 11-102(a).
- Ohio Rev. Code § 2930.09.
- 18 U.S.C. § 3771(a)(3).



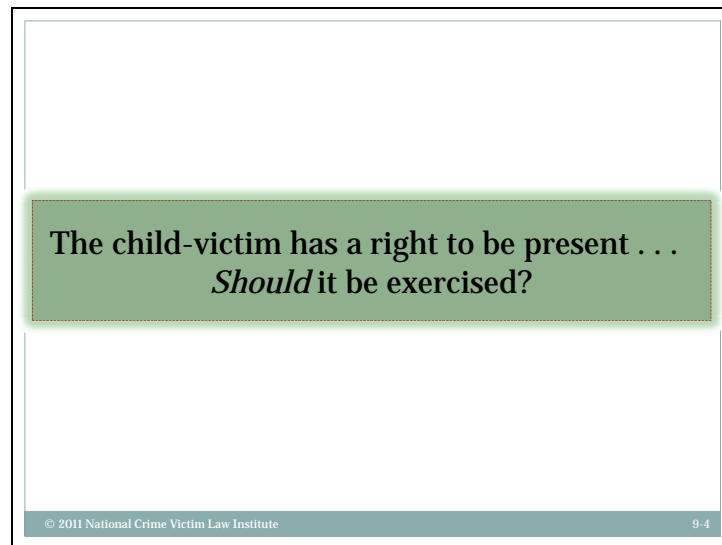
## Law on Witness Exclusion

### Witness Exclusion Evidence Rules

- Witness exclusion rules may be implicated when the child-victim is also a witness in the case
- Many states explicitly exempt child-victims from the sequestration rule
  - ❖ Maryland Rule 5-615(b)(a)
  - ❖ Fed. R. Evid. 615, Exemption 4
  - ❖ Ariz. Rule 615, Exemption 4
- In jurisdictions without an explicit exemption for child-victims' right to be present, the right to be present may trump witness exclusion
  - ❖ *Gabriel v. State*

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- *Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988).
- *Mathis v. Wainwright*, 351 F.2d 489 (5th Cir. 1965).
- *State v. Fulminante*, 975 P.2d 75 (Ariz. 1999).
- *State v. Beltran-Felix*, 922 P.2d 30 (Utah Ct. App. 1996).
- *Wheeler v. State*, 596 A.2d 78 (Md. Ct. App. 1991).
- Federal Rule of Evidence 615.
- 18 U.S.C. § 3771(a)(3).
- Maryland R. 5-615(b)(5).
- Ariz. R. Evid. 615.
- *Gabriel v. State*, 925 P.2d 234 (Wyo. 1996).

A presentation slide with a white background and a thin black border. In the center, there is a green rectangular box with a thin black border containing the text "The child-victim has a right to be present . . .  
*Should it be exercised?*". At the bottom of the slide, there is a light blue horizontal bar containing the copyright notice "© 2011 National Crime Victim Law Institute" on the left and the number "9-4" on the right.

The child-victim has a right to be present . . .  
*Should it be exercised?*

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Considerations	
Potential Implications of the Child-Victim's Presence	
Positive	Negative
Empowerment of the child-victim	Potential that the child-victim will find the event traumatic
Can lend appropriate gravity to the proceedings	Jurors may react negatively to the child-victim's presence
Can have a positive impact on the behavior of the defense	
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- Tanya Asim Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witnesses by Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel*, 9 Cardozo Pub. L. Pol'y & Ethics J. 239 (Spring 2011).
- Jessica Liebergott Hamblen, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 Law & Psychol. Rev. 139 (1997).
- U.S. Dep't of Justice, Debra Whitcomb et al., *The Emotional Effects of Testifying on Sexually Abused Children* (1994).
- Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 Crim. Just. 12 (Spring 2009).
- Victoria Weisz et al., *Children and Procedural Justice*, 44 Court Rev. 36 (2008), available at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2Weisz.pdf>.
- Carri Geer Thevenot, *Kids Have Their Day in Court*, Las Vegas Rev.-J. (Dec. 21, 2008), available at <http://www.lvrj.com/news/36525339.html>.

What if the Child-Victim Chooses Not to Personally Exercise the Right to be Present?

❖ A “representative” may be able to attend on behalf of the child-victim

- This may be a parent of the child-victim, another family member, or an appropriate designee

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- Ariz. Rev. Stat. § 13-4403(C).
- Ohio Rev. Code Ann. § 2930.02.
- Utah Code Ann. § 77-38-9(3).

### What if the Child-Victim Chooses to Exercise the Right to be Present?

Work with the child-victim's mental health provider

Older children may be better prepared to handle any trauma that occurs as a result of attending the proceedings

**Preventive Measures:**

- Introduce the child-victim to the players and the courtroom environment in advance
- Seek accommodations

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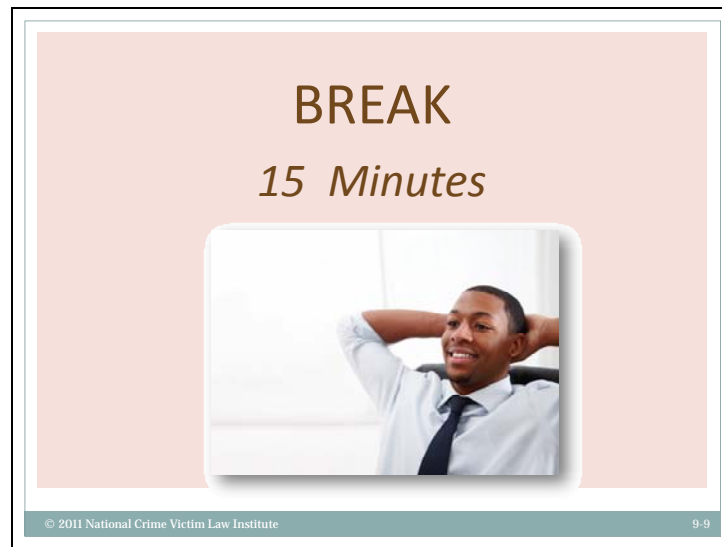
## Seeking Accommodations

