

# Considering the Golden Rule of Defense-Initiated Victim Outreach (DIVO) for Non-Capital Criminal Defense



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## Rarely Does a Criminal Defense Investigation Go Unaccused

Most of us who do criminal defense work and are proud of our factual or mitigation investigation know the blood-chilling effect of later hearing the prosecutor’s accusation, “I hear you have been trying to intimidate our witnesses!” Certainly, there are federal and state criminal statutes<sup>1</sup> and ethical rules<sup>2</sup> that prohibit witness or victim intimidation and tampering, and improper contact with represented persons. And, certainly, there are some justified prosecutions and disciplinary proceedings against lawyers and their agents for such actions.<sup>3</sup> However, regular criminal defense practitioners will also recognize such a mid-litigation accusation of “witness intimidation” against defense counsel for the unethical “brushback pitch”<sup>4</sup> it sometimes is.<sup>5</sup>

Criminal defense counsel unquestionably has a Sixth Amendment obligation to conduct an investigation into the law and facts of the case, as well as, into evidence that might mitigate any sentence the accused might receive.<sup>6</sup> How, then, can we meet this obligation and learn what outcomes witnesses or victims truly hope to achieve through their participation in criminal prosecutions? How, then, do we avoid aggravating our clients’ situations through inconsiderate interviews, scheduling, and rhetoric that make witnesses or victims even less willing to negotiate or support leniency for our clients? The usual best practices for immunizing defense counsel’s investigative efforts from criminal and ethical accusations are well known.<sup>7</sup> The purpose of this article is not to repeat these best practices or to recommend the usual time and resource-consuming counterattacks on prosecutorial misconduct. Quite the opposite. This article suggests sometimes avoiding the problem altogether—particularly in defense communications with victims—by creatively implementing the Defense-Initiated Victim Outreach (“DIVO”) adaptation of the golden rule<sup>8</sup>:

***“If we fail to act with compassion toward the victim survivor, we cannot ask that same compassion to be shown our client.”—Richard Burr<sup>9</sup>***

To those prosecutors and others who accuse defense-initiated victim liaisons of witness interference, intimidation, or tampering, DIVO professionals respond: “DIVO in no way seeks to influence someone’s testimony or participation in the process. In many instances the victim survivor isn’t a witness and has no formal role in the process except that as a victim survivor. Since DIVO is victim-driven, the defense would have no way of even making such an offer nor would a [victims’ liaison] relay such an offer. Defense-based victim outreach is not witness tampering.”<sup>10</sup> Actually, DIVO has an impressive, humanitarian genesis.

### **Genesis of Defense-Initiated Victim Outreach (DIVO)**

In the wake of the worst act of homegrown terrorism in our nation’s history—the bombing of the Alfred P. Murrah Federal Building in Oklahoma City<sup>11</sup> on April 19, 1995—Timothy McVeigh’s defense counsel struggled with how to effectively represent their client while acknowledging that the nation was reeling from devastation at the hands of some of its own citizens.

This was not a time for defense counsel to avoid naming victims and their loved ones as the “victims,”<sup>12</sup> as we might usually do to shield our clients from any prejudicial labels at jury trial.<sup>13</sup> Instead, McVeigh’s defense counsel turned to top restorative justice experts for advice on how to effectively represent him without ignoring the devastation perpetrated by his actions.<sup>14</sup> Specifically, defense counsel wanted to know how to interview and cross-examine victim survivors without exacerbating the trauma they had suffered. They wanted to know how to express defense counsel’s respect and compassion for the loss of lives and livelihoods. With the expertise of Dr. Howard Zehr<sup>15</sup> and his, then, graduate student, Tammy Krause,<sup>16</sup> “Defense-Initiated Victim Outreach” (“DIVO”)<sup>17</sup> was born.

The DIVO process was developed, in part, as a natural successor to the victims’ rights and restorative justice movements of the past several decades.<sup>18</sup> Dr. Zehr explains that “[r]ather than obsessing about whether ‘offenders’ get what they deserve, restorative justice focuses on repairing the harm of crime and engaging individuals and community members in the process.”<sup>19</sup> Proponents of restorative justice ask the “defense community, whose members serve a core function within the criminal justice system, [to] recognize and act upon their obligation to the victim survivors whose experiences of harm initiate and drive the [criminal justice] process.”<sup>20</sup> They assert, “The responsibility for treating victim survivors with dignity and respect falls to *every* member of the criminal justice system.”<sup>21</sup> Similarly, the Kansas Bill of Rights For Victims of Crime establishes that “[v]ictims should

be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum necessary inconvenience from their involvement with the criminal justice system.”<sup>22</sup>

