

## **THE VICTIM'S RIGHT TO CONFER IN THE FACE OF A GAG ORDER\***

Recently, victims' rights attorney, law school professor, and former federal judge Paul Cassell was gagged. While serving as counsel for two victims in an environmental pollution prosecution, the district court judge issued an order "reminding" Professor Cassell of his duty to comply with the gag order in place in the case.<sup>1</sup> The original order did not explain the scope of the gag on extrajudicial statements, but the judge explained "I don't want this case tried in the newspaper. . . . And this case will not be tried in the press."<sup>2</sup> Although the judge's statement in the original gag order was not aimed at a particular party, the addition of "pro hac vice counsel" in the subsequent order was clearly directed at Professor Cassell and his co-counsel representing the victims. This case presents a number of interesting questions about: whether crime victims inherently fall within the scope of a gag order governing the parties to a criminal prosecution; the scope of permissible communications between those who are expressly gagged by the order and other participants in the case; and the impact of a gag order on crime victims' constitutional and statutory rights. The issue discussed in this article is whether and how victims can assert their right to confer with the prosecution while a gag order is in place.

Victims have the right to confer with the prosecution in a criminal case under federal and most states' law. Although no case law exists expressly addressing the interaction between gag orders and victims' rights, a review of case law regarding gag orders in general illustrates that victims should be able to assert their right to confer even when a gag order is in place. Courts issue gag orders to control pretrial or trial publicity by preventing trial parties and participants – such as attorneys, court staff, witnesses, and law enforcement – from discussing aspects of the case with the public. The orders are primarily designed to protect the criminal defendant's right to an impartial jury, as well as the right of the government, the court, and the public to the fair administration of justice. Because a victim is not a "party" to a criminal prosecution, he or she may be viewed as outside the scope of the gag order – neither bound by its terms, nor allowed to communicate with those who are. Importantly, however, because crime victims have specific rights in the criminal justice process, gag orders cannot properly be construed to terminate a victim's legal rights, including the right to confer with the prosecution.

### **The Purpose of Gag Orders**

The primary purpose of a gag order is to prevent out-of-court publicity from interfering with the fairness and integrity of criminal proceedings, especially trial.<sup>3</sup> Courts often issue such orders to protect juror impartiality when a change of venue or other procedural device is unavailable.<sup>4</sup> Gag orders generally arise out of the criminal defendant's right to an impartial jury under the Sixth Amendment of the United States Constitution.<sup>5</sup> Control of publicity in a criminal case has often been recognized by the United States Supreme Court as essential to a defendant's Sixth Amendment right to a fair trial.<sup>6</sup> Without a gag order in place, extrajudicial statements could violate the defendant's fundamental right to have his or her trial decided by impartial jurors.<sup>7</sup>

In addition to protecting the fair trial rights of criminal defendants, a gag order “also protects the interest of the public and [government] in the fair administration of criminal justice” by guarding against the prejudicial effects of pretrial publicity.<sup>8</sup> Importantly, courts may also issue gag orders to protect crime victims’ interest in the non-disclosure of certain information to the public.<sup>9</sup> For instance, courts have found that victims’ interests in privacy and emotional well-being may necessitate the issuance of an order barring trial participants from discussing a case with the media.<sup>10</sup>

### **A Victim’s Right to Confer with the Prosecution**

Victims have both a federal statutory right and, in many states, a constitutional and/or statutory right to confer with the prosecution.<sup>11</sup> The right to confer generally allows a victim to speak with the prosecution about the status of the case, the government’s direction, and possible disposition of the matter.<sup>12</sup> It also provides victims with the opportunity to form and express opinions about the case to the government and court.<sup>13</sup> The right is expansive and requires that the communication between prosecutor and victim be meaningful.<sup>14</sup> However, the right to confer does not bestow party status onto the victim, and the prosecutor retains all discretion regarding the charging decision and recommendations regarding the disposition of the criminal proceedings.<sup>15</sup>

### **Ethical and Constitutional Limitations on the Prosecution’s Speech**

Gag orders restrict First Amendment rights to free speech and press. These constitutional freedoms are “not absolute but must instead be ‘applied in light of the special characteristics of the [relevant] environment.’”<sup>16</sup> Courts have found that the free speech rights of trial participants may be limited to ensure a fair trial.<sup>17</sup> For the purposes of First Amendment analysis, a gag order prohibiting parties, lawyers, and potential witnesses from making extrajudicial statements is considered a “prior restraint” on speech.<sup>18</sup>

In general, a “prior restraint” will only be upheld if the government can show that the restrained activity poses “either a clear and present danger or serious and imminent threat to a protected competing interest”; that the restraint is narrowly tailored; and the least restrictive means of protecting the protected interest.<sup>19</sup> Thus, if the goal of protecting the fairness and integrity of trial can be accomplished without restricting free speech rights, a gag order restricting the speech of trial participants, including the prosecuting attorneys who the law obligates to confer with victims, will be invalid on First Amendment grounds.