**If a child-victim wishes to attend all or a portion of a proceeding:**

<ul style="list-style-type: none"><li>• Some states may have statutes specifically contemplating such situations and providing some accommodations for child-victims</li><li>• Consider requesting presence by electronic means, if appropriate</li></ul>	<ul style="list-style-type: none"><li>• File a motion with the Court requesting that:<ul style="list-style-type: none"><li>○ graphic evidence not be published to the jury in a manner visible to the child-victim</li><li>○ counsel provide advance warning of graphic or upsetting testimony</li></ul></li></ul>
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- Alaska Admin. Code tit. 22, § 20.102.



## Testimonial Accommodations: Alternative Means of Testifying for Child- Victims

Module # 10

- Constitutional Requirements Established in  
*Maryland v. Craig*
  - *Craig* findings and two-way CCTV
- The Child Victims' and Child Witnesses' Rights Act,  
18 U.S.C. § 3509
  - Timing
- Addressing Pretrial Hearing & Confrontation  
Concerns

40 minutes

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- Jessica Liebergott Hamblen, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 Law & Psychol. Rev. 139 (1997).
- *Maryland v. Craig*, 497 U.S. 836 (1990).
- 18 U.S.C. § 3509.



## Maryland v. Craig

Leading Supreme Court case addressing alternative means of testifying for child-victims

- Child-victims testified in different room from defendant
- Testimony played in courtroom via one-way CCTV
- Defendant had contemporaneous communication with her defense attorney

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- *Maryland v. Craig*, 497 U.S. 836 (1990).


### Requirements Established in *Craig*

**Trial court hears evidence:**

- Is testimony by alternative means necessary to protect this child-victim from trauma?
- Is the child-victim traumatized by prospect of testifying in front of the defendant?
- Is the child-victim likely to suffer more than *de minimis* trauma if he or she has to testify in court in front of the defendant?

**If alternative means are necessary to protect the child-victim, the court determines whether the means employed are sufficiently reliable:**

- Under oath
- Contemporaneous cross-examination
- Fact-finder and defendant have the opportunity to observe the child-victim during testimony



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- *Maryland v. Craig*, 497 U.S. 836 (1990).

What type of evidence is constitutionally required?

**Evidence**

- Must be particular to this child-victim
- Child-victim would be traumatized by the presence of the defendant
  - × Fear of the defendant, or
  - × Serious emotional distress, or
  - × Inability to reasonably communicate, or
  - × Inability to testify openly and accurately in defendant's presence
- Expert or non-expert testimony

**Findings made on the record**



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- *Maryland v. Craig*, 497 U.S. 836 (1990).

## Fear of the Defendant

*Fear of the defendant is sufficient*

- *United States v. Carrier*
- *Spigarolo v. Meachum*

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*Fear must be caused primarily by the defendant, not by the courtroom setting generally*

- *United States v. Turning Bear*
- *United States v. Bordeaux*

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- *United States v. Carrier*, 9 F.3d 867 (10th Cir. 1993).
- *Spigarolo v. Meachum*, 934 F.2d 19 (2d Cir. 1991).
- *United States v. Turning Bear*, 357 F.3d 730 (8th Cir. 2004).
- *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005).

## Serious Emotional Distress

Serious emotional distress such that the child-victim cannot reasonably communicate is sufficient

➤ *Maryland v. Craig*



Countless emotions may also overwhelm a child-victim's ability to communicate, including:

- fear
- guilt
- confusion
- remorse
- loyalty to family privacy
- shame

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- *Maryland v. Craig*, 497 U.S. 836 (1990).
- *Lomholt v. Iowa*, 327 F.3d 748 (8th Cir. 2003).

### Inability to Reasonably Communicate

Testimony that the child-victim would not be able to “reasonably communicate” may be sufficient




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- *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993).
- *Lomholt v. Iowa*, 327 F.3d 748 (8th Cir. 2003).

Inability to Testify Openly & Accurately

Inability to testify openly and accurately in defendant's presence may be sufficient

- *Lomholt v. Iowa*
- *United States v. Garcia*



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- *Lomholt v. Iowa*, 327 F.3d 748 (8th Cir. 2003).
- *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993).

Type of Evidence:  
*Expert or Non-Expert Testimony*

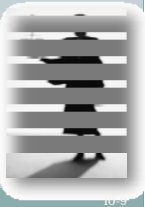
Showing Trauma:

1. Experts, parents, caregivers, family members, child-victim's own testimony (outside defendant's presence)
2. Possibility of combining generalized testimony from a specialist in the field with testimony that is specific to the child-victim
3. Judge may base findings on personal observation of the child-victim

What is **not** constitutionally required by *Craig*?

- ❖ Expert testimony (some statutes require)
- ❖ Child-victim being forced to confront defendant to establish that it is a traumatizing experience

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- *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993).
- *Maryland v. Craig*, 497 U.S. 836 (1990).



Craig Findings Necessary for Two-Way CCTV: <i>Circuit Split</i>	
<u>Second Circuit</u>	<u>Eighth &amp; Eleventh Circuits</u>
<ul style="list-style-type: none"><li>• Does not require <i>Craig</i> findings when a witness testifies using two-way CCTV<ul style="list-style-type: none"><li>○ Face-to-face elements of confrontation are preserved using this method<ul style="list-style-type: none"><li>✦ <i>United States v. Gigante</i></li></ul></li></ul></li></ul>	<ul style="list-style-type: none"><li>• Requires <i>Craig</i> findings even with two-way CCTV<ul style="list-style-type: none"><li>○ Not constitutionally equivalent to face-to-face confrontation<ul style="list-style-type: none"><li>✦ <i>United States v. Yates</i></li><li>✦ <i>United States v. Bordeaux</i></li></ul></li></ul></li></ul>

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- *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).
- *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).
- *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005).

