

## **2006 WATCH Victim Impact Statement Study**

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So when you get to the impact statements, even the ones that are particularly moving and heartfelt and emotional, they aren't really telling a judge anything he didn't know or already assume. In addition to which you have to be careful.

Sympathy for the victim is not a legitimate function for the judge.

Fourth Judicial District Judge

Well, in some cases it [the victim impact statement] is totally decisive; that is, I have had cases where I was planning to honor a plea agreement and then after victim impact I rejected it. That is not typical; it's unusual, but it has happened. And I actually changed my practice after that, and I told people whether I accept a plea agreement depends on the entire process, including the victim impact statement.

Fourth Judicial District Judge

And people come and they think the courtroom is going to be a therapeutic place, and it's the exact opposite of anything like that. It's not going to bring them peace or comfort.

Fourth Judicial District Judge

But recognizing the closure aspect of it [the victim impact statement] for victims I think is important. I do. So I have kind of come full circle with it; I think it's a good thing.

Fourth Judicial District Judge

### **Introduction**

Victim impact statements, as the quotes above from four different judges convey, constitute a most unusual and perplexing form of communication in the legal arena. Judges make sentencing decisions or accept plea negotiations based on factors such as criminal history and severity of offense, and, in felony cases, judges are restricted by legislated sentencing guidelines. Victims in their impact statements, however, may want to influence the duration and disposition of the sentence and often seek emotional closure by describing the psychological and physical affect of the crime on their bodies and lives. Judges vary in whether they think impact statements should and do affect the terms of a sentence and whether the courtroom is the best place for a victim to reach emotional closure.

The right to give an impact statement is legislated in Minnesota Statute 611A.038 (a), which states that

a victim has the right to submit an impact statement to the court at the time of sentencing or disposition hearing. The impact statement may be presented to the court orally or in writing, at the victim's option. If the victim requests, the prosecutor must orally present the statement to the court.

Statements may include the following, subject to reasonable limitations as to time and length:

- (1) a summary of the harm or trauma suffered by the victim as a result of the crime;
- (2) a summary of the economic loss or damage suffered by the victim as a result of the crime; and
- (3) a victim's reaction to the proposed sentence or disposition.

The judge may limit the number of impact statements and determine just who is a victim, particularly in homicide cases where a great many friends and family members might want to speak. Victims must address the judge, not the defendant, in their statements. In addition, Minnesota Statute 611A.037 states that the pre-sentence investigation, conducted by probation before the sentence is handed down, should include “a summary of damages or harm and any other problems generated by the criminal occurrence,” a statement of “what disposition the victim deems appropriate” for the defendant and the victim’s reasons for that opinion, and any written objections to the proposed disposition. Other than these statutes, no professional or universal guidelines exist on how judges should handle victim impact statements, although victim-witness advocates have developed their own recommendations for victims on how to prepare an impact statement and a good many websites exist that offer a template for impact statements.<sup>1</sup>

This study began by asking to what extent victim impact statements affected or should affect sentencing decisions and acceptance of plea negotiations, particularly in domestic violence or sexual assault cases, and what features make an impact statement persuasive or memorable. At the outset, we sent letters to all judges in the Fourth Judicial District (Hennepin County) in late 2004 informing them of the project and inviting them to participate in an interview. Twenty-two judges agreed to a 45-minute face-to-face interview between November 2004 and January 2006. In spring 2006 we conducted similar interviews with 15 community and county-based domestic violence and sexual assault victim-witness advocates in Hennepin and Ramsey counties to determine what motivates victims to offer impact statements and what the advocates believe makes an impact statement persuasive. (See Appendix A for interview questions.) Both groups were very generous in fitting us into their busy schedules.

In addition, WATCH volunteers observed 74 sentencing hearings from November 2004 through April 2006 in which victim impact statements were offered. They recorded the content of the statement and what effect the statement seemed to have on the sentence on

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<sup>1</sup> See, for example, <http://www.mdoc.state.ms.us/VictimImpactStatement.htm>, <http://www.tdcj.state.tx.us/publications/victim.svcs/publications-victims-svc-victim-impact-statement.htm>, and <http://www.madd.org/docs/VictimImpactStatementWorkbook.pdf>.

a supplementary observation template we created for the project. (See Appendix B for the form we created.) Finally, two University of Minnesota researchers personally attended an additional 15 sentencing hearings to observe the dynamics in the courtroom and the judge's verbal and nonverbal responses to the impact statement. The hearings we observed involved domestic violence, sexual assault, homicides, or other person crimes because we learned that often these hearings draw a number of people who want to speak.<sup>2</sup>

This study focuses on domestic violence and sexual assault cases because WATCH has identified these cases as important in following the treatment of women and children in the courtroom. Also, although some similar studies exist in which victims in particular have been interviewed about their motivations and experiences in presenting impact statements, none has specialized in these two kinds of cases, which add complications to the process. Domestic violence cases, for example, are challenging to judges, prosecutors, defense attorneys, and advocates because some victims recant their initial statements to law enforcement because of intimidation or desire to maintain a relationship with the

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<sup>2</sup> Twelve male judges and ten female judges participated in this study, and their experience on the bench ranged from 2 ½ to over 30 years. All of the victim-witness advocates we interviewed were female. We also interviewed a probation officer who has worked for over 30 years with victims of domestic violence and sexual assault and who was highly recommended for his expertise by one of the judges we interviewed. We include his comments among those from the advocates. We coded both sets of interviews to identify common themes and concerns. Although our interview questions initially focused on certain ideas, coding is an inductive process; for example, we didn't predict the contrast between victims of domestic violence and victims of sexual assault that would emerge in some interviews until we began to mark key statements and ideas in the interview transcripts. We coded the information from the special WATCH observation template and the usual WATCH sentencing hearing form to determine such things as the intended purpose of the impact statement and any judicial references to the statement when imposing the sentence. Of these 74 hearings, four actually took place before the study began, but the WATCH staff included them because the observer had taken particularly thorough notes that pertained to our research questions. Three of the 15 hearings we attended personally took place in the Second District (Ramsey County); the others were held in the Fourth District. Both of us attended several of the hearings we personally observed to norm our responses and discuss our impressions, and we then divided up the responsibilities. We considered our notes on these hearings much like ethnographic notes in that we tried to gather in-depth detail about not just the words but also the actions and reactions that constitute the dynamics of such hearings. In part, our interviews captured the perceptions about impact statements and courtroom dynamics, but our observations went beyond those perceptions to reflect upon actual events in the courtroom. Finally, the direct quotes offered in this report are taken from both the interviews and the hearing observations, and we have edited these to eliminate some repetitive words or verbal pauses such as "you know" and "I mean." We have used ellipses to indicate redundant words have been deleted from a quote and square brackets to include our own clarifying words.

defendant. Therefore, although impact statements in domestic violence cases may express the victim's progress in separating from her abusive partner, they may instead request mercy for the defendant, contradicting the plea negotiation or sentencing decision.<sup>3</sup> Sexual assault cases, on the other hand, may also involve a reluctant or severely traumatized victim, for whom the impact statement is an important step in healing, but certain cultural myths about this victim may affect the court's reception of the impact statement. Finally, few previous scholarly or public policy studies have attempted to understand the roles of two seemingly opposite parties in the sentencing process: the judge as decision-maker, who is assumed to maintain emotional distance and neutrality in the courtroom, and the advocate as victim supporter, who is assumed to establish emotional closeness with the victim and maintain support for her throughout the legal process.<sup>4</sup>

Our report is divided into six main sections: Benefits of Victim Impact Statements; The Effect of Victim Impact Statements on Sentencing; Motivation or Reluctance to Give an Impact Statement; Features of the Persuasive Impact Statement; Perceptions of the Domestic Violence Victim and the Sexual Assault Victim; and Judicial Demeanor and Dynamics in the Courtroom. These sections are based on the common themes and concerns that emerged as we coded the interviews. Following these discussions are our conclusions and recommendations, also based on common themes and concerns expressed during the interviews. Our initial conclusions show that understandings of the role of the judge as decision-maker and the advocate as victim supporter require a more nuanced understanding of the sentencing process than is often expressed in scholarly or public policy studies. That is, the role of the advocate far exceeds what is typically understood as working closely with the victim throughout the legal process. The role of the advocate also involves system education, or educating the various parties involved in the process, including judges. Judges are assumed to maintain with ease emotional distance and neutrality in the courtroom, and as judges indicate in our interviews and as we observed in the hearings we attended, this is often a difficult task. Judges often find themselves in the dual position of respecting the idea of the victim impact statement while also understanding that their sentence will be based perhaps more so on plea agreements and sentencing guidelines than on victim input. This is not to say, though, that impact statements have no impact—they can in fact influence the sentence—especially if they are written and delivered in such a way that makes use of appropriate levels of emotion, insight, and objectivity. It is then the difficult task of the advocate, among other things, to aid the victim in writing a statement that meets many of these spoken and unspoken criteria.