Courts recognize that, for the purposes of First Amendment analysis, there is a distinction between gag orders that restrict the speech of the participants in a case and those that apply to the press; orders that apply to participants are evaluated under a less stringent standard than those that apply to the press.<sup>20</sup> The Circuit Courts of the United States Court of Appeals are split on the exact nature of this distinction with respect to the “prejudice” prong of the prior restraints test.<sup>21</sup> Despite this split, prosecutors are often already be required to comply with a “substantial likelihood” standard based on their own state ethics rules.<sup>22</sup> Most states follow the American Bar Association’s model rules governing an attorney’s extrajudicial statements, which restrict an attorney from making an extrajudicial statement that the “lawyer knows or reasonably should know will be disseminated . . . and will have a substantial likelihood of materially prejudicing [the trial].”<sup>23</sup> Thus, if a prosecutor speaks with the press or a victim, he will only be in violation of the ethics rule if he knows or reasonably should know that the information will be released to the public *and* that the statement will prejudice the trial.

## How a Victim's Right to Confer Coexists with a Gag Order

The right to confer exists regardless of whether a gag order is in place. The right to confer gives victims the right to be given information and to express opinions.<sup>24</sup> If victims are prohibited from receiving information and expressing their opinion to the prosecutor through a gag order, this right is violated. As demonstrated below, case law related to the right to confer, as well as the purpose of and obligations imposed by gag orders, reveal that a gag order cannot strip victims of their right to confer.

Although few courts have expressly addressed the issue of whether a gag order can interfere with a victim's right to confer with the prosecution,<sup>25</sup> case law demonstrates that a gag order cannot prevent a crime victim from exercising her statutory and/or constitutional right to confer. For instance, one federal court found that the prosecution was allowed to speak with victims as required by a victim's rights statutes even where a gag order was in place. In *United States v. W.R. Grace*, the court found that a gag order was not violated when a Victim Witness Specialist from the United States Attorney's Office met with prosecutors and made a public statement requesting that more victims to come forward.<sup>26</sup> After the public statement was made in this case, defendants sought an order requiring the government attorney to comply with rules prohibiting extrajudicial statements.<sup>27</sup> The district court judge denied the motion, finding that the government had not violated any rules.<sup>28</sup> The court held the government's statements were necessary to comport with the victims' right to be notified of all proceedings under Montana's victims' rights statute.<sup>29</sup> Although public statements to victims that are not required by the state's victims' rights statute could violate the gag order, those statements would only be sanctioned if they commented on the defendant's guilt or had "substantial likelihood of prejudicing the proceedings."<sup>30</sup>

Courts have also found that a defendant's fair trial rights can coexist with a victim's right to confer with the prosecution.<sup>31</sup> Even when "extensive media coverage" could potentially prejudice the defendant, the Fifth Circuit held that prosecutors should still confer in some meaningful way with the victims prior to a plea negotiation.<sup>32</sup> Although a gag order was not in place in this Fifth Circuit case, the court rejected the argument that public notice of the negotiation would prejudice the defendant, and noted that the victims should have been allowed to communicate meaningfully with the prosecution.<sup>33</sup>

Additionally, as gag orders serve only to control publicity and protect juror impartiality, open communication between victim and prosecutor is unlikely to frustrate an order's purpose. Unless the victim discloses to the public information that falls within the order's scope. Gag orders rarely restrict trial parties or participants from speaking with one another; instead, they are designed to prevent these individuals from speaking to the public.<sup>34</sup> Indeed, for the most part, gag orders are used to prohibit trial parties and participants from discussing a case with the media. Presumably, gag orders never restrict communication between trial participants because the goal of a gag order is to prevent potential jurors from becoming biased. Victims have independent participatory rights under federal and state law, and often serve as witnesses in a criminal proceeding. And, although a court lacks authority to gag a victim who is not participating in the case whatsoever,<sup>35</sup> a victim could arguably be considered a "participant" in the case upon exercising his or her right to confer. As such, it is unlikely that a gag order on all trial participants could bar victims and prosecutors from communicating with one another. Also, in those situations where the victim falls within the scope of the gag order, enforcing the right to confer cannot undermine the order's purpose because the disclosure of protected information is already barred by the order. Indeed, even where the victim does not fall within the bounds of the gag order, the right to confer can still be enforced without undermining the purpose of the gag order.<sup>36</sup>