### 18 U.S.C. § 3509: Child-Victims' and Child-Witnesses' Rights Act

- Enacted the same year as *Craig* (after *Craig*)
- Codifies federal protections for child-victims and child-witnesses
- Allows for testimony by two-way CCTV or videotaped deposition (no one-way CCTV)

Notable differences from *Craig*

- Expert testimony may be required
- Does not specify that fear of testifying in open court must stem from the defendant
- Videotaped testimony permits presence of defendant unless additional showing is made

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- 18 U.S.C. § 3509.
- *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005).
- *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993).

Timing	
Pretrial	Mid-Trial
Ideal - ensures that the child-victim does not suffer any more trauma than is necessary	Remedial
	No motion made pretrial (or pretrial motion denied) and child-victim develops difficulty upon taking the stand or while testifying

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- 18 U.S.C. § 3509(b)(1)(A).

Pretrial *Craig* Hearings & Confrontation Concerns

May a child-victim testify about his/her fear of the defendant in a pretrial *Craig* hearing held without the defendant present?

Yes

*This is the very situation these statutes seek to prevent!*

Confrontation clause rights do not apply to pretrial hearings:

- *Kentucky v. Stincer*
- *Pennsylvania v. Ritchie*
- *Peterson v. California*

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- *Kentucky v. Stincer*, 482 U.S. 730 (1987).
- *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).
- *Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010).

**Activity**


Beyond One-Way  
CCTV, Two-Way  
CCTV & Videotaped  
Testimony  
(10 minute large  
group discussion)

- What have you done?
- What would you like to see done?
- What showings and arguments would you want to make to avoid reversal on appeal?

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- Terry Campos, *Practical Tips and Legal Strategies for Protecting Child-Victims While Testifying*, NCVLI News (10<sup>th</sup> ed. 2008).

## Preparing the Child-Victim for Testimony and Being Heard



Module # 11


- Three Steps to Preparing for Testimony
  - The Setting
  - The Process
  - Testimonial Preparation
- Right to be Heard/Victim Impact Statements
  - Content and Delivery Considerations
  - Defendant's Right to Challenge and/or Cross-Examine in the Context of Victim Impact Statements

25 minutes

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### Three Steps to Preparing a Child-Victim for Testimony

- Get the child-victim familiar with the setting
- Teach the child-victim about how the court process works
- Prepare for the testimony itself



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## The Setting



- If possible, take the child-victim to visit the courtroom or place where the alternative means of testifying will occur and introduce him or her to the judge, bailiff, clerk, court reporter, security officers, etc.
- Orient the child-victim to the players and explain the layout of courtroom, including any video or audio recording technology

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## The Process

○

**The child-victim will:**

- Be called to the stand
- Be sworn in
- Be asked to provide name and (possibly) address
- Be questioned by prosecutor (or you, depending on the proceeding)
- Be questioned by defense counsel or the defendant
- Be told to step down by judge



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- Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. Cal. L. Rev. 1017 (2000).
- Greg Rios, *Navigating the Perils of Pro Se: How to Protect Your Client from Cross-Examination by a Pro Se Defendant*, NCVLI News (8<sup>th</sup> ed. 2007).

## Preparation for Testimony

- Take the child-victim through the general areas likely to be covered by questioning and explain what it means to “object”
  - Competency Hearings
  - *Craig* Hearings
  - Trial Testimony
- Explain who the defense attorney and prosecutor are and what their jobs are
- Discuss who the child-victim would prefer to have present in the room while they testify and who they would prefer to be absent during testimony
- Practice asking and answering sample questions

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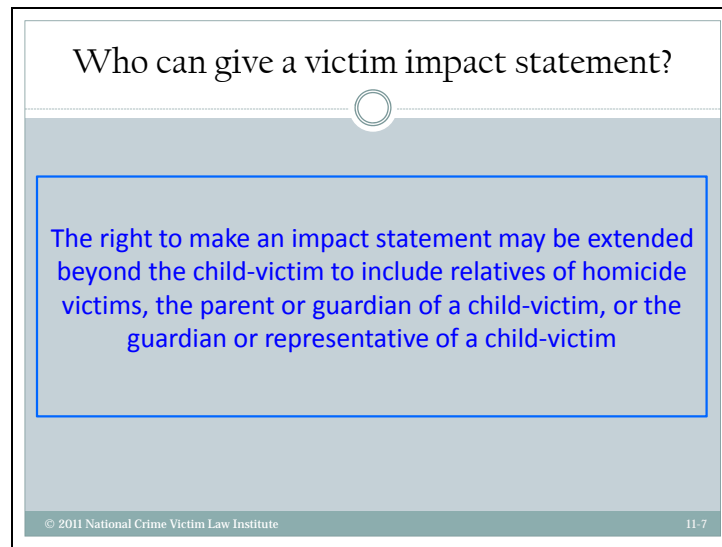
- Utah Code Ann. § 77-38-8.

What is the Right to be Heard at Sentencing?

- Written or oral information about the impact of the crime on the child-victim and/or the child-victim's family
  - Potentially includes sentencing recommendations

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- 18 U.S.C. § 3771(a)(4).
- Conn. Const. art. I, §8 (b)(8).
- Utah Const. art. I, § 28(1)(b).
- Alaska Stat. § 12.61.010(a)(9).
- Ark. Code. Ann. § 16-90-1112(a)(1).
- Christine M. Englebrecht, *The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System*, 36 Crim. J. Rev. 129 (2011).
- Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 Ohio St. J. Crim. L. 611 (2009).
- Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 Crim. & Just. 347 (2009).



Who can give a victim impact statement?