DIVO asks, amongst other questions: How can we expect compassion and empathy from the jury and the Court if we do not express the same to victim survivors? The answer according to Richard Burr? We can’t.<sup>23</sup> Although it is possible to represent our clients by focusing solely on their guilt, innocence, and mitigating circumstances,<sup>24</sup> we may do a disservice to our clients by repressing and failing to address the empathy we feel for victim survivors—that same empathy which drives law enforcement, prosecutors, jurors, and the Court, in the investigation, prosecution, and, if convicted, sentencing of the accused.<sup>25</sup>

Humans are by nature an empathetic species. We seek to restore that which was destroyed and to forgive that which was injured. What harm befalls defense counsel or our clients if we acknowledge that the victim survivors suffered some form of harm? Often, none. Empathy is not proof of guilt during a jury trial. Compassion is not proof of aggravating factors during a penalty phase proceeding. The harm to victim survivors might be perceived or actual. It might take an emotional, psychological, financial, or physical form, or some combination thereof. Harm might have occurred at the hands of the accused, a third party, or only in the minds of the victims themselves. It might be an ongoing inadvertent harm inflicted by the very proceedings instigated to address the alleged criminal offense. In fact, by acknowledging these harms and expressing compassion and empathy for victim survivors, rather than damaging our clients’ cases, we just might engender reciprocal compassion for the accused from the victim survivors, the jury, the Court, and the community at large.

### **Breaking the Stereotype**

We often hear the phrase “a lawyer is a shark”—a cold-blooded fish. Perpetuating this stereotype, the Broadway musical adaptation of the ever-popular 2001 film, “Legally Blonde,” includes a musical number devoted to lawyer “sharks” targeting the “Blood in the Water,” unsympathetic toward the disastrous consequences of their defense strategy for the victim survivors.<sup>26</sup> In accord with this stereotype, it is not unusual for criminal defense attorneys to be asked: “How can you represent that person?” “How can you defend those crimes?” Surely, we must be as reprehensible, depraved, and villainous as our clients are accused of being to be willing to represent them, right? Wrong. Our failure to recognize and empathize with the harms experienced by victim survivors, however, might bolster this stereotype of criminal defense lawyers and, by extension, our clients as being cold, unfeeling, and unsympathetic, ergo, lacking remorse. DIVO may help erode these misconceptions about defense counsel, and, by association, the accused, that victim survivors might have.<sup>27</sup>

Regardless of the guilt or innocence of the accused, there is a societal expectation that defense counsel and our clients will feel and express a certain degree of sympathy – if not empathy – and compassion toward victim survivors, even those who are solely victims of their own minds. Further, when accused persons are in fact guilty of the criminal offense charged, victim survivors, jurors, the Court, and the community at large desire evidence that offenders are remorseful, not merely regretful of having been caught.<sup>28</sup> True remorse requires not only regret for having committed the criminal offense, but also remorse for the trauma and harm experienced by the victim survivors. In televised coverage of jury trials or sentencing hearings, the news media often points to the visible reactions, or lack thereof, of defense counsel and our clients as hallmarks of whether offenders are sorry for their actions if adjudicated guilty and/or, generally, sorry for the harm experienced by victim survivors. Jurors, the Court, the community, and victim survivors want to see accused individuals evince empathy and, if guilty, take accountability for their actions – something which might in turn help the jurors and the Court humanize the accused.<sup>29</sup>

### So, What is DIVO?

First, we must recognize an accusation that a criminal offense, especially a crime against a person, was committed creates a lifelong relationship between the accused and victim survivors. When accused individuals are actually innocent of the alleged crime, however tangentially, they are forced into a relationship with the victim survivors through the institution of criminal proceedings. In these cases, defense counsel might be the victim survivors' only hope of learning the truth about what happened to themselves or their loved ones, even if that truth is that the accused was in no way involved in the alleged crime, or that the accused's actions were legally justified, such as in self-defense.<sup>30</sup>

Alternatively, when accused individuals are, in fact, guilty of the offense charged, as offenders, they have forced a relationship upon victim survivors. By the very nature of the criminal offense, especially when lives are lost, offenders might hold information not in the possession of any other party or witness.<sup>31</sup> However, historically, defense counsel has surrendered to the prosecution the opportunity to communicate with victim survivors.<sup>32</sup> This single-party communication and flow of information often leaves victim survivors bereft of the unique answers and services they need from defense counsel and, particularly, offenders.