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<sup>3</sup> Because so many victims of domestic violence and sexual assault are female and so many perpetrators are male, we have used “she” when referring to a victim and “he” when referring to a defendant. We retained the appropriate individual pronoun, however, when quoting from the judges and advocates.

<sup>4</sup> These terms and assumptions are discussed at length in Patricia Yancey Martin's *Rape Work: Victims, Gender, and Emotions in Organization and Community Context* (New York: Routledge, 2005), chapter 9 in particular.

## Benefits of Victim Impact Statements

It's empowering; it's a chance to finally say what you want to say as opposed to answering questions that other people ask you; it's a time to talk about the personal toll that the process has taken on you. And so I think it's important for people to do it if they feel like they can. I think it's important for the defendants to hear in personal terms about the pain that they have caused.

Fourth Judicial District Judge

If the sentencing guidelines call for a probationary sentence, then whatever probationary conditions are imposed could be impacted by what the victim states, especially in regards to no-contact orders. Anger management, chemical dependency issues—you sort of need that information from the victim because they are the ones who know.

Fourth Judicial District Judge

The judges interviewed for this study, as shown in the quotes above, identified a number of benefits of victim impact statements, including offering the court important information about the nature of the relationship between the victim and the defendant, affecting no-contact orders and treatment requirements during probation, raising the defendant's consciousness about the nature of his crime, empowering the victim, and bringing reality and humanity into the courtroom.

Although the pre-sentence investigation conveys to a judge the prior history of the defendant and predicts his amenability to probation, some judges recognize that the information in the victim impact statement can also predict the chances of stopping the cycle of domestic violence. In some cases then, the victim brings expert knowledge into the courtroom. As one judge said, these crimes “are about relationships, not just about single acts,” and this judge wants to know if the victim will try to continue the relationship and whether she is comfortable with the terms of the sentence. Judges also recognize that if the victim wants contact with the defendant, a no-contact order will probably be useless. As one judge said, “I tend to go along with what the victim says if they have taken the effort to come because you cannot really enforce a no-contact if both parties want contact anyway.” The victim might also offer insight into what treatment plans, such as anger management, might work for the defendant on probation, and in some cases she can inspire the judge to be creative in the conditions for probation. One judge, after sensing that the victim's top priority for a gross misdemeanor DWI was that the defendant understand the impact of his act, required him to write a letter to MADD every month for the entire three years of probation “so that the mother knew that at least once a month he had to sit down and think about her child.”

Judges may carefully watch the defendant's reaction to an impact statement as a “barometer” as to whether they are going to be successful in probation: “If he owns what he did, apologizes, shows some remorse, I am encouraged by that, and it might be reflected in the sentence. On the other hand, if it's entirely ignored, or no comment on it, it will go the other way.” A judge might also use the impact statement to admonish the

defendant. As one judge described, in the impact statement the domestic violence victim “needs to tell the defendant and clearly tell them, ‘I don’t want to have anything more to do with this person.’” And the judge in turn can then say, “ ‘Now did you hear this? Do you understand this? You cannot have contact with this person anymore.’”

Although in domestic violence cases, the victim can be further victimized if the defendant responds to their impact statement by saying, “She deserved it” or “I never did it,” as one judge speculated, many judges do recognize that the law could be a “healing tool” for some victims. These judges say that “there is a great deal of value letting anyone say anything he wants within reason because it is a cathartic kind of thing,” and impact statements can “give the victim an opportunity to put closure on that stage of their life.” The victim then can be empowered by giving an impact statement. Judges recognize in serious person crimes that writing and perhaps reading an impact statement is a “real personal event that they [victims] need to participate in,” and for domestic violence victims this might be the point where the victim can say “ ‘What you did to me was wrong, and it harmed the children and myself. . . and I don’t want to continue anymore, and this will end the relationship.’ . . . The first time she has got the courage to say it.”

Several judges spoke about being “sort of insulated and numb in a sense” from handling so many serious cases, “so removed from crime for the most part” in their own personal lives, and working in a legal tradition that tends “to strip away emotions” and becomes “a factory of sorts where we are just grinding these cases out.” The victim impact statement then also puts a face to victims and brings reality and humanity back into the courtroom. Several judges remarked how impressed they were with the compassion of victims: “The defendants often times speak so poorly of humanity, and the victims speak so well of it—of how they understand, and they hope that the person gets the help he needs and doesn’t hurt anyone else. Hearing victims is a very reaffirming thing about humanity.” The majority of the judges we interviewed commented on the potential benefits of impact statements for the victim, for the bench, and for the receptive defendant.

Advocates, too, see impact statements as potentially beneficial on several levels. Advocates work to establish a trusting relationship with the victim, to create a link between the victim and the system, and to educate victims and the system about the dynamics of domestic violence and the expectations and limitations of the court. As one advocate put it, “My role is to give her all the information I can about the legal process and her specific case and make sure that her victim’s rights are respected and upheld and that she participates to the extent that she wants to.” Another advocate described her role as that of an interpreter: “We do a lot of education of the lawyers in terms of the dynamics of domestic violence and helping them understand why a victim would have this particular opinion or need or piece of input. So it’s a sort of interpreter kind of role.”

Judges and advocates were generally in agreement that the impact statement can be a powerful “part of the healing process” for the victim. Judges and advocates also both acknowledged that, even though the impact statement should be “directed toward the judge, it’s their [the victim’s] way to have the respondent, or defendant, hear how they are feeling, and sometimes that’s important. They [victims] want them to understand

what it is they have done.” Overall, advocates emphasized that the impact statement is the victim’s best opportunity to be “fully, independently heard.” Impact statements are powerful healing tools for letting the court and even the defendant know that, as one advocate said, “This is me. I am still trucking. I am still surviving here, and I want everyone to know that what he said, whatever it is, it isn’t true.”

Impact statements can be especially validating for the victim when judges invoke or refer to the impact statement during the sentencing. For example, in a January 2006 sentencing hearing in which the offense involved terroristic threats, WATCH observed as the judge said to the defendant, “You’ve had treatment before, why is it any different this time? Did you ever figure out what you’re so angry about? [Silence.] Well, you better start there.” The judge was also noted to have directly invoked the impact statement, which described how the defendant was not allowed in his family’s home until he turned things around, when he said to the defendant that he is hurting his family both physically and emotionally, to the point where they won’t have anything to do with him. It was likely very validating for the victim and their family to see the judge invoke the impact statement and admonish the defendant in this way.

Delivering a victim impact statement in court then can empower the victim, affect the defendant, and humanize the legal process in unique ways. One hearing we personally attended involved 3<sup>rd</sup> degree criminal sexual conduct. In her impact statement, the victim conveyed a sense of her trauma and survival in saying, “Don’t be afraid when something like this happens” but be strong and courageous. She conveyed how her life had eventually gotten better, and she thanked the police officer on the scene who had helped her. But perhaps the most impressive thing happened after the formal part of the hearing. The judge walked out into the gallery to speak to the victim, whom he recognized from her appearances in drug court. The judge and advocate praised her for how far she had come. This conversation seemed almost a celebration of her progress in which the judge couldn’t have been more supportive and the victim more validated.