The right to make an impact statement may be extended beyond the child-victim to include relatives of homicide victims, the parent or guardian of a child-victim, or the guardian or representative of a child-victim

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- *United States v. Duffy*, No. 08-10241, 2009 WL 235669 (11th Cir. Feb. 3, 2009).
- *United States v. Craig*, No. 08-4166, 2009 WL 891012 (4th Cir. Mar. 31, 2009).

Written vs. Oral Impact Statements	
Written Impact Statement	Oral Impact Statement
<ul style="list-style-type: none"><li>• A written description of the physical, psychological, emotional, and financial harm caused by crime to child-victim and/or the child-victim's family</li><li>• May be given directly to the court, or provided to the individual drafting the presentence report</li></ul>	<ul style="list-style-type: none"><li>• Given in person, in court</li><li>• If the child-victim gives the statement, it should be in his/her own words</li><li>• Request any necessary accommodations</li></ul>
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- *People v. Kelly*, 171 P.3d 548 (Cal. 2007), *cert. denied sub nom. Kelly v. California*, 129 S.Ct. 564 (2008).
- *Salazar v. State*, 90 S.W.3d 330 (Tex. Crim. Ct. App. 2002).

## Impact Statements Made on Behalf of a Child-Victim

Giving an impact statement on behalf of a child-victim can often prove difficult for adults

- Focus primarily on the harm to the child-victim and not the representative's own pain and suffering
- Keep in mind that venting, while cathartic, can be unpersuasive to the audience
- Highlight bad facts and aggravating circumstances

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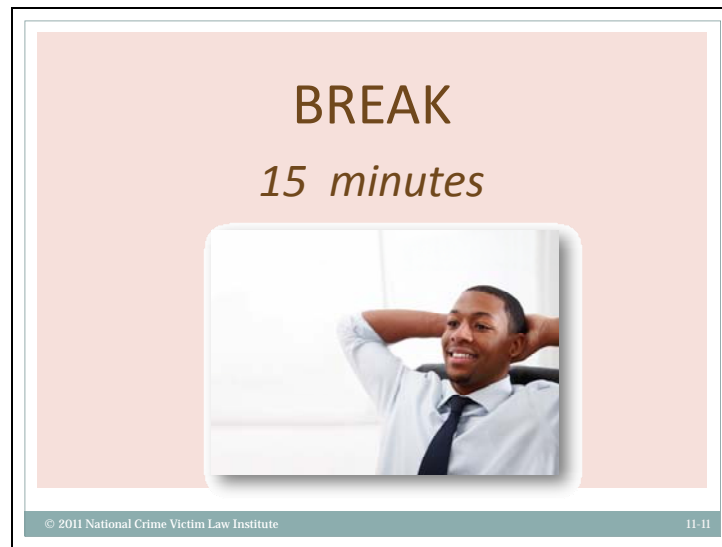
### Defendant's Right to Challenge and/or Cross-Examine

- Several states permit defendants to challenge/rebut statements of fact contained in a victim impact statement by offering testimony/evidence
- Defendants may be permitted to engage in cross-examination relating to statements of fact contained in a victim impact statement
- Most defense attorneys refrain from any challenge

Focusing the statement on the impact of the crime on the child-victim's life can help avoid the vast majority of these challenges

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- Ark. Code Ann. § 16-90-1112(c).
- Tex. Code. Crim. Proc. Ann. art. 56.03(e).
- Md. Code Ann., Crim. Proc. § 11-403(c).





Seeking Restitution for Child Victims

Module # 12

- Constitutional and/or Statutory Right
  - Breadth of Restitution Requests
    - Timing
    - Payment
  - Tony and Jeffrey, Revisited


30 minutes

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- National Association of Crime Victim Compensation Boards, *available at* <http://www.nacvcb.org/> (last accessed Nov. 17, 2011).
- NCVLI, *Securing Restitution for Victims of the Viewing, Possession, and Distribution of Child Abuse Images* (2011).

### Constitutional or Statutory Right

- Some states include the right to restitution in their constitutions
- The federal government and the states provide a statutory right
- Some states provide both



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- Ariz. Const. art. II, § 2.1(A)(8).
- Cal. Const. art. I, § 28(b)(13).
- Or. Const. art. I, § 42(1)(d).
- S.C. Const. art. I, § 24(A)(9).
- 18 U.S.C. § 3663A.
- 18 U.S.C. § 3771.
- 18 U.S.C. § 3663.
- Ariz. Rev. Stat. Ann. § 13-603(C).
- Cal. Penal Code § 1202.4.
- Colo. Rev. Stat. § 18-1.3-603.
- Or. Rev. Stat. § 137.106.
- NCVLI, *Fundamentals of Victims' Rights: A Victim's Right to Restitution* (2010).

Defining and Identifying Victims Entitled to Restitution

**"Victims" as defined by the law are entitled to restitution**

- Many jurisdictions employ broad definitions of "victim," while others are more restrictive in scope
- "Victim" may have a unique meaning in the context of restitution
  - × Even "victimless" crimes may result in "victim" who is legally entitled to restitution

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- Rebecca S.T. Khalil, *Protecting the Victims of 'Victimless' Crimes*, NCVLI Newsletter of Crime Victim Law (14th ed. 2011).

## Broad Range of Recoverable Losses

Broad range of losses may be sought in restitution

MVRA Provisions
Value of property
Cost of necessary medical and related professional services
Cost of necessary physical and occupational therapy and rehabilitation
Lost income
Cost of necessary funeral and related services
Necessary child care, transportation, and other expenses

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- Cal. Penal Code § 288.
- Cal. Penal Code § 1202.4(3)(F).
- *United States v. Serawop*, 505 F.3d 1112 (10<sup>th</sup> Cir. 2007).
- *People v. Quevedo*, No. F049371, 2007 WL 520333 (Cal. Ct. App. Feb. 21, 2005).
- *Commonwealth v. Casanova*, 843 N.E.2d 699 (Mass. App. Ct. 2006).
- *People v. Bryant*, 122 P.3d 1026 (Colo. App. 2005).
- NCVLI, *Fundamentals of Victims' Rights: A Victim's Right to Restitution* (2010).