DIVO is a process, program, and (some might say) philosophy by which defense counsel, through a neutral third party, attempts to bridge that gap and stem the animosity and adversity between victim survivors and defense counsel by addressing the needs and concerns of victim survivors.<sup>33</sup>

There are three primary principles upon which DIVO relies:

- Provide victim survivors with another avenue of information and services.
- Reduce the harm that criminal justice proceedings inadvertently and often unnecessarily inflict on victim survivors.
- Provide defense counsel a means to relate to victim survivors with respect and compassion.<sup>34</sup>

DIVO contends: “Survivors should be provided as much information about the crime, the case and the process as possible, in non-technical language, without compromising due process for the defendants.”<sup>35</sup>

This defense-initiated outreach does not take the place of the prosecution's victim outreach or other community victim support. Neither is it redundant. Rather, DIVO provides a different avenue by which victim survivors can receive information and services unique to defense counsel and our clients, including, but not limited to:

- Information about the defendant and his/her family.
- Information about the crime.
- An opportunity to express feelings about the accused or defense counsel.
- Questions about defense strategy.
- Input into plea decisions.
- Requests for certain considerations during court proceedings.
- Whether and how they wish to interact with the defense during court proceedings.
- Return of non-evidentiary property.<sup>36</sup>

Receiving such information often empowers victim survivors, permitting them to make informed choices in the criminal justice process and to better cope with their victimization.<sup>37</sup> However, victim survivors do not always know what they need from the criminal justice process and being asked to make decisions within a system that has an inherent focus on punishment of offenders and the harm to the state can be overwhelming.<sup>38</sup> Therefore, “[s]urvivors should be provided as many options as possible for their involvement.”<sup>39</sup> And, “[a]ll possible precautions should be taken to avoid or reduce additional trauma to victim survivors through testimony, cross-examination or other parts of the process where the needs of the defense and the survivors intersect.”<sup>40</sup>

## Abuse of the DIVO Process

“Although [DIVO] has been very helpful to many victims, it is challenging, risky and controversial work.”<sup>41</sup> We must recognize that without adherence to certain safeguards the scales can tip, causing the DIVO process to shift from a genuine attempt to show victim survivors respect and compassion into a game, scheme, or emotional manipulation with the goal of avoiding the conviction of the accused or lessening the sentence of the convicted offender at the expense of re-traumatizing victim survivors.

## Ethical DIVO Safeguards

To prevent this abuse of the DIVO process, many states have implemented sections to their Victims’ Rights Bills that expressly proscribe contact by victim liaisons for the defense without the consent of victim survivors, contact without identifying the liaison’s relation to defense counsel, and contact without correcting any misperceptions by victim survivors as to the liaison’s relationship to defense counsel. Some states, further permit third-party communication of this lack of consent rather than requiring victim survivors to communicate directly with defense-initiated victim liaisons.<sup>42</sup>

Further, the Institute for Restorative Justice and Restorative Dialogue has developed a series of strict, yet evolving, guidelines and standards for the DIVO process.<sup>43</sup> Amongst the most important standards for maintaining the integrity of the DIVO process is the differentiation of the victim-centered role of the DIVO Victim Outreach Specialist (“VOS”) from that of any mediator or member of the defense team.<sup>44</sup>

## Victim Outreach Specialists (VOS)

VOS are highly trained individuals who operate as neutral third parties—albeit retained by defense counsel.<sup>45</sup> Liaisons contact victim survivors and, with victims’ permission, address the questions and needs which might only be fully addressed without speculation by defense counsel, or the accused through their defense counsel. Victims’ liaisons are channels of communication between victim survivors and the defense, seekers of information for survivors, compassionate listeners, interpreters, problem solvers, dialogue facilitators, negotiators, and educators.<sup>46</sup>

The sole objective of the VOS must be “to engage the survivors wherever they are, wholly on the survivors’ terms, and to offer a relationship with the [alleged] offender, through the defense team, that may satisfy at least some of the survivors’ needs and interests. The liaison can have no other agenda.”<sup>47</sup> “DIVO is defense initiated but victim driven.”<sup>48</sup> “If what the family needs is for the victim liaison to go away, the victim liaison goes away.”<sup>49</sup>