### **The Effect of Victim Impact Statements on Sentencing**

I think most judges want to do the right thing, and if they can hear in an impact statement that they are going to make a difference by what they do, I think that that matters to them.

Victim advocate

One of the things that people will say to me is “is it going to make a difference?,” and my honest answer is “probably not.”

Victim advocate

Although judges do recognize the benefits of victim impact statements, they are skeptical about their having a major effect on the majority of sentencing decisions by the time of the sentencing hearing. Over 90 percent of cases are decided by plea agreement, and although the prosecutor is required to talk to the victim about the agreement and although the pre-sentence investigation contains a section on victim impact, one judge commented

that “the large majority of cases are negotiated so the judge makes no decision, simply accepts or on rare occasions rejects a plea agreement, and in those cases to a certain extent this [presentation of the impact statement] is all a charade.” Sentencing guidelines provide a starting point in felonies, and the nature and severity of the crime are reflected in those guidelines, and so the judge quoted above believes that “you approach every case from the assumption that the victim has been hurt very badly and wants a severe sentence.” In considering whether to depart in duration or disposition from the guidelines, prior unsuccessful attempts at treatment are among the aggravating factors while amenability to probation and remorsefulness are among mitigating factors.<sup>5</sup> Most judges praise the guidelines for limiting disparity and promoting proportionality and for giving judges a starting point. In misdemeanors, judges state that the extent of the abuse, the criminal record of the defendant, and their impression of how dangerous the defendant is affect their decisions. The challenge for those cases is predicting a successful probation based on criminal history and prior attempts at probation.

Regardless of their skepticism about the affect of an impact statement on the sentence, many judges still ask specific questions about the nature of the relationship between the victim and defendant and about the event itself and worry about the safety of the victim and future victims. One judge, for example, said that she would ask where the parties live, whether they share housing, if they have children, who has custody, and whether supervised visitation is needed and where and how should it be arranged. Another judge said she would want to know if an incident of domestic violence happened “in the middle of a drunk episode or a drug episode” to see if the “alcohol caused the fight or the fight caused the alcohol.” These judges wanted answers to these questions to assess what kind of services the defendant might need during probation and saw probation as “holding time or fines over their head to try to get them to do what they are supposed to do and not repeat their performance.”

Judges want to understand the nature of the parties’ relationship to assess the history of violence toward a victim in domestic violence cases. They see they have more leeway in these cases than they do in sexual assault cases. One judge, for example, said, “Now with a serious rape or great bodily harm sort of injury, you know, it’s like ‘so what’ because it’s only a question of how much time, but in those areas [domestic violence] where I could go either way, then the history between the people, of course, makes a difference.” Judges also look carefully at rehabilitation in accepting a plea negotiation or imposing a sentence, as they must attempt to stop the cycle of violence and prevent future crimes. So even though the sentencing guidelines, the pre-sentencing investigation, and other measures (such as the domestic violence screening instrument used by probation) are seen as necessary and perhaps restricting tools, as one judge said, “I don’t just sit there as

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<sup>5</sup> During this study the US Supreme Court rendered a decision in *Blakely v. Washington* 542 U.S. 296; 124 S. Ct. 2531; No. 02-1632 (June 24, 2004), that affects states with sentencing guidelines such as Minnesota. A jury must now determine beyond a reasonable doubt whether aggravating factors, other than prior convictions, exist as “facts” before a judge may use them to depart upward from the sentencing guidelines or the defendant must waive his “Blakely rights” in a plea negotiation.

a bump on the log.” Judges still want to know the victim, whether from the perspective of probation, the prosecutor, or from her own words.

Advocates are aware that judges generally place less emphasis on the impact statement than on other factors in sentencing decisions or in accepting a plea agreement. While the majority of advocates note that “very rarely does an impact statement affect the sentence because its typically been decided already,” they also acknowledge the huge benefit of the statement for the victim. Advocates will let victims know that, in general, the purpose of the impact statement is not necessarily to influence the sentence; rather, “the power really is just in the victim being able to stand up and say, ‘You did this to me, it was wrong, this is how it affected me, and this is what I think should happen to you for doing that to me.’”

On the other hand, as judges also noted, there are certainly instances where the impact statement can influence the sentence. Many advocates felt that it really depends on the judge—that some judges “really try to take into consideration what the victim is saying.” One advocate even described a case in which the written impact statement was about ten pages long, which is not traditional; the judge “took a recess from the hearing to go back and read all ten pages.” The judge then “came back out on the record and she kicked the plea deal, because based on everything the victim was telling her in the impact statement, she didn’t feel that she could support the plea negotiation.” So there are cases in which the impact statement can influence the sentence, but as this advocate put it, “That is the .01 percent.” And in a December 2005 sentencing hearing for criminal sexual assault, WATCH observed as the judge thanked the victim for her thoughtful statement, and then asked the defendant if the statement had any impact on him, with the stated purpose of finding out whether the defendant was still minimizing his behavior and not understanding the severity of his actions.

Again, while advocates generally agreed that the impact statement is unlikely to have a real “impact on the judge in terms of sentencing,” there was clear agreement among advocates that the work of the impact statement transcends the actual sentencing. By giving an impact statement, as one advocate said, “You will be giving a gift to society because you are educating every single person in that courtroom—the court reporter, the clerk, the total strangers, the judge, the defense attorney, the prosecutors” Instead of viewing the victim as “a case, they are going to see a human being. They are going to go, ‘Wow, I cannot imagine what that would be like if it happened to me.’”

If the work of the impact statement can transcend the actual sentencing and contribute to a greater good, it seems doubly important that the judge convey a welcoming and accommodating impression to the victims or victims’ families. While we observed several sentencing hearings in which judges made an extra effort to welcome, thank, or even praise the victim, we did see one in which we wished the judge had made more effort. The court waited a long time for the defendant, who was in custody for murdering his wife, to be brought into court, and the judge was clearly concerned about getting back to a trial that he was conducting. After the advocate read statements from the step-father and mother of the victim, the judge’s only comment was “ok.” The attack was

particularly brutal, so much so that the sentence was an upward departure from the guidelines. We imagined that it would be hard for the victim's family, who sat in the gallery, to interpret just what that "ok" meant.

### **Motivation or Reluctance to Give an Impact Statement**

Some people feel, on a plea negotiation especially, that even though they were consulted with and should ideally have agreed with it, the whole thing is sort of in the bag and resolved and that nothing that they say is going to make very much difference.

Victim advocate

A lot of people won't come to pre-trials, because even if they are there to say, "I want him hung by his nails," a defendant often will look at that as "Oh, she loves me. She is here. And she is only saying that because that advocate makes her." We make them say that, according to the defendants.

Victim advocate

Reluctance is more fear...

Victim advocate

Judges recognize that standing up in court to give an impact statement is intimidating for victims, particularly victims of domestic violence or sexual assault. Judges understand when a victim elects to have an advocate or the prosecutor read her impact statement for her, and some judges will invite the victim to speak privately to them in chambers. As one judge said, "If she is really the victim of on-going abuse, I think that standing up in the courtroom puts her in harm's way." Judges also recognize that the victim might elect not to attend a sentencing hearing because she is challenged by other things in life, such as eviction, unemployment, or health problems, sometimes as a result of the crime. Victims also might not "feel that the system really cares about them, and they don't think that they are going to have any impact" on the sentence. Some judges then are particularly impressed by the victim who does read her impact statement at the sentencing hearing: "When someone does come in, and they actually are having the courage to stand there and face him, then I want to empower that even more by what my decision is." And, again, for some judges, the presence of the victim completes a necessary part of the case: "You know almost no matter what they say, I just think it's wonderful when they're there before me that I can actually see a case [come] together, the whole piece of it; that's what I like, the whole picture."

Seeing that whole picture then is enhanced by the very appearance of the victim or the visual aids a victim or a victim's family might bring to the sentencing hearing. As one judge hypothesized, if a victim writes a statement that "I have one eye as a result of this [crime], I know that would be significant. But if I see her walk in with one eye, you know I could certainly be impacted by that appearance." Another judge recalled a criminal vehicular crime where the victim brought in his smashed motorcycle helmet, and other judges mentioned the photo displays of deceased victims that family members offer.