## When to Start Thinking About Restitution

### Timing

- Talk to clients early
- Document expenses
- Think broadly

May depend on jurisdiction

- Federal
  - 18 U.S.C. § 3664
  - *Dolan v. United States*


- States
  - Or. Rev. Stat. § 137.106(1)
  - *State v. McLaughlin*

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- 18 U.S.C. § 3664.
- *Dolan v. United States*, 560 U.S. ---, 130 S.Ct. 2533 (2010).
- Or. Rev. Stat. § 137.106(1).
- *State v. McLaughlin*, --- P.3d ----, 243 Or. App. 214 (Or. Ct. App. 2011).

## Restitution and Plea Agreements



**\* Get involved pre-plea to ensure that restitution to the child-victim is included in the plea agreement, especially if charges relating to the child-victim client are dropped as part of a deal**

The government cannot waive a child-victim's right to restitution for the crime of conviction in a plea agreement

- *People v. Valdez*
- *People v. Brown*
- *Matheny v. Commonwealth*
- Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*

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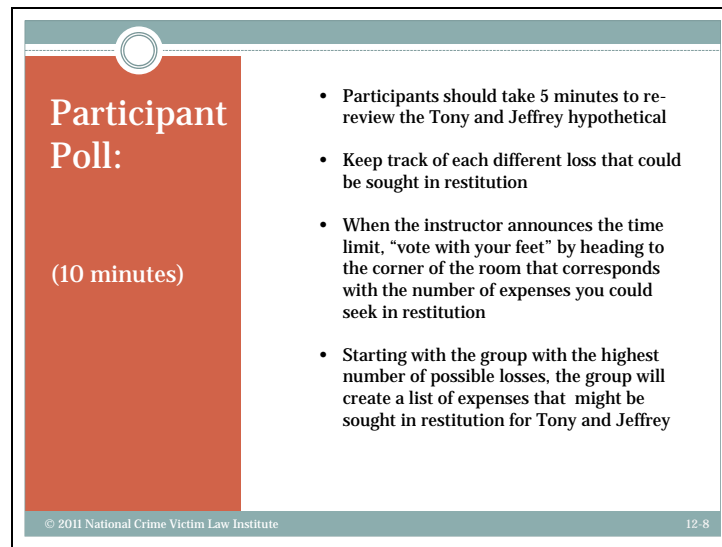
- Ariz. Rev. Stat. § 13-4402.01(A).
- *People v. Valdez*, 30 Cal. Rptr. 2d 4 (Cal. Ct. App. 1994).
- *People v. Brown*, 54 Cal. Rptr. 3d 887 (Cal. Ct. App. 2007).
- *Matheny v. Commonwealth*, 37 S.W.3d 756 (Ky. 2001).
- Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255 (2005).
- *Hughey v. United States*, 495 U.S. 411 (1990).
- *People v. Carbajal*, 899 P.2d 67 (Cal. 1995).
- *United States v. Birdsong*, No. 04-5620, 2009 WL 1546380 (6th Cir. June 3, 2009).

## Payment of Restitution

- Child-victim's expenses vs. expenses incurred by others on behalf of the child-victim
  - Transferring of funds
    - ✓ Parents
    - ✓ Trusts
    - ✓ Estates
- Avoid reimbursements, when possible

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- *United States v. Palmer*, --- F.3d ---, Nos. 10-2272, 10-2399, 10-2724 & 10-2824, 2011 WL 2582864 (8th Cir. July 1, 2011).
- 18 U.S.C. § 3663A.

The slide is titled "Participant Poll:" in a large, white, serif font on a red background. Below the title, in a smaller white font, is "(10 minutes)". To the right of the red background, on a white background, is a bulleted list of four instructions. The slide has a teal header bar with a white circle icon on the left and a teal footer bar with copyright and slide number information.

**Participant Poll:**

(10 minutes)

- Participants should take 5 minutes to re-review the Tony and Jeffrey hypothetical
- Keep track of each different loss that could be sought in restitution
- When the instructor announces the time limit, "vote with your feet" by heading to the corner of the room that corresponds with the number of expenses you could seek in restitution
- Starting with the group with the highest number of possible losses, the group will create a list of expenses that might be sought in restitution for Tony and Jeffrey

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Pleas

Module # 13

- ❖ Victims' Rights Implicated
- ❖ Protecting Child-Victims' Rights in Plea Agreements
- ❖ Remediating Violations of a Child-Victim's Rights

20 minutes

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## Victims' Rights Implicated

- To confer
- To be heard
- To be treated with fairness, dignity, and respect
- To protection
- To notice
- To privacy
- To restitution

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- Or. Const. art. I, § 42(1)(f).
- Cal. Const. art. I, § 28(b)(6).
- 18 U.S.C. § 3771(a)(5).
- N.M. Stat. § 31-26-4(F).
- Utah Const. art. I, § 28(1)(b).
- Ariz. Const. art. II, § 2.1(A)(4).
- 18 U.S.C. § 3771(a)(4).
- Utah Code Ann. § 77-38-4(1)(b).
- *Powell v. Alabama*, 287 U.S. 45 (1932).
- N.M. Const. art. II, § 24(A)(1).
- N.J. Const. art. I, ¶ 22.
- 18 U.S.C. § 3771(a)(8).
- 725 Ill. Comp. Stat. 120/4(a)(1).
- N.M. Const. art. II, § 24(A)(3).
- Cal. Const. art. I, § 28(b)(2).
- Conn. Const. art. I, § 8 (b)(3).
- 18 U.S.C. § 3771(a)(1).
- S.C. Code § 16-3-1525(G).
- Mo. Const. art. I, § 32(2).
- 18 U.S.C. § 3771(a)(2).
- Idaho Code § 19-5306(1)(d).
- *Roe v. Wade*, 410 U.S. 113 (1973).
- *Whalen v. Roe*, 429 U.S. 589 (1977).