Accordingly, VOS are not given confidential and privileged information about the accused and the case.<sup>50</sup> Vice versa, the accused receives no confidential information about victim survivors without their express permission.<sup>51</sup> While VOS might be retained in a fashion similar to that of an expert witness, they will not be called to testify on the accused’s behalf. In fact, it is not unusual for VOS to have a clause in their retention contracts prohibiting defense counsel from calling the VOS to testify during trial.<sup>52</sup>

## DIVO is . . . .

- A bridge between victim survivors and the defense attorney;
- A mechanism by which victim survivors can have access to, interaction with, and potentially influence the defense process as well as the prosecutorial process;
- Voluntary on the part of the victim survivor;
- A way to give victim survivors greater information, more options, and more active roles in the criminal justice process;
- A way to potentially reduce the adversarial nature of the process and its negative impact on victim survivors;
- Appropriate regardless of the victim survivors’ beliefs about suitable sanctions;
- Based on restorative justice principles;
- Guided by written, value-based principles of practice;
- Consistent with the American Bar Association guidelines for defense counsel; and
- Voluntary on the part of the defense attorney.<sup>53</sup>

## DIVO is not . . . .

- Victim/offender dialogue or a mechanism by which the victim and the defendant have direct contact;
- A replacement or alternative to the victim services provided by the state, non-system-based programs, or social service agencies;
- A mechanism by which the defense gathers information about or relays messages to the victim survivor;
- Carried out by defense attorneys, mitigations specialists, investigators, or other members of the defense team;
- Guaranteed to help the defendant in some way; or
- Provided by someone without specific training in DIVO work.<sup>54</sup>

“Restorative justice, and by extension DIVO . . . , [is] about getting the victim’s needs met in ways that are meaningful to the individual.”<sup>55</sup> Capital defense attorney Richard Burr succinctly articulates how abuse of the DIVO process subverts its underlying intent: “For either the defense or the prosecution to use survivors as a means to their separate ends . . . is fundamentally disrespectful of survivors, is likely to make their travail through the judicial process worse and will undoubtedly leave the needs and interest they have – which arise solely out of the involuntary relationship they have with the [accused] offender – largely unsatisfied.”<sup>56</sup> Therefore DIVO principles include regular evaluation by oversight committees composed of victim survivors, VOS, and other stakeholders.<sup>57</sup>

### DIVO Is Not Restricted to Capital Cases

DIVO also is not as restricted in its application as we might think. Every victim survivor deserves respect, compassion, and recognition of the harm they suffered regardless of whether that harm was the death of a human being or another form of harm. Despite its genesis and predominant use in capital cases, DIVO is not limited to defendants accused of capital crimes.<sup>58</sup> There are victim survivors to many criminal offenses who might need information and services that defense counsel and the accused are in a unique position to provide. In fact, these authors have seen where commencing DIVO through a victim liaison before non-capital charges were even filed against the accused, ultimately, led to a satisfactory plea agreement forged by the efforts of defense counsel, the accused, the prosecution, and the Court with the support of the victim survivors.

### Effective Representation of Our Clients Through Respect and Compassion for Victim Survivors

Despite what we ordinarily believe as we file “Motions In Limine To Prohibit Use Of Prejudicial Labels” on our clients’ behalf, acknowledging and expressing respect and compassion toward victim survivors’ pain is not mutually exclusive of the effective representation of persons accused of criminal offenses. “Utilizing defense-initiated victim outreach does not mean

that defense lawyers forgo or diminish zealous advocacy. Nor does it require victims to forgive. Defense-initiated victim outreach recognizes that victims have a stake in the case and offers the possibility of a relationship between the defense team and the victims.”<sup>59</sup> Communication with victim survivors and addressing their needs helps cool tempers, assuage heightened emotions, and, generally, foster a less adversarial approach to victim survivor communications with defense counsel. While not the main goal of DIVO, one possible unexpected outcome of addressing the needs of victim survivors is that victim survivors, juries, and the Court may be reciprocally more empathetic and compassionate toward the accused: in essence, the golden rule in action.<sup>60</sup> “The paradox of victim outreach is that by treating victims with respect and sensitivity, by listening to their concerns, meeting their needs, and answering their questions to the extent possible, the defense team has a better chance of getting what it wants than they have by asking the victims for it. By engaging in a process that ultimately humanizes everyone, including the defendant, the judicial process itself becomes more humane.”<sup>61</sup>

### Conclusion

Ultimately, we must always act in the best interests of our clients. However counterintuitive, that effective representation might include recognizing the harms experienced by victim survivors and showing respect and compassion for the pain they have suffered and the losses they have endured. Engaging a victims’ liaison through the defense-initiated victim outreach process is one way to humanize the criminal justice process, thereby limiting re-traumatization of victim survivors. Such communications are not witness tampering. Rather, they are a victim-driven example of the golden rule in action. Serendipitously, these efforts of defense counsel to empathize with victim survivors just might be reciprocated by victim survivors, jurors, and the Court when the time comes for negotiation of a plea agreement, jury trial, or, if convicted, sentencing of the accused. Eventually, to the benefit of all, this less antagonistic approach to defense counsel interactions with witnesses and victims just might become more prevalent even in non-capital cases.