Judges, however, balance the benefits of having the victim come to a hearing with the potential for losing control of the legal process or their courtrooms or being personally unsettled by the emotions provoked by the impact statement. Judges recognize in domestic violence cases in particular that it's important for the victim's safety that the defendant believe that the victim has no control over the sentence. They also adhere to the principle that "an individual does not get to dispense individual justice." That individual does not have the experience or knowledge to know what the sentencing options are, and "furthermore, they are hugely interested, of course, and the most interested person in the room is not supposed to be doing the sentencing in our system. It's supposed to be someone disinterested."

Sentencing hearings in which the victim appears can be "fraught with a lot of emotion and a lot of confusion," judges note, and the judges are individually affected based on their personalities. One judge called these hearings "kind of secular funerals," but noted that he was not a "hand wringer" himself. Another judge said, "Sometimes victims don't understand that their hatred of the defendant will convey itself to the judge, which undermines the credibility of what they are saying in the sense of objectivity." Other judges mentioned that they had cried during the reading of an impact statement, they were affected but had "learned not to show it on the bench," or they knew they needed to "put things behind them in order just to keep living." Many judges then face the discomfort of losing a neutral and objective demeanor during an emotional sentencing hearing and that the impact statement may bring that emotion directly into the courtroom. One judge is not unique in being impressed and grateful when a victim's family "transcended" that emotion: "I was really nervous about having the victim's family and the defendant's family sit so close, I have such a small courtroom. And about by the fourth day [of the murder case] they were acknowledging each other, and kind of like hugging, because I think that they realized that both of their sons were lost if this went the way it was expected." Judges then recognize the courage it takes for a victim to come to a sentencing hearing but are uneasy about the emotions raised when they and others in the courtroom see that "whole picture."

Advocates also recognize the many variables that factor into the victim's decision to attend the sentencing hearing and possibly read an impact statement. While judges tended to note that they value the victim's presence in the courtroom, advocates felt that some victims will choose not to attend a sentencing hearing because they perceive systemic indifference: "A lot of people feel like it's useless. Everything is already preordained and 'why would I spend my time coming in. No one is going to listen or care.'" Most advocates, though, noted that when victims choose not to attend the hearing it is most often because they either fear the defendants or feel pressured by them. Many advocates described a "fear factor, that there is pressure going on from the defendant, that 'you need to make this all go away,' or 'don't make it worse for me,' that kind of thing where they are feeling fear; they are being pressured or threatened." For example, during a February 2006 high-profile murder hearing, during which the defendant was sentenced to three consecutive life sentences, WATCH observed as the defendant threatened family members of the victim, was consequently gagged, and continued to yell through his gag.

Advocates therefore emphasize that it is the victim's choice to attend; as one advocate said, "I try to explain to them that they don't have to do it if they don't want to...I don't want them to be more victimized by this process, so I explain to them that 'it's your choice.'"

Advocates work closely with victims to help them understand the limitations of the system and to provide advice on what information the impact statement should include. Advocates generally agreed that it is important for victims to think about what they expect to gain from the process, or what their motivations are for writing the statement. As one advocate put it, "I always ask them to think about 'why you would want to do this, why is this important to you, what's the most important thing that you want to get across.'" Advocates also emphasize that they are there to support the victim, and that they can read the statement on their behalf if need be. As one advocate said: "A lot of people just want to attend the sentencing and listen and watch" but also want the judge to know that they are present.

Overall, advocates return to the idea of the impact statement as a liberating tool for empowerment and validation: "I do think people want to be heard, or victims want to be heard about all the different ways this affected their lives...it's maybe validating for them to say it out loud in the courtroom." One advocate also noted that speaking to the defendant, even indirectly, can be a liberating act: "When you do a victim impact statement in court, when you speak in court, I think it's a chance to speak to a wider audience, including the defendant. Even though you don't speak to the defendant, you are supposed to look at the judge, I really view it as almost a liberating act."

For these reasons, it seems worth the risk of having the courtroom become a highly emotional setting during the reading of an impact statement. We did observe one case involving vehicular homicide in which the court clerk, the prosecutor, and, we believe, the judge all were crying during the reading of four impact statements. The statements conveyed how a young woman, who had overcome physical and mental challenges to marry, had been killed on her first wedding anniversary by a driver under the influence of drugs. The statements detailed her joy in celebration and how each family member had learned of her death. Nothing could have conveyed "the whole picture" more than these statements.

### **Features of the Persuasive Impact Statement**

So by her being very verbal, and she did a great job, but it backfired. It made them think that she was psychologically unstable because she elaborated about how stressful it was and that she had PTSD and this happened and that. And they just saw her as someone who just needed something the court couldn't give.

Victim advocate

I think an impact statement that speaks to the victim's wish to have the defendant get help, versus endless incarceration or worse, can be very impactful.

Victim advocate

Even though a great many judges say that victim impact statements seldom have direct effect on the sentence at the time of the sentencing hearing, most can list the features of a persuasive statement. These persuasive impact statements may argue for a downward departure that displays understanding of the purpose of the judicial system, demonstrate insight into the relationship with the defendant in domestic violence cases, offer new information to the court, or distinguish the crime from the “average” one in the same category. Achieving these features, however, is challenging for the victim.

As one judge said, the “‘lock them up and throw away the key’ stuff doesn’t really have any impact on me at all because I am already aware of all that.” Instead more than one judge said he or she is more impressed with the victim who considers what would be best for society: “I just think we probably are all a little more comfortable if we hear the victim say, ‘This was awful, terrible, and yet I know that society would be better off, or the next set of victims would be better off or whatever, if this guy gets treatment as opposed to getting prison.’” Perhaps because judges realize the effort it takes to let go of personal anger, they are impressed with victims who convey a sense that they can think beyond the personal effects of the crime. A judge who sentenced a defendant who had committed a series of rapes, the last of which ended with the murder of the victim, commented how persuaded he was when one of the victims was able to think about “where does this [sentence] fit for women, and where does this fit for sort of citizenry and the safety of people in the streets.” During a February 2005 criminal sexual assault hearing, for example, WATCH observed as the victim stated that her goal was for this never to happen to her or anyone else ever again. The victim who achieves this level of reasoning may be persuasive because some judges see her as affirming their sentencing decisions. As one judge said, “My sense is that my colleagues and I feel better about a deal if we hear from the victim that they bought the deal.” But this position may be impossible for some victims, because as one judge said, “Once you have been victimized, I think, you know, people aren’t so willing to separate the behavior from the person, and they want the person accountable.”

The persuasive domestic violence victim is one who has achieved insight into her relationship with the defendant or moved on. One victim, for example, impressed a judge when she was able to say, “I am not afraid of him, but I don’t want him back in the house until he has completed counseling and a program and unless he is sober.” This judge doesn’t expect people to stop loving their loved ones but instead to “appreciate the changes that need to be made.” Another judge recalled a case in which a man on drugs had thrown a child against a wall to stop the child from crying. The recommended sentence was prison, but the judge changed his mind based on the wife’s statement. She was pregnant with another child and described how the new baby would suffer without a father, how remorseful the defendant was, and how he would never be free of what he had done. The judge changed his mind and put the defendant on probation and treatment, which the defendant completed successfully. Finally, a judge described a 15-page impact statement, which, because of its length, the prosecutor hadn’t read. The judge took the statement back into chambers and read what she considered an impressively candid statement: The victim “talked about her own drug use and her own prostitution, her own

history of some petty thefts, and what they did together in their lifestyle. She admitted to at times lashing out against him, but it was clear that she was, in this letter, talking about someone, herself, trying to break away.” The violence was escalating, and the judge thought, “it was like a murder that was waiting to happen.” Even though the attorneys decided to wait another week until a different judge was on, for the moment, the victim impact statement “brought the wheels of justice to a screeching halt.”