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### Protecting Child-Victims' Rights in Plea Agreements

- Take steps to preserve the child-victim's rights
- Exercise the child-victim's rights
- Child-victims are granted a voice, not a veto
- Prepare to protect child-victims' interests in the event his or her position is not successful

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- *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008).
- *State v. McDonnell*, 794 P.2d 780 (Or. 1990).
- *In re Dean*, 527 F.3d 391 (5th Cir. 2008).

## Remedying Violations of a Child-Victim's Rights

### Re-Opening a Plea

- *State v. Casey*

### Rejecting a Plea Agreement

- *People v. Stringham*
- *State v. Means*

***Timing may be crucial!***

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- *State v. Casey*, 44 P.3d 756 (Utah 2002).
- *People v. Stringham*, 253 Cal. Rptr. 484 (Cal. Ct. App. 1988).
- *State v. Means*, 926 A.2d 328 (N.J. 2007).
- *In re Dean*, 527 F.3d 391 (5th Cir. 2008).

## Timing and Remedies


Timing may be crucial in determining the remedies available when a child-victim's rights have been violated

- Impact of sentencing on available remedies
  - *State ex rel. Goldesberry v. Taylor*
- Alternative remedies may be available to child-victims
  - *State v. Barrett*

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- *State ex rel. Goldesberry v. Taylor*, 233 S.W.3d 796 (Mo. Ct. App. 2007).
- *State v. Barrett*, 255 P.3d 472 (Or. 2011).
- *United States v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006).
- Ariz. Rev. Stat. § 13-4402.01(A).

Practical Litigation Strategies: *Day 2 Objectives*



- Identify key grounds for resisting “discovery” requests for medical, psychological, educational records, and other information
- Describe common testimonial accommodations for child-victims
- Articulate several considerations involved in preparing child-victims for testimony and for being heard
- Identify losses that are recoverable in restitution, and anticipate key restitution issues
- Describe how to advocate for child-victims in the context of plea agreements, release conditions, and protective orders

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**BREAK**  
*15 minutes*



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Resisting the temptation to be all things to a child-victim client

Module # 14

Lunch Presentation

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The slide features a blue header with the title "Ethical Issues" in white serif font. Below the header is a thin white line with a small circle in the center. The main content area is white and contains the text "Module # 15" in a small, underlined, black serif font, followed by a black box containing the text "2 hours" in white. At the bottom of the slide is a green footer bar with the text "© 2011 National Crime Victim Law Institute" on the left and "15-1" on the right.



## Ethical Issues: *Objectives*

- Recognize and properly respond to key ethical issues that may arise in the course of representing child-victims
- Incorporate strategies that can be used to address or avoid ethical dilemmas

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Ethical Issues: <i>Outline</i>	
<ul style="list-style-type: none"><li>• Interacting with and representing a child-victim client</li><li>• Scope of the representation</li><li>• Potential conflicts of interest</li><li>• Contact with represented persons</li></ul>	<ul style="list-style-type: none"><li>• Confidentiality and parental involvement</li><li>• Legal advice vs. legal information</li><li>• Communication and technology issues</li><li>• Attorney misconduct</li></ul>
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- Am. Bar Ass'n, *Model Rules of Professional Conduct*, available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) (last visited Feb. 16, 2012).

## Child-Victims' Attorneys Require Specialized Knowledge

### Providing Effective Representation


**MODEL RULE 1.1: Competence**

- Victims' Rights is a specialized area of legal knowledge
- Specialized knowledge is required for representing child-victim clients

**Special Lawyer Competencies for Working with Children**

- The ABA recommends that lawyers working with children receive training specifically focused on child advocacy and representation of children
  - Am. Bar Ass'n, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 18-20 (1996)

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- Am. Bar Ass'n, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996), available at [http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards\\_abuseneglect.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf)
- Model Rules of Prof'l Conduct R. 1.1.

Ensuring the child-victim is an informed client:

*Diminished Capacity*

Diminished Capacity	ABA's Position
<ul style="list-style-type: none"> <li>• <b>Model Rule 1.14</b> – Client with Diminished Capacity                             <ul style="list-style-type: none"> <li>○ Maintain a normal attorney-client relationship as far as reasonably possible</li> <li>○ Exception for seeking protective action to prevent substantial harm when a child-victim client cannot act in his or her own interest</li> </ul> </li> </ul> <div style="border: 1px solid #C00000; padding: 5px; margin-top: 10px;"> <p>Module focuses primarily on representing child-victims who are able to actively participate in some or all of their representation</p> </div>	<ul style="list-style-type: none"> <li>• “In all but the exceptional case, such as with a preverbal child, the child’s attorney will maintain this traditional relationship with the child client.”</li> </ul> <p style="margin-top: 20px;">*Am. Bar Ass’n, <i>Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases</i>, 2 (1996)</p>

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15-5

- Am. Bar Ass’n, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996).
- Ann M. Haralambie, *The Role of the Child’s Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. Rev. 939 (1995).
- Alan N. Young, Ottawa, Canada: Department of Justice, Research and Statistics Division, *The Role of the Victim in the Criminal Process: A Literature Review—1989 to 1999*, available at [http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00\\_vic20/rr00\\_vic20.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00_vic20/rr00_vic20.pdf).
- Victoria Weisz et al., *Children and Procedural Justice*, 44 Court Rev. 36 (2008), available at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2Weisz.pdf>.
- Model Rules of Prof’l Conduct R. 1.14.