1 See, e.g., K.S.A. 21-5909; 18 U.S.C. §1512(a)-(b) (Tampering with a witness, victim, or an informant).

2 The Kansas Supreme Court exhorts: “Vilification, intimidation, abuse and threats have no place in the legal arsenal.” *In re Gershter*, 270 Kan. 620 (2001) (citing *In re Mezzacca*, 340 A.2d 658 (N.J. 1975)); See, e.g., KRPC 1.3 cmt. 1; 4.1(a); 4.1 cmt. 1; 4.3; 4.4, generally; 4.4 cmt. 1; 8.4 cmt. 2; Cf. MODEL RULES OF PRO. CONDUCT r. 4.1 to 4.4 (AM. BAR ASS’N 2019).

3 See, e.g., *In re Manafort*, 207 A.3d 593 (D.C. 2019) (disbarment of attorney, Paul Manafort, after guilty plea to conspiracy to obstruct justice by tampering with witnesses); *People v. Olson*, 470 P.3d 789 (Colo. O.P.D.J. 2016) (attorney suspended for 30 days for witness tampering); *In re Goodrich*, 290 Kan. 950 (2010) (attorney disbarred after being indicted for, amongst other felonies, intimidation of a witness); *In re Deutsch*, 730 N.Y.S.2d 503 (N.Y. 2001) (attorney automatically disbarred for federal witness tampering); *The Florida Bar v. Carswell*, 624 So.2d 259 (Fla. 1993) (attorney suspended from practice for 180 days for witness tampering);

*Matter of Stroh*, 644 P.2d 1161 (Wash. 1982) (attorney disbarred for witness tampering).

4 A “brushback pitch” is a pitch thrown close enough to the batter to intimidate him. Refusing to be intimidated by the brushback is a critical trait for major league baseball batters, as those who can be intimidated likely will be regular victims of subsequent brushback pitches. *Brushback Pitch*, SPORTS REFERENCE, LLC: BASEBALL REFERENCE BULLPEN (2000-2020), [https://www.baseball-reference.com/bullpen/Brushback\\_pitch](https://www.baseball-reference.com/bullpen/Brushback_pitch) (last visited Sept. 29, 2021). Brushback pitches are understandably dangerous, and umpires do not hesitate to warn or eject pitchers from the game if they believe the pitch was intentional. *Brushback pitch*, SPORTING CHARTS: MLB (2015), <https://www.sportingcharts.com/dictionary/mlb/brushback-pitch.aspx> (last visited Sept. 29, 2021).

5 Courts have recognized justifications for such prosecutorial tactics as specious:

Tampering with witnesses and subornation of perjury are real dangers, especially in a capital case. But there are ways to avert this danger without denying defense counsel access to eye witnesses to the events in suit unless the prosecutor is present to monitor the interview. We cannot indulge the assumption that this tactic on the part of the prosecution is necessary . . . . In fact, the Government’s motivation in disallowing defense counsel to interview witnesses apparently stems from factors other than fear of tampering.