Judges admit that, although highly unusual, an impact statement can bring new information to a case: “They are proposing a certain sentence, and it makes sense to me, and then I get the victim impact. And I learn of the victim’s injury and impact in some dimension that has never been flashed before my brain before, and I will reject negotiations on those cases.” But most likely, the victim will have to describe her injuries in some way that distinguishes her from other victims of the same crime to halt those wheels of justice. One judge was quite candid in his description of this position: “You have probably lost some sleep, and you probably have had your daily patterns altered, and you probably have night terrors, or whatever. But what else has happened? What makes you different from all the other people in the same position that you are?” The hardest thing about the guidelines, this judge said was having to “look over the bench” and say figuratively, “Madam, your rape was just average.” We did get the sense of how victims may be challenged to describe the effects of the crime to so distinguish it from the “average” rape.

One criminal sexual assault and kidnapping sentencing we observed unfortunately took place in Domestic Violence court on a noisy and chaotic day. The defendant received a double upward departure from the sentencing guidelines and was to register as a dangerous predator. The defense attorney argued against this sentence, stating that the victim’s zone of privacy was not invaded, her physical injury was less than would ordinarily merit aggravating factors, and the event lasted a short time and she wasn’t taken a great distance. The victim had to listen to this argument before she gave her impact statement, but she addressed the defense’s argument by detailing how badly she had been physically and emotionally injured by being kidnapped off the street and taken to another location to be raped. The defendant spoke after the impact statement and accused the victim of “being coached to death” by her advocate and acting like her life had been taken away when “it was his life that was being taken away.” Victims who ask for an upward departure face quite a challenge in trying to distinguish the crime committed against them from other crimes in the same sentencing guidelines category.

Being able to offer very specific details about how the crime has affected the victim’s life seems the more effective way for the victim to take on this challenge. The same judge who struggled with telling the victim that her rape was “just average,” demonstrated this challenge in a hypothetical case: “And I want to hear it in human terms. And you don’t think about how awful very little things can be. I mean you cannot straighten one finger, so you have to wear mittens because you cannot wear gloves. . . [or] ‘he used a [brown-handled] knife and so now I have had to go to all white-handled knives, or every time I go into a restaurant and they give me a brown-handled knife, you know, the thing goes zipping through me again.’” This judge wasn’t alone in requiring the persuasive victim to

be particularly articulate in telling her story. To derail a plea negotiation or affect a sentencing decision at this final stage of the legal process, the sentencing hearing, the victim often has to appear objective and reasonable, to be a skillful narrator, or to have achieved insight into or escaped the cycle of domestic violence.

Advocates recognize that for an impact statement to be viewed as credible by a judge, it must achieve a delicate balance between emotion and more “objective” insights into the crime. Because this is often easier said than done, advocates will work closely with victims in constructing a statement that the victim feels comfortable with and that the advocate feels will be well received by the court. As one advocate described: “There are things they can say in their impact statements, but there are certainly things they cannot say in their impact statements too. The court is pretty clear on that, and we try to educate them so that they are not doing something that they are not going to be allowed to do or that could endanger possible future victim impact statements.”

Advocates are aware that the “‘lock them up and throw away the key’ stuff” (as the one judge called it) tends not to be well received by the court, and so if victims want to include recommendations for sentencing in their impact statements, advocates will help them create a balanced statement in this regard. As one advocate said: “One of the things that we always have to explain [to victims] is you can ask for the moon, but these are what the guidelines say. And so this is the most that he is going to get.” Another advocate described the need for victims to balance respect with openness and honesty: “I let them know ‘I want you to be as open and honest as you are willing to be’... ‘you are welcome to talk about him but the comments have to be directed to the court,’ and then [there are] guidelines about being respectful too.”

Advocates noted that victims’ requests for sentencing should “be reasonable,” and that when reading the impact statement, it’s “okay to cry, and it’s okay to be emotional, but you don’t want to yell. You don’t want to talk in half sentences.” Advocates also noted that impact statements tend to work best when they are written or prepared ahead of time. Impact statements, then, must be carefully crafted, respectful, and articulate. Delivering the statement is also a very difficult task, because on the one hand, as many advocates agreed, “the ones that are probably the most compelling and the most powerful are the ones where people are really willing to open up and really talk about their pain.” On the other hand, though, most advocates agreed that “the more sensible you come across, the more seriously you are taken.” The standard for the well-received impact statement is therefore very high. Advocates and victims alike have the difficult job of achieving what may seem like an impossible balance. That is, judges seem to want very personal information and insights about the relationship conveyed in the impact statement, but this information must be presented in a balanced tone that is not overly emotional.

One advocate noted, for example, that “judges are very moved by when a victim does express how this has affected their lives.” And, in a December 2005 criminal sexual assault hearing, WATCH observed as one victim described the aftermath of being attacked while she was jogging: “My girls deserve a safe neighborhood to bike in. ... Any presence on my left is still nerve-wracking. I’m still afraid when a biker or jogger

passes me from behind.” This judge then thanked the victim for her thoughtful statement. In another December 2005 criminal sexual assault hearing, the victim said in her statement: “I can’t sleep at night for fear of you; I can’t hold a knife without seeing you coming after me; it is still hard for me to pass the place I was raped—that was seven months ago.” This judge said to the victim that her impact statement gave him important information that he couldn’t get from reading the legal documents.

Another advocate noted that the persuasive impact statement provides insights into the relationship and the crime that otherwise would not be available to the court: “We don’t want them to get a whole lot into the incident... that’s already been established. But maybe where they were, the hopes, the dreams they had for this relationship, how it started out and maybe how did it get this way, how it has affected them, maybe what they have been reduced to because of this.” As difficult as it may be, the most persuasive impact statements seem to be ones where the victim can describe relationship dynamics and personal accounts that the judge would otherwise be unable to see or understand. We observed then the judge in a 2<sup>nd</sup> degree unintentional homicide case add restitution to the sentence for ongoing counseling for the victim’s children after she heard the victim’s mother and former husband describe how the children of the victim cried every day and had been separated to live with other relatives. Providing new information in a victim impact statement, achieving a balanced tone that is not overly emotional but remains “sensible,” describing in detail the effects of the crime on daily life, offering insight into the relationship with the defendant, and distinguishing this crime from others may be quite challenging, if not impossible, for those victims who are non-native English speakers or those with limited formal education. Advocates will serve as editors for victims writing an impact statement and offer examples of other statements, but it’s often up to the victim to provide the content and to deliver the statement in court.

### **Perceptions of the Domestic Violence Victim and the Sexual Assault Victim**

I think that the judges understand maybe why victims recant or why victims go back to their partners, but it sometimes makes their job more difficult.

Victim advocate

I think that any time a judge can relate to the victim, you know if there is someone who looks like them or comes from where they are that has a huge impact on them. It maybe shouldn’t but it does. It really does. Because I think that it shows that all of us are vulnerable to these things, and I think that when people articulate how normal their life was and that they were just an average person going about their day, you know, responsible citizen and that something like this happens, I think that’s pretty illuminating for a judge. It’s not like they caused any of this. And I don’t think that a lot of judges victim-blame anyway, but I think that it changes things in their minds.

Victim advocate

The judicial reactions to victim impact statements are further complicated by the special needs of and reactions to the domestic violence victim and the sexual assault victim.

Some judges are suspicious of the domestic violence victim, expecting her to recant prior statements, request that the no-contact order be lifted, or ask for mercy for the partner upon whom she is emotionally and physically dependant. Some judges may also place the burden to leave the relationship on her. Other judges acknowledge the victim caught in the battered woman syndrome<sup>6</sup> and take a protective role toward her. Sexual assault cases might be complicated, however, when a judge or prosecutor hold views that blame a victim for “complicity” in the crime, for example, a victim who dated the defendant before the event or was drinking before the assault. In our interviews and observations, these views were not blatantly expressed, and many judges were very careful about not blaming the victim, but such impressions seem to emerge when a few judges described the victim of stranger assault as somehow more “innocent” than the victim of an assault by an acquaintance or loved one.