MODEL RULE 1.4: Communication  
*Effectively Communicating with a Child-Victim Client*

- Use the skills learned during the Interviewing Techniques module
  - Rapport development
  - Narrative practice
  - Instructions to improve communication
  - Open-ended questions
  - Developmentally appropriate language
  - "Tell me more about" questions
  - Wait-time
- Adequately convey the lawyer's role and confidentiality obligations
- Verbal explanations alone may not be enough
- Accurately understand and express the child-victim's position

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- Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of their Lawyers' Roles*, 64 Fordham L. Rev. 1699 (1996).
- Model Rules of Prof'l Conduct R. 1.4.

MODEL RULE 1.2: Scope of Representation  
*Limited Representation of a Child-Victim*

Model Rule 1.2(c) Addresses Limited Representation

Example:

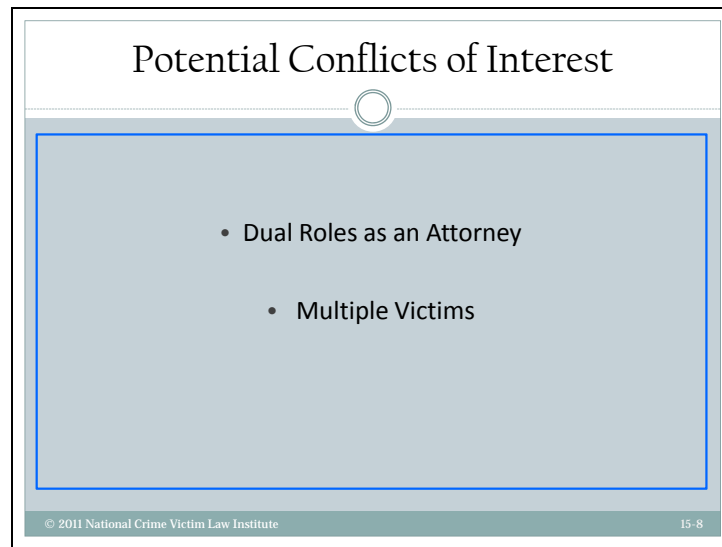
The lawyer is only representing a child-victim client with respect to some aspects of the child-victim's legal issues (civil suit and victims' rights in the criminal context), but not others (dependency, immigration issues).

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- Model Rules of Prof'l Conduct R. 1.2.





## Potential Conflicts of Interest

- Dual Roles as an Attorney
- Multiple Victims

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MODEL RULE 1.7: Conflict of Interest

Current Clients

Concurrent conflict of interest exists if:

- Representation of one client will be directly adverse to another
- Significant risk that representation will be materially limited by responsibilities:
  - To another client, a former client or third person, or
  - By a personal interest of the lawyer

Notwithstanding, a lawyer may represent if:

- Able to provide competent and diligent representation
- Not prohibited by law
- Does not involve a claim by one client against another in same litigation or proceeding
- Informed consent, confirmed in writing

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- Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 Loy. U. Chi. L.J. 259 (1995).
- Model Rules of Professional Conduct R. 1.7.

Dual Roles as a Lawyer for a Child-Victim:

*Examples*

- Victims' rights representation
- Protective orders
- Civil suits for damages
- Immigration proceedings
- Divorce/custody disputes
- Dependency proceedings
- Indian law implications
- Prosecution or juvenile proceedings relating to the child-victim's own acts

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## Multiple Victims: *Examples*


What are some issues that could present conflicts when representing multiple victims?

- Release recommendations
- Sentence recommendations (length, treatment, etc.)
- Restitution
- Conferring with the prosecution regarding seeking the death penalty or other charging decisions
- Others?

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## Contact with Represented Persons

- **MODEL RULE 4.2: Communication with a Person Represented by Counsel**
- **MODEL RULE 8.4: Misconduct**
  - (a) Contact by another at the direction of counsel



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- Model Rules of Prof'l Conduct R. 4.2.
- Model Rules of Prof'l Conduct R. 4.2, cmt. 2.
- Model Rules of Prof'l Conduct R. 8.4.

Contact with Represented Persons:  
*Practical Application*

Applies to:

- Contact by attorney or representative of attorney (such as an investigator)

May apply to:

- Child-victims who are represented by a GAL
  - × UT Ethics Opinion 07-02 (2007)
- Child-victim who has obtained civil counsel in a related case and attempted contact is being made by attorney in criminal case who knows of the representation

- *Remember:* consent is an exception, where appropriate

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- Utah Ethics Op. 07-02 (2007).
- *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011) (en banc).

### Activity

Hypothetical: Rules of Ethics and Interviewing a Child-Victim

20 minutes (10 minutes for review and small group discussion, followed by a 10 minute large group discussion)


- Read the hypothetical and background information. Discuss in small groups.
- Do the ethical canons permit the defense attorney in this case to interview the child-victim under these circumstances?
- If you represented the child-victim in this scenario, what could you have done to prevent this occurrence, and what would you do now that it has occurred?
- Assign a note-taker who will present your comments to the large group.

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- North Carolina RPC 61 (July 13, 1990).

# BREAK

## *15 Minutes*



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## Hypothetical Discussion

What could an attorney for the child-victim have done?  
What can the attorney for the child-victim do now?

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## Confidentiality and Parental Involvement

**Model Rule 1.6:**  
**Confidentiality of Information**

Lawyer **shall not** reveal information relating to representation unless:

- the child-victim client gives informed consent,
- disclosure is impliedly authorized in order to carry out the representation, or
- disclosure is otherwise permitted by the rules.