Moreover, on a practical level, it is unlikely that statements that the prosecutor makes to the victim in the course of conferring will result in the type of prejudice that gag orders are designed to guard against. First, the timing

of a public statement may affect the potential for prejudice.<sup>37</sup> For instance, an attorney's statement made six months prior to trial would likely have no prejudicial effect on the pool of potential jurors, whereas a statement made on the eve of *voir dire* is more likely to result in prejudice.<sup>38</sup> Because many victims exercise their right to confer long before trial, it is unlikely that statements that the prosecutor makes while meeting with the victim would result in prejudice. Second, if the prosecutor makes an innocuous statement about the trial unrelated to the defendant's guilt, that statement also has little to no likelihood of prejudicing the potential jury. The content of the prosecution's conversations with the victim about the status of the trial will most likely not be disseminated to the press. Even if they were, this kind of innocuous statement about trial procedure would not affect the defendant's fair trial rights.<sup>39</sup> For these reasons, statements that the prosecutor makes while conferring with the victim about procedural matters, such as trial schedule or trial status, or the victims opinions about the case, are unlikely to result in prejudice if disclosed to the public.<sup>40</sup>

## Conclusion

Although the law on whether victims are – or even can be – automatically included in a gag order issued against the parties to a criminal proceeding is uncertain, it is clear that crime victims are interested persons with clear rights in the criminal process, including the right to confer with the prosecution. Neither a criminal defendant's fair trial rights, nor the state and public's interests in the fair administration of justice are not violated simply because a victim exercises his or her statutory right to confer with the prosecution. Because gag orders are used to prevent prejudicial pretrial publicity, a statement made between prosecution and victim does not undermine the orders' purpose. Prosecutors should freely speak with the victim as required by the right to confer.

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<sup>1</sup> The order specifically stated: "all Counsel in this case, including those admitted *pro hac vice* for any purpose, are advised that that the Court's Orders regarding public statements by Counsel remain in effect." *United States v. W.R. Grace*, No. CR 05-07-M-DWM, Order at 1 - 2 (Feb. 24, 2009).

<sup>2</sup> *United States v. W.R. Grace*, 401 F. Supp. 2d 1057, 1058-59 (D. Mont. 2005).

<sup>3</sup> *United States v. Brown*, 218 F.3d 415, 423 (5th Cir. 2000).

<sup>4</sup> Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 Ohio N.U. L. Rev. 755, 765 (2008) (stating that the United States Supreme Court prefers such remedial procedural approaches because a gag order completely freezes speech).

<sup>5</sup> U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.").

<sup>6</sup> *Brown*, 218 F.3d at 424.

<sup>7</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991)).

<sup>8</sup> *Brown*, 218 F.3d at 424.

<sup>9</sup> See *Fischetti v. Scherer*, 840 N.Y.S.2d 575, 577 (N.Y. App. Div. 2007) (stating that there are "important interests" other than fair trial concerns that may warrant a gag order, such as the privacy interests of a victim of sexual abuse and the interests of the state in encouraging victims of sex crimes to report such offenses without fear of exposure).

<sup>10</sup> See, e.g., *In re J.S.*, 640 N.E.2d 1379, 1383 (Ill. App. Ct. 1994); *In re A Minor*, 595 N.E.2d 1052 (Ill. 1992).

<sup>11</sup> See, e.g., 18 U.S.C. § 3771(a)(5); Alaska Const. art. 1, § 24; Cal. Const. art. 1 § 28(6); La. Const. art. 1, § 25; Mich. Const. art. 1, § 24; N.M. Const. art. 2, § 24(A)(6); S.C. Const. art. 1 § 24(A)(7); Tenn. Const. art. 1, § 35; Tex. Const. art. 1, § 30; Va. Const. art. 1, § 8-A; Wisc. Const. art. 1 § 9m; Ariz. Rev. Stat. Ann. § 13-4419; Ark. Code Ann. § 16-21-106; Del. Code Ann. tit. 11, § 941; D.C. Code § 23-1901(b)(5); Ind. Code § 35-40-5-3(b); Mass. Gen. Laws ch. 258B, § 3(g); Mo. Rev. Stat. § 595.209(1)(4); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(f); N.C. Gen. Stat. § 15A-832; Ohio Rev. Code Ann. § 2930.06.