Credibility is a major challenge for the victim of domestic violence given how frequently such victims recant or ask for mercy for their abusers. As one judge said, “We cannot figure those cases out. In those, you know that the victim has lied on one or the other of the occasions. Said this to the police and is saying this now. So you know that one or the other is a lie.” Judges have difficulty reconciling their impulse to ensure the safety of the victim with the victim who recants or pleads for mercy because the evidence in these cases often contradicts what the victim is saying: “You know you have read [in the police report] that there is a clump of bloody hair left on the carpet, and then here’s the person saying that it’s all a lie, he’s a wonderful guy, and the police are bad people.” Judges admit that these cases are very frustrating, and so it’s “easy to become kind of cynical” about them. Some judges clearly place the burden to leave on the victim and say that there is nothing they can do to change “her behavior.” Another judge said that he is sympathetic, but “I don’t know what I can say. Two hundred million two hundred thousand more people that you could be going with [than the defendant].” One judge’s language belied his sympathy for the victim in saying that the victim was responsible “in a broad sense if she goes back to the abuser” but not in a criminal sense: “[T]hat doesn’t mean you give the abuser a pass just because she is stupid enough to go back to you, you know.” Finally, some judges suspect that victims might use charges of domestic violence to gain control of their partners in child custody or divorce cases.

And so judges struggle to gain a perspective on the domestic violence victim. One judge determined that a domestic violence victim “cannot reconcile her awareness of the defendant’s good points with her belief that someone who is guilty of what he has been convicted has to have no good points and be really evil,” that her loved one is a criminal. Several judges mentioned how they became aware of the cycle of domestic violence and the battered woman syndrome. One judge, for example, described how he now understands the domestic violence victim: “It was originally beyond my comprehension

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<sup>6</sup> The term “battered woman syndrome” was coined by psychologist Lenore Walker (*The Battered Woman*, Harper Collins, 1979) as a clinical description of the psychological effects of battering on certain women. There is some objection to the term now as it focuses on the woman rather than the cultural conditions that might produce the violence and suggests that she, rather than her batterer, is emotionally and mentally impaired.

how domestic violence occurred. I understand how you get hit the first time; I never understood how you got hit the second time. It took me a long time to figure that out, and once I started figuring that out, I understood why people are not concerned about telling me what happened. They are concerned about reestablishing their relationship with the abuser. You know, the cycle.” Another judge speculated the reason why women might ignore the no-contact order designed to protect them: “She doesn’t want a no-contact order; what she really wants is the court to somehow make him better.” The court, however, is challenged as to how to make the abuser better and still protect the victim who wants contact.

One challenge comes from the perception that the victim’s problems are deep seeded. One judge summed this up by saying “a lot of people who are victimized are chosen by their victimizers because they are vulnerable people to be begin with.” Another recalled a case where the abuser had thrown lighter fluid on the victim and lit her on fire. She appeared in court to ask the judge not to send the defendant to jail because “this was the only person in the world who had ever loved her.” Other judges have lost faith in the possibility of changing many abusers who seem completely resistant to treatment. As one said, “There is no therapy for it,” and another recalled: “They are only sorry they got caught, and they blame the victim. You know I have had guys blame the three-year-old for coming on to them.”

Several judges we interviewed responded to this dilemma by assuming that their role was to protect the victim regardless of what she says. As one judge said, “And I will look them right in the eye and tell them, ‘I don’t think that you are making good decisions for yourself, and I will not lift that no-contact order.’ And they probably hate me for that.” This role, however, takes away the victim’s agency and voice, as one judge admitted: “So this is a kind of tricky area because you want to respect victims’ feelings, and I am not real enthusiastic about playing the big brother, big mother, whatever role, and ‘well, I know what’s best for the victim.’” Judges reconcile this dilemma by remembering that the state is the victim, by realizing that they are charged not to “sentence some other woman to be beaten up,” or, as one judge called it, by “trusting her own thermometer” about each case. One judge saw the ultimate contradiction in how victims of domestic violence were treated: If the victim wants punishment, “the county attorney says that’s rational. If she says she wants leniency, the county attorney says, ‘Discount that because she is being abused, and this is part of the cycle of violence, and you shouldn’t listen to her.’ Ok, well, that’s true in some instances, but the paradigm doesn’t work.”

Finally, although we didn’t ask judges to contrast victims of domestic violence to victims of sexual assault, some clearly did. One judge assumed that the victim of rape always would want the defendant “lowered one inch at a time into the wood chipper,” because of the severity of her injuries. This judge and others seemed to imagine the perpetrator of severe sexual assault as a stranger and the victim’s desire to have retribution and punishment as natural. One judge contrasted “the woman who is a victim of date rape because she excessively consumed alcohol” to someone who had “no ability to control the circumstances” where the perpetrator had a weapon or took her off the streets. This contrast perhaps reflects the challenge that judges feel in keeping the victim of domestic

violence safe if she wants to continue her relationship with the defendant—to some judges she is seen as more responsible for her predicament than is the victim of sexual assault by a stranger.

While advocates are also concerned for the safety of the victim who recants, asks a no-contact order be lifted, or pleads for mercy for the abuser, they view this impulse somewhat differently than judges. One advocate noted, for example, that “what people define as a recantation isn’t really a recantation; it’s a reluctance. And I think that’s the piece that the judges can still get some education on.” In cases like this, one advocate described the need to help the victim explore her motivations for not wanting to come to court: “They are doing that because they need something. And they’re trying to control how that’s going to happen.” As this advocate put it, “I view people recanting as being backed in the corner. . . . My job is to stop that process before they are totally in the corner. So I basically view recantation as a system failure.”

Advocates also acknowledge that “cynicism runs pretty deep” in the court system, and there are views that both the victim and the perpetrator have “a similar role in the relationship.” Nonetheless, there was general consensus among advocates that in the case of recantation, there is a strong need to “find out why they are recanting, what the underlying issue is.” With recantation comes the need for additional communication with the victim and additional education on the part of the system.

Education needs to happen not only around the issue of recantation, but also around the (mis)perception that, as one advocate put it, “if these women could just figure out what they are doing wrong, we could fix this.” One advocate cited a similar misperception around domestic violence crimes, or the attitude of, “It’s your problem. It’s just in your house.” Instead, there needs to be an understanding that “what happens in your house can still be a crime... what happens in your house impacts all of us.” This advocate was unsure whether judges would agree but would like to see community impact statements that “get the community involved too, to take a role and say, ‘Yeah, it does impact all of us, what happens in our community.’” Another advocate sees the tendency to blame the victim as rooted in the fear of being victimized ourselves, or being able to identify too closely with the victim: “I think it’s easy to blame the victim because if you don’t blame the victim, it could happen to you.”

Next, because judges often tended to contrast victims of domestic violence to victims of sexual assault, we decided to ask advocates whether they felt the two groups are perceived differently by the court. One advocate acknowledged the difficult position of judges in this regard: “I think judges are human, and in our society we want to define, and they have to define responsibility—they have to say, ‘you, x person, are responsible for this crime’...but I think it’s still pretty easy for judges to think domestic violence has some sort of complicity.” In other words, even though the role of the judge is to assign accountability, there still exists a tendency on their part to view the domestic violence victim as complicit to some extent. This is not always the case, though; as one advocate said, “There are some judges who think victims are solely to blame, or 90 percent, and I think there are other judges who do really understand the dynamics of domestic

violence.” Even so, this advocate made a point consistent with some judges’ comments about how easy it is to lose faith in the whole process: “The longer they are on the bench, I think that it’s easier for them to say, ‘Ah, you know, we are just going to see these people back. It doesn’t matter what I do.’” Another advocate noted that judges who deal with domestic violence perhaps “develop a tolerance”; since they “see some of the same people again and again,” they may get discouraged over time.