- Gregory v. United States**, 369 F.2d 185, 188 (D.C. Cir. 1966); *See also* Belle Yan, *Prosecuting Members of Defense Legal Teams and Its Ethical Implications for the Prosecutor: A Proposal for a New Ethical Standard*, HASTINGS BUS L. J. 135, 136-37 (2020); Martha Neil, *Charges dismissed against defense lawyer accused of witness intimidation in murder case*, ABA JOURNAL: DAILY NEWS: CRIMINAL JUSTICE (Jun. 4, 2014, 10:35 PM), [https://www.abajournal.com/news/article/charges\\_dismissed\\_against\\_defense\\_lawyer\\_accused\\_of\\_witness\\_intimidati](https://www.abajournal.com/news/article/charges_dismissed_against_defense_lawyer_accused_of_witness_intimidati); Lorelei Laird, *Public defenders allege prosecutor’s office filing unwarranted charges against them*, ABA JOURNAL: DAILY NEWS: PUBLIC DEFENDERS (May 2, 2017, 8:00 AM), [https://www.abajournal.com/news/article/public\\_defenders\\_allege\\_prosecutors\\_office\\_filing\\_unwarranted\\_charges\\_again](https://www.abajournal.com/news/article/public_defenders_allege_prosecutors_office_filing_unwarranted_charges_again); John Simerman, *Orleans public defense investigator charged with faking credentials claims retaliation by Leon Cannizzaro, District Attorney’s Office*, NOLA.COM (Nov. 21, 2019, 8:40 PM) (digital publication of the TIMES PICAYUNE & NEW ORLEANS ADVOCATE), [https://www.nola.com/news/article\\_c51a6c1b-21da-5c8b-a908-40738d6a2f50.html](https://www.nola.com/news/article_c51a6c1b-21da-5c8b-a908-40738d6a2f50.html).
- 6 **Strickland v. Washington**, 466 U.S. 668-680, 690-91, 706 (1984). And the prosecution may not impermissibly interfere with defense counsel’s execution of this investigatory duty. *See, e.g., Gregory*, 369 F.2d at 187; **Davis v. State**, 881 P.2d 657, 664-66 (Nev. 1994); **State v. York**, 632 P.2d 1261, 1263 (Or. 1981); **State v. Humphrey**, 217 Kan. 352, 362 (1975); **Lewis v. Court of Common Pleas of Lebanon Cnty.**, 260 A.2d 184, 188-89 (Pa. 1969); *See also* David S. Caudill, *Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims’ Rights*, 17 GEO. J. LEGAL ETHICS 103, 110 n.40 (2003) (citing VA. R. OF PROF. CONDUCT r. 3.8(c) (2002)); Std. 3-3.4(h) (The Prosecutor Function) (AM. BAR ASS’N 2017); Std. 4-4.1, 4-4.3(c) (The Defense Function) (AM. BAR ASS’N 2017).
  - 7 *See, e.g.,* Jonny J. Frank and Bart M. Schwartz, *Private Eyes: Using Investigators in Criminal Defense Matters*, 11 FALL CRIM. JUST. 21 (1996); Std. 4-4.3 (The Defense Function) (AM. BAR ASS’N 2017); *Interviewing Witnesses in Criminal Case*, ABA Comm. on Ethics & Pro. Resp., Informal Op. 581 (1962).
  - 8 The “Golden Rule” is the most culturally universal ethical tenet. Although dating back as early as 2000 B.C.E., one of its most familiar pronouncements can be found in the Christian New Testament: “Do under others as you would have them do unto you.” *See Mt. 7:12; Lk. 6:31; See also*, Norman Rockwell, *The Golden Rule is Common to All Religions*, THE SATURDAY EVENING POST (Apr. 1, 1961), reprinted NORMAN ROCKWELL MUSEUM: GOLDEN RULE (2021), <https://www.nrm.org/2018/03/golden-rule-common-religions/> (last visited Sept. 30, 2021); Bill Puka, *The Golden Rule*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (author associated with the Rensselaer Polytechnic Institute, a private research university), <https://iep.utm.edu/gold-rule/#H4> (last visited Sept. 29, 2021); *Golden Rule*, NEW WORLD ENCYCLOPEDIA, [https://www.newworldencyclopedia.org/entry/Golden\\_Rule#The\\_Golden\\_Rule\\_in\\_the\\_World.27s\\_Religions](https://www.newworldencyclopedia.org/entry/Golden_Rule#The_Golden_Rule_in_the_World.27s_Religions) (last visited Sept. 29, 2021).
  - 9 Richard Burr spearheaded pursuit of the restorative justice and DIVO approaches as a member of the defense team in the federal prosecution of Timothy McVeigh for the bombing of the Alfred P. Murrah Federal Building in 1995 and in the subsequent sentencing and capital defense proceedings.