<sup>12</sup> See, e.g., *State v. Stauffer*, 58 P.3d 33, 37 (Ariz. Ct. App. 2002); *Reed v. Becka*, 511 S.E.2d 396, 400 (S.C. Ct. App. 1999).

<sup>13</sup> *United States v. BP Products North America Inc.*, Crim. No. H-07-434, 2009 WL 677653, at \*61 (S.D. Tex. Mar. 12, 2009).

<sup>14</sup> See *United States v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006) (noting that the CVRA's guarantee to victim's of the "reasonable right to confer" with the prosecution is "'intended to be expansive'" (quoting 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl)).

<sup>15</sup> See *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008) (noting that a victim’s right to confer “is not an infringement . . . on the government’s independent prosecutorial discretion . . . ; instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion”).

<sup>16</sup> *Brown*, 218 F.3d at 424.

<sup>17</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984).

<sup>18</sup> *Brown*, 218 F.3d at 424-25. A “prior restraint” is an administrative or judicial order that restrains certain communications before such communications are to occur. *Id.*

<sup>19</sup> *Id.* at 425.

<sup>20</sup> *Gentile*, 501 U.S. at 1073; *Brown*, 218 F.3d at 425.

<sup>21</sup> The Supreme Court has not yet established a standard for evaluating when a gag order on trial parties or participants is proper. *Brown*, 218 F.3d at 426-27.

<sup>22</sup> *Brown*, 218 F.3d at 428 (“An attorney’s ethical obligations to refrain from making prejudicial comments about a pending trial will exist whether a gag order is in place or not.”); see also *In re Morrissey*, 168 F.3d 134, 138 (4th Cir. 1999) (noting that local professional conduct rules governing extrajudicial statements further “the important governmental interest of protecting both the accused and the public’s right to a fair trial.”).

<sup>23</sup> Model Rules of Prof’l Conduct R. 3.6(a); see, e.g., Ariz. Rules of Prof’l Conduct R. 3.6(a) (following ABA Model Rule 3.6(a)); Md. Rules of Prof’l Conduct R. 3.6(a) (same); Or. Rules of Prof’l Conduct R. 3.6(a) (same).

<sup>24</sup> *BP Products*, 2008 WL 501321, at \*15.

<sup>25</sup> Perhaps this is because most gag orders are challenged by media persons who want to exercise their right to document a high profile trial, or because gag orders often include “witnesses” in the list of people who are prohibited from speaking with the media, and victims often fall into that category.

<sup>26</sup> *W.R. Grace*, 401 F. Supp. 2d at 1064.

<sup>27</sup> *Id.* at 1058.

<sup>28</sup> *Id.* at 1064.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., 18 U.S.C. § 3771(a)(5) (stating that the victim has the “reasonable right to confer with the attorney for the Government in the case”).

<sup>32</sup> *In re Dean*, 527 F.3d 391, 395 (5th Cir. 2008).

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., *In re Benton*, 238 S.W.3d 587, 592 (Tex. Ct. App. 2007) (quoting trial court’s gag order, which expressly allowed the attorneys to “[communicate] with the parties or their witnesses in order to prepare for trial”).

<sup>35</sup> See *In the Interest of J.G.*, 660 A.2d 1274, 1283 n.12 (N.J. Super. Ct. Ch. Div. 1995) (noting that “a gag order upon the victim, who is only a private citizen in this [criminal prosecution], would most likely raise some serious First Amendment problems.”); *Commonwealth v. Mulholland*, 94 P.3d 624, 645-46 (Pa. 1997) (rejecting argument that statements to media by victim’s attorney amounted to prosecutorial misconduct where there was a gag order in place prohibiting parties, their witnesses, and their counsel from making extrajudicial statements about the case, because statements of a private attorney are not attributed to the prosecutor).

<sup>36</sup> See *United States v. Rubin*, 558 F. Supp. 2d 411, 425 & n.10 (E.D.N.Y. 2008) (“Any information-gathering aspect of the right to confer is necessarily circumscribed, in the first instance, by its relevance to a victim’s right to participate in the federal criminal proceedings at hand and to do so within the bounds demarked by the CVRA.”).

<sup>37</sup> Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 Fordham L. Rev. 865, 894-95 (1990).

<sup>38</sup> See *Gentile*, 501 U.S. at 1044.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*