Another advocate acknowledged that “some people may think that it’s not as bad, that a stranger sexual assault is definitely worse,” but remarked that “it depends on how you look at it—are you looking at public safety, maybe it is a bigger public safety risk because anyone is at risk. But at the same time, I cannot imagine what is worse than being sexually assaulted by someone you trusted either. So there are arguments on both sides of that.” So some judges may consider stranger assaults to pose a bigger public safety risk. For example, in a July 2005 sentencing hearing for a stranger assault, WATCH observed as the judge issued an upward departure of 80 months, noting that there was a violation of the zone of privacy (the crime took place in the victim’s bedroom), and that the incident put other people at risk. When the judge described his reasons for an upward departure, he also noted the content of the impact statement, in which the victim described feeling very vulnerable, suffering from PTSD, having flashbacks, being constantly paranoid, and being unable to trust people. She was also scared that the defendant would find her again. This is not to say, though, that all judges view victims of domestic violence as complicit, or that stranger sexual assault is somehow “more” of a crime. In fact, as one advocate said, “There are some judges who certainly may take domestic violence way more seriously than even a stranger case because they know that person is in way more danger than another person.”

Finally, judges have to balance whether the defendant can be rehabilitated, whether the case involves domestic violence or sexual assault. We were impressed when judges took the time during a sentencing hearing to justify to the victim how they weigh punishment in prison against treatment under supervised probation. In one hearing we observed, in which the defendant was charged with 3<sup>rd</sup> degree criminal sexual conduct in an assault against a minor, both the step-father and the mother of the teenage victim asked for an upward departure from the guidelines. The judge directly addressed their request as he explained in great detail the content of the pre-sentence investigation, the psychological evaluation, and studies that noted that sex offenders were less likely to re-offend if they received treatment rather than prison time. Because this was the defendant’s first offense, the judge found that the defendant’s willingness to agree to a plea an indication that he could be rehabilitated. “There has to be a future for everyone,” the judge noted—for both the defendant and the victim. In what the judge called “an imperfect world,” this seemed the best solution to him.

## Judicial Demeanor and Dynamics in the Courtroom

Victims really appreciate it if the judge acknowledges that it was difficult to say what they say, that they were glad that they survived. “I am glad that you are here today” doesn’t just mean “I am glad that you are here today”; it means that you are glad that you are breathing and that you are upright.

Victim advocate

I like the judge who will control the courtroom and be courteous; you do not have to really gush but be courteous and control and keep things going in an orderly fashion.

Victim advocate

Because the victim impact statement brings challenges to the dynamics in the courtroom and to judicial demeanor, judges may feel compelled to explain to victims where authority lies in the courtroom and legal process. As one judge said, “But I also am very careful to tell them that ‘the decision is mine, and it’s [victim impact] one of many factors, and if you are disappointed in how it comes out, it’s because there are so many other factors I have to weigh.’” Judges describe having to handle outbursts of anger between victims and defendants and often recall when they had to limit the number of impact statements and the time given to them. As one judge said, “What I object to is when I have set up something for a 30-minute hearing, and the prosecutor tells me, ‘We have 12 victims that are going to make statements.’ I say, ‘No, you are not. You are going to have two or three.’ I clearly have the authority to limit.” Judges, on the other hand, do not want victims to avoid coming to hearings because they think that their statements will make no difference, and so some judges describe how they face an impossible challenge at times: “No matter what you do, somebody is going to think, ‘that was a terrible judge.’”

Most judges have, over time, developed certain verbal and nonverbal techniques to maintain authority in the courtroom and ease the tension during the presentation of an impact statement. They insist that the defendant listen to the impact statement but not respond to it, and they require that the victim speak to the judge. Many mention that they try to look at the victim and avoid reading something or filling out forms during the statement. Some judges deliberately don’t say anything to the victim or simply thank her, because, as one judge said, “Usually I don’t say too much because you just never know what to say because whatever you say could be taken wrong, and I won’t want anyone to think that I am judging what they say or demeaning them.” That possibility proved true for a judge who tried to convey to the victim that her living child would need her now and she should “find it in her heart to not live with her anger,” but the victim “just flipped out,” possibly thinking that the judge was “making light” of the loss of her other child. Other judges take this risk because, as one judge said, “These statements are so moving that it just seems like common decency to express your sorrow and condolence and so forth.” Some may allude to specifics from the impact statement as they deliver the sentence. Others may praise the victim for her courage and try to facilitate her healing. One judge described how he used the “power of his pulpit” in many cases, such as a

sexual assault case in which he said to the 14-year-old victim, “You are a courageous young woman, and you are a strong young woman, and I want you to know that this is not your fault.”

Advocates have, for certain, witnessed a wide range of judicial demeanor in the courtroom, and our interviews reflected this. Most advocates cited eye contact, the general display of active listening, and making validating comments as among the best things a judge can do to make the victim feel heard. As one advocate said: “I love the eye contact, and the victim might not even be aware of it because she is shaking, holding her paper, trying to read. So the eye contact, the acknowledgment that they did that. Certainly when they say things like ‘I just want to thank you for your courage. I know that was hard for you,’ I just think that’s huge in helping her heal from it all.” During a February 2005 criminal sexual assault hearing, for example, WATCH observed as the judge told the victim that she was brave, that she was a good person, and that she did the right thing. What can be most validating, though, is when the judge will say things to the defendant that the victim would like to be able to say herself. As another advocate put it: “Judges have a lot to say at sentencing hearings to the defendant, and depending on how moved they have been by what this person did, sometimes they say what the victim would like to say themselves but can’t. Things like, ‘It’s hard, you know, I can’t believe how much damage you have caused here.’” During a June 2005 murder hearing, WATCH observed a judge tell a family member who read an impact statement that she was aware of how wonderful his sister was and how much she had cared for her friends and family; the judge then addressed the defendant and told him he has caused a great deal of pain to the family and friends that love her. One advocate also said that a victim once told her the judge’s words were “balm for her soul.” So, working in the positive, the judge’s comments can be validating for the victim.

Other judges, however, will talk to their clerks or leaf through papers while victims are reading their statements; one advocate even noted a judge who once said to a victim, “I don’t know who is telling the truth here. I think that you are lying just as much as he is.” Another advocate described a judge who “got up while someone was doing a victim impact statement just to reach over to the clerk to get some information that was not there in his area,” citing that behavior as very disrespectful. Finally, as some judges themselves noted, advocates also acknowledge that judges can rarely make everyone happy. As one advocate commented: “I feel badly for the judges sometimes, all the things they have to factor and probably all the pressure they are getting from other places. I do think they take victim concerns into consideration, but I do think that they have to be realistic too.”

Finally, victims seem quite affected by any comments the judges make to them. In one hearing we observed, involving a “date rape” in which both parties had been drinking heavily, the victim described how difficult it had been to wake up in the hospital and realize that she had been a victim of rape. She described how she experienced both guilt and stress since the assault. Her parents didn’t trust her anymore, and one high school teacher had been unsympathetic over her absences from class. The judge addressed her directly in saying that he was happy that she had stopped drinking but that she didn’t do

anything to deserve the rape. “You were a victim,” he said. “You shouldn’t be punished.” The judge also noted that the teacher was at fault for not understanding her stress, and that the rape was a “horrible experience” for her. We observed another judge in a sentencing hearing of a defendant who had murdered his estranged girlfriend say to the defendant, “There are no words that I have that are anywhere close to the words that were spoken with great power and dignity” in the impact statements. The judge said that he would “like to think on this day in early spring” that the victim “lived in the flowers, each blade of grass, and the air and sunshine, and that she would always live in the hearts of those who loved her.” He then imposed the sentence by listing first the number of minutes, then days, then months, and finally years that the defendant would serve, stating that he wanted the image of the victim “to occupy each waking thought” of the defendant. Judges hold such authority and power that their words can greatly help the victim or the victim’s family begin to heal.

### **Conclusions and Recommendations**

Whether or not victim impact statements directly affect a sentence, they have value in the sentencing process. They may convey which treatment plans might work for a defendant, offer new information to a judge, educate the whole courtroom about the nature of crime, or affirm how the sentence will work best in stopping violence or rehabilitating an offender. Certainly victim impact statements may help a victim reach emotional closure, and they bring a human face into the courtroom. However, fear of the perpetrator or of the public setting of the courtroom, and distrust of the system might prevent a victim from writing or delivering an impact statement. A domestic violence victim might have a hard time achieving credibility, especially if she recants or pleads for mercy for her abuser. And to be persuasive, all victims may be challenged to distinguish their assault from the “average” assault and to give a balanced but detailed account of the effects of the crime on their lives. Judges, however, as we observed and as advocates convey, can help empower victims by being aware of the dynamics of their courtrooms and their own judicial demeanor.