  - 10 Stephanie Frogge, MTS & Marilyn Armour, Ph.D., *Defense-Initiated Victim Outreach (DIVO): A Guide for Creating Defense-Based Victim Services: Prosecuting Attorney Manual*, 29, INSTITUTE FOR RESTORATIVE JUSTICE & RESTORATIVE DIALOGUE [hereinafter “IRJRD”] (2009) [hereinafter “Prosecuting Attorney Manual”], <https://irjrd.org/wp-content/uploads/2020/08/DIVO-Prosecutor-Manual.pdf> (Sept. 2, 2021); *See also* Stephanie Frogge, MTS & Marilyn Armour, Ph.D., *Defense-Initiated Victim Outreach (DIVO): A Guide for Creating Defense-Based Victim Outreach Services: Manual For Defense*, 48, IRJRD [hereinafter “Manual for Defense”] (2009), [https://mow.fd.org/sites/mow.fd.org/files/training/2017-04-27\\_CLE\\_Handouts/divo/Defense%20Initiated%20Victim%20Outreach%20Resource%20Book%20including%20Sample%20Funding%20Motion.pdf](https://mow.fd.org/sites/mow.fd.org/files/training/2017-04-27_CLE_Handouts/divo/Defense%20Initiated%20Victim%20Outreach%20Resource%20Book%20including%20Sample%20Funding%20Motion.pdf) (last visited Sept. 2, 2021).
  - 11 The bombing resulted in 168 deaths, 19 of which were children, in addition to several hundred non-fatal casualties. *See History: Famous Cases and Criminals: Oklahoma City Bombing*, FEDERAL BUREAU OF INVESTIGATION, <https://fbi.gov/history/famous-cases/oklahoma-city-bombing> (last visited Aug. 16, 2021).
  - 12 In accord with the terminology established by DIVO victims’ liaisons, in this article we will refer to the “person or persons most directly harmed by the crime, either as primary victims or secondary victims, whether or not someone was killed,” collectively, as “victim survivors.” Manual for Defense, *supra* note 10, at 5.
  - 13 *See, e.g., State v. Devey*, 138 P.3d 90, 95 (Utah App. 2006)) (“Where a defendant claims that the charged crime did not actually occur, and the allegations against the defendant are based almost exclusively on the complaining witness’s testimony, participants in the trial, including the trial court, the State, and all witnesses, should be prohibited from referring to the complaining witness as ‘the victim.’”) (cleaned up); *see also State v. Albino*, 24 A.3d 602, 615 (Conn. App. 2011); Anna Roberts, *Victims, Right? 42 CARDOZO L. REV. 1449* (2021) (discussing pre-adjudication uses of the label “victim”).
  - 14 *See* Manual for Defense, *supra* note 10, at 8.
  - 15 Dr. Zehr was the foremost authority on restorative justice in the United States at the time and continues to be known as the “grandfather of restorative justice.” He began as a practitioner and theorist in restorative justice in the late 1970s at the foundational stage of the field. He has led hundreds of events in more than 25 countries and 35 states, including trainings and consultations on restorative justice, victim-offender conferencing, judicial reform, and other criminal justice matters. His impact has been especially significant in the United States, Brazil, Japan, Jamaica, Northern Ireland, Britain, Ukraine, and New Zealand, a country that has restructured its juvenile justice system into a family-focused, restorative approach. *See Howard Zehr*; EASTERN MENNONITE UNIV. (2021), <https://emu.edu/faculty-staff/?show=zehrh> (last visited Sept. 1, 2021); *See also* THE ZEHR INSTITUTE FOR RESTORATIVE JUSTICE [hereinafter “ZEHR INSTITUTE”], <https://www.zehr-institute.org/> (last visited Sept. 1, 2021).
  - 16 Dr. Krause holds a Ph.D. in law from the University of Manchester School of Law in England and is the Defense Victim Outreach Coordinator for the Federal Death Penalty Resource Counsel. *See Tammy Krause*, FEDERAL DEATH PENALTY RESOURCE COUNSEL (2017), <https://fdprc.capdef.net.org/overview/about-us/180> (last visited Aug. 17, 2021); Lauren Jefferson, *Defense-Victim Outreach Pioneer Tammy Krause Earns CJP Alumni Award for Outstanding Service*, THE CENTER FOR JUSTICE & PEACEBUILDING (2016-2017), <https://emu.edu/now/peacebuilder/2016/10/defense-victim-outreach-pioneer-tammy-krause-earns-cjp-alumni-award-for-outstanding-service/> (last visited Aug. 16, 2021).
  - 17 DIVO is also abbreviated as “DVO” for “Defense Victim Outreach” or termed, “defense-based.” The authors feel it is more accurate to state this process is defense-*initiated* as opposed to defense-*based*. While defense counsel contacts and retains DIVO victims’ liaisons, thereby initiating the DIVO process, the liaisons themselves are a neutral third party, not an agent acting on behalf of defense counsel, therefore, arguably, not defense-*based*. If anything, DIVO liaisons are *victim*-based. For consistency and accuracy, we will use “DIVO” throughout this article.
  - 18 *See* Manual for Defense, *supra* note 10, at 10-11.
  - 19 *See* ZEHR INSTITUTE, *supra* note 15.
  - 20 Manual for Defense, *supra* note 10, at 4.
  - 21 *Id.* (emphasis in original).
  - 22 K.S.A. 74-7333; *Compare* 18 U.S.C. § 3771 (Federal Crime Victims’ Rights Act).