**Parental Involvement: Proceed with Caution**

- AZ Ethics Opinion 97-05 (1997)
- State v. A.N.J.*
- State v. Sucharew*
- Kevlik v. Goldstein*

Lawyer **may** reveal information relating to representation:

- to prevent reasonably certain death or substantial bodily harm,
- to prevent the client from committing a crime or fraud in furtherance of which the client has used or is using the lawyer's services,
- to prevent, mitigate or rectify substantial injury resulting from the client's commission of a crime or fraud,
- to secure legal advice about the lawyer's compliance with the ethics rules,
- in a controversy between lawyer and client, or
- to comply with other law or a court order.


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- Ariz. Ethics Op. 97-05 (1997).
- Model Rules of Prof'l Conduct R. 1.14 cmt 3.
- *State v. A.N.J.*, 225 P.3d 956 (Wash. 2010).
- *State v. Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003).
- *Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984).
- Model Rules of Prof'l Conduct R. 1.6.

## Confidentiality and Reporting Obligations

- **Mandatory reporting obligations (in some jurisdictions)**
  - ✦ Identify mandatory reporters and advise the child-victim client
- **Confidentiality obligations precluding reporting (in some jurisdictions)**
  - ✦ Los Angeles Bar Association Professional Responsibility and Ethics Committee, Ethics Opinion No. 504 (2001)



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- Or. Rev. Stat. § 419B.005(3)(m).
- Or. Rev. Stat. § 419B.010(1).
- Los Angeles Bar Ass'n Prof'l Responsibility and Ethics Comm., Ethics Op. 504 (2001).
- Texas Ethics Op. 193 (Feb. 1959), 18 Baylor L. Rev. 285 (1966).
- Ass'n of the Bar of the City of New York, Formal Op. 1997-2 (March 1997).

Communicating with Parents: <i>Legal Information vs. Legal Advice</i>	
<u>Legal Information</u>	<u>Legal Advice</u>
<ul style="list-style-type: none"><li>• Answering general questions about the law</li><li>• Explaining the general process in a criminal proceeding</li></ul>	<ul style="list-style-type: none"><li>• Applying legal principles and interpretation to specific facts</li><li>• Privileged communication</li><li>• Incorporates relevant social, economic, and moral factors</li></ul>
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## Communication & Technology Issues

- Special confidentiality considerations
  - ✦ Forwarding electronic communications
  - ✦ Use of social media
- Electronic communications with the perpetrator, opposing counsel, or other third parties
- Obligations imposed on attorneys for child-victims



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- N.Y. State Bar Ass'n, Ethics Op. 843 (Sept. 10, 2010).
- Philadelphia Bar Ass'n, Ethics Op. 2009-02 (March 2009).
- The State Bar of California Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179.
- Am. Bar Ass'n Formal Op. 99-413 (1999).
- N.Y. State Bar Ass'n, Ethics Op. 820 (Feb. 8, 2008).

Misconduct: *Empowering the Child-Victim to Respond*

1. Child-friendly explanations of what to expect from the child-victim's attorney
2. Developmentally appropriate explanations of what the child-victim can do in the event the child-victim's attorney engages in misconduct
3. Misconduct rules are also binding on counsel for the defendant

Model Rule 8.4

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- Model Rules of Prof'l Conduct R. 8.4.

Activity

Hypothetical:  
Texting, Technology,  
and Privilege


20 minutes (10  
minutes for review  
and small group  
discussion, followed  
by a 10 minute large  
group discussion)

- Read the hypothetical and background information. Discuss in small groups.
- What ethics- and privilege-based arguments should be made as part of the motion to quash the subpoena?
- What additional information might be helpful?
- What challenges do you anticipate?
- Assign a note-taker who will present your comments to the large group.

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- Julie Creswell, *Wal-Mart Says Worker Taped Reporter's Calls*, N.Y. Times, Mar. 6, 2007, available at <http://www.nytimes.com/2007/03/06/business/06walmart.html>.

## Hypothetical Discussion



What ethics- and privilege-based arguments should be made as part of the motion to quash the subpoena?

What additional information might be helpful?

What challenges do you anticipate?

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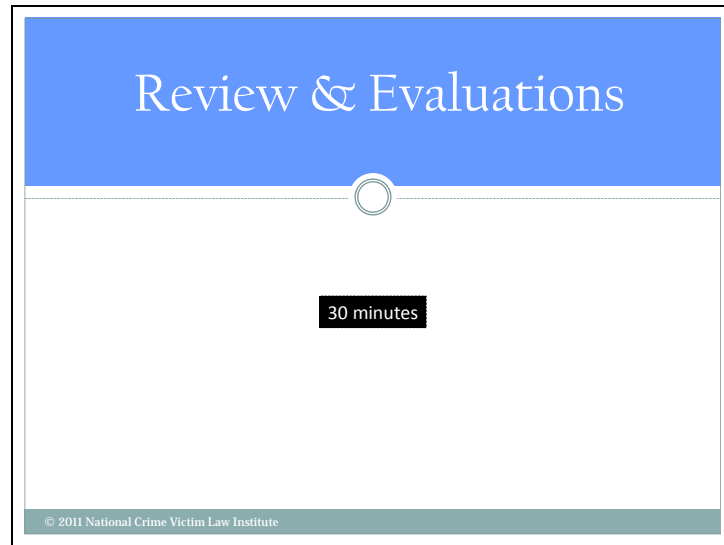
A presentation slide titled "Review of Objectives" with a decorative circle below the title. The main content is enclosed in a blue-bordered box and lists two objectives for participants. The footer contains copyright information and a slide number.

## Review of Objectives

Participants can now:

- Recognize and properly respond to key ethical issues that may arise in the course of representing child-victims
- Incorporate strategies that can be used to address or avoid ethical dilemmas

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The slide features a blue header with the text "Review & Evaluations" in white. Below the header is a large white rectangular area. In the center of this white area is a black box containing the text "30 minutes". A small circular graphic is positioned at the top center of the white area, just below the header. At the bottom of the slide, there is a thin teal bar containing the copyright notice "© 2011 National Crime Victim Law Institute".

Review & Evaluations

30 minutes

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