Some specific recommendations for how to handle victim impact statements follow:

1. Victim impact statements should be submitted well in advance of the sentencing hearing to give judges time to read and respond to them.
2. Victim input into the pre-sentencing investigation is very important, particularly requests for restitution. Judges express willingness to require restitution for such things as ongoing therapy for victims and their families.
3. Prosecutors as well as advocates should solicit impact statements, and if the victim chooses not to attend the hearing, the prosecutor should assure the victim that the statement was read by the court and, if possible, share the judge’s comments with her after the hearing.
4. Advocates and prosecutors should continue to explain to victims the purpose and nature of plea negotiations so that their expectations are realistic.
5. Prosecutors and advocates should remember that community impact statements also help change perceptions about the nature of domestic violence. Community

- impact statements focus on overall social effects of domestic violence and challenge perceptions that it only affects individuals.
6. More conversation and education are needed on the issue of victims of domestic violence who recant, ignore no-contact orders or ask to have them lifted, or plead for mercy for the perpetrator, and on the perception of the domestic violence victim as complicit in the crime. Advocates, prosecutors, and judges might find it interesting to share strategies and perceptions in handling these cases.
  7. To be most persuasive, victim impact statements must achieve a difficult and delicate balance between emotion, reason, and insight.
  8. Judges should remember to thank the victim for coming forward, and if they are comfortable, to compliment the victim on her courage in doing so. Given how healing and empowering this might be for the victim, judges should also consider mentioning the impact statement and any specifics from that statement when handing down the sentence.
  9. Judges should be aware that explaining how they reached a sentencing decision or why the terms of a plea agreement make sense in this crime often helps victims heal.
  10. Judges should avoid reading or writing during an impact statement and maintain eye contact with the victim. Such a stance assures her that she is being heard.

## **Appendix A**

### **Interview Questions**

#### Interview Questions for Judges

1. How long have you been a judge in Hennepin County? How long have you handled felony or gross misdemeanor domestic violence cases?
2. How often do you see a victim impact statement submitted to you before a sentencing hearing?
3. How often does the victim give allocution of that statement at the hearing?
4. What factors do you commonly weigh before deciding upon a sentence?
5. How important is the existence of a victim impact statement in the context of all the other factors that influence your decision?
6. Which is the most important factor in deciding upon a sentence?
7. Do you give more weight to victim who gives allocution of that victim impact statement at the hearing itself? Or does it matter?
8. Do you think that it is necessary or useful for the victim to be present at the hearing?
9. In considering a victim impact statement, do you consider separately the victim's statement of the emotional impact of the crime from the victim's opinion of the kind and degree of sentence that the defendant should receive?
10. If you do consider separately the victim's statement of the emotional impact of the crime from the victim's opinion of the kind and degree of sentence that the defendant should receive, which carries more weight with you? The emotional appeal or the reaction to a possible sentence?
11. Are there universal standards or professional guidelines that help you determine how much weight to give the victim impact statement?
12. Over time, have you developed your own standards or guidelines that help you determine how much weight to give the victim impact statement? And would you share those with me?
13. Could you recall for me a victim impact statement that made a particular impression upon you? And why?
14. Is there anything else that you would like to share with me about the felony/gross misdemeanor domestic violence courtroom, the sentencing decisions that you must make, and/or victim impact statements?

#### Interview Questions for Advocates

1. Could you describe how you have worked with victims of domestic violence or sexual assault in the past to develop victim impact statements? What tools and guidelines do you provide them?
2. Generally how have you observed victim input is gathered by your office or organization, by the prosecutor's office, or by probation?

3. What do you think motivates victims of domestic violence or sexual assault to submit a victim impact statement? What might make them reluctant? Who do you think that a victim who writes an impact statement perceives the audience to be?
4. Do you think that it is more important for the victim to express the emotional impact of the crime or for the victim to express an opinion as to the kind and degree of the sentence? Or both? Generally which of these two purposes are victims more successful in accomplishing?
5. How often do victims elect not only to write an impact statement but also to attend and speak at the sentencing hearing? Do you think that it's important for a victim to attend the sentencing hearing—and do you urge them to do so?
6. In your experience, if a victim elects not to attend a hearing and to give allocution, why does the victim choose not to do so?
7. How much weight do you think that judges give to victim impact statements? In terms of the other factors that the judge must weigh in determining a sentence, which factor do you think is most important?
8. In your opinion, what features must a persuasive victim impact statement have?
9. Could you share with me a description of any victim impact statement that you think had a particular impact on the judge—in terms of expressing the emotional impact of the crime or in influencing the kind and degree of sentence or both?
10. Have you observed any aspect of judicial demeanor that indicates to the victim that she has been heard during a sentencing hearing? Any verbal or nonverbal cues or feedback?
11. Is there anything else you would like to share with me in terms of your experience in working with victims of domestic violence or sexual assault in general? Or in submitting victim impact statements? Or in giving allocution at a sentencing hearing?
12. Would you be willing to alert me when a victim is going to appear at a sentencing hearing so that I might attend the hearing and observe the judge's response.
13. Is there anyone else involved in working with victims who should be interviewed for this study?

**Appendix B  
Observation Form**

Your Name:  
Case Number:  
Offense:  
Defendant:  
Sentence:

Date:  
Judge:  
Advocate:  
Relationship to Victim:

- I. How was the victim impact statement presented in court (circle all that apply)?
  - a. Read by the victim or family member in the hearing
  - b. Read by the county attorney/prosecutor in hearing
  - c. Read by advocate in hearing
  - d. Submitted in writing before the hearing
  - e. Other \_\_\_\_\_
  
- II. Was your impression that the victim impact statement was offered to (circle all that apply)
  - a. argue for a particular sentence or treatment plan
  - b. bring closure to the emotional affect of the crime on the victim
  - c. give the victim a sense that justice was being done
  - d. other \_\_\_\_\_
  
- III. Summarize the content of the victim impact statement if it was read or described during the hearing. Be sure to include any specific requests made by the victim:
  
- IV. How would you describe the demeanor of the judge in listening to and responding to the victim impact statement?
  - a. supportive (e.g., welcoming, agreeing)
  - b. courteous (e.g., attentive, interested)
  - c. businesslike (e.g., routine, impersonal)
  - d. strict (e.g., bureaucratic, firm, stress power of the judge)
  - e. condescending (e.g., patronizing, demeaning, sexist)
  - f. harsh (e.g., nasty, abrasive, scolding, contemptuous)
  - g. other:
  
- V. What *verbal* statements did the judge make toward the victim or the person reading the impact statement that might contribute to your descriptions of judicial demeanor? For example, did the judge engage in dialogue with the victim, thank the victim, respond to any specifics of the impact statement, mention specifics of the impact statement to the defendant? Please describe:

- VI. What *nonverbal* gestures did the judge make toward the victim or the person reading the impact statement that might contribute to your descriptions of judicial demeanor? For example, facial expressions (maintains eye contact, smiles, frowns), posture (faces victim, sits at attention), mannerisms (nods head, looks down at papers), tone of voice (harsh, soft). Please describe:
- VII. Did the judge acknowledge that the victim impact statement affected his or her decision about the sentence for the defendant?  
No \_\_\_\_\_  
Yes \_\_\_\_\_  
Please summarize what the judge said, particularly about how the sentence might have been affected by the victim impact statement:
- VIII. Describe anything that the defendant or the defense attorney said on the defendant's behalf (particularly in response to the impact statement):
- IX. Describe any reaction to the impact statement from the gallery or anything that the judge did to maintain control of the courtroom during the sentencing:
- X. Record below any other impressions that you think might be important:

(Note: An earlier version of the form didn't include questions IV, V, IV, VIII, and IX. We added these when we decided to focus on the dynamics in the courtroom and judicial demeanor—two themes that emerged from our interviews with judges and advocates. The categories in question IV were inspired by James Ptacek in *Battered Women in the Courtroom: The Power of Judicial Response*, Northeastern Press, 1999.)