- 23 See Manual for Defense, *supra* note 10, at 9 (citing capital defense attorney, Richard Burr).
- 24 Richard Burr, *Expanding the Horizons of Capital Defense: Why Defense Teams Should Be Concerned about Victims and Survivors*, 30 DEC. CHAMPION 44 (2006).
- 25 Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 3, 1019, 1020 (2008). This same empathy forms the basis for victim survivors, law enforcement, prosecutors, judges, and defense counsel alike to become “tunnel-visioned” in their search for truth and justice—at times, fallaciously fitting facts to a particular theory or lens while dismissing other facts as irrelevant, incredible, or unreliable. This empathy-driven tunnel vision may result in accused individuals being prosecuted, convicted, and sentenced for a crime for which they are actually innocent. Understanding this tunnel vision and the empathy that drives it might better position defense counsel to counteract it. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291 (2006).
- 26 Neil Benjamin and Laurence O’Keefe, “*Blood in the Water*,” LEGALLY BLONDE: THE MUSICAL (2007).
- 27 See Stephanie Frogge & Michelle Cruz, *Victim Outreach: An Ethical and Strategic Tool for the Defense*, 38 APR. CHAMPION 34, 35 (2014).
- 28 See Hon. Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge’s Musings On Defendants’ Right and Rite of Allocution*, MAR. CHAMPION 26 (2011).
- 29 See Branham & Burr, *supra* note 25, at 1021.
- 30 “Another lesson learned in the evolution of DIVO is that, in many cases, what victims want more than anything else is the truth about what happened, no matter how painful.” See *About DIVO*, IRJRD [hereinafter “About DIVO”], <https://irjrd.org/divo/about-divo/> (last visited Aug. 9, 2017); See also, Branham & Burr, *supra* note 25, at 1023 n.6 (citing *Interview with Robert C. Shaler, Former Director of the Forensic Biology Dept., Office of the Chief Medical Examiner of N.Y.*, NPR RADIO BROADCAST: TALK OF THE NATION (Jan. 6, 2006)).
- 31 See Branham & Burr, *supra* note 25, at 1023.
- 32 See Stephanie Frogge, *Defense-Initiated Victim Outreach (DIVO)*, TEXAS CENTER FOR THE JUDICIARY: IN CHAMBERS, at 38, 40 (Summer 2014); See also Manual for Defense, *supra* note 10, at 16.
- 33 See *Defense-Initiated Victim Outreach*, U.S. DEP’T. OF JUSTICE: OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE ASSISTANCE, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/divo.pdf> (last visited Aug. 9, 2021); *About DIVO*, *supra* note 30.
- 34 See Manual for Defense, *supra* note 10, at 6.
- 35 See *id.* at 16.
- 36 *About DIVO*, *supra* note 30.
- 37 Manual for the Defense, *supra* note 10, at 16-17.
- 38 *Id.* at 13, 17.
- 39 *Id.* at 18.
- 40 *Id.*
- 41 *Victims’ Needs in Death Penalty Cases*, ZEHR INSTITUTE FOR RESTORATIVE JUSTICE AT THE CENTER FOR JUSTICE & PEACEBUILDING (2018), <https://zehr-institute.org/webinars/victims-needs-in-death-penalty-cases.html> (last visited Aug. 17, 2021); See also Pam Alexander, *DIVO, the Ultimate Oxymoron*, THE TEXAS PROSECUTOR: THE TEXAS DISTRICT & COUNTY ATTORNEYS ASSOC. (Nov./Dec. 2010); *Response To Defendant’s Renewed Motion For Sanctions For Prosecutorial Interference With Defense Investigation [D-137a] And Response To Defendant’s Motion For Discovery Of Emails And Other Written Communications Sent By Arapahoe County District Attorney’s Office To Victim-Witnesses In This Case [D-219]*, ¶11, **People of the State of Colorado v. James Eagan Holmes; Case No. 12 CR 1522** (Jun. 27, 2014); Jordan Steffen, *Both Sides Vie for Victims’ Support in Theater Shooting Case*, THE DENVER POST (Jul. 18, 2014, at 1:19 p.m.), <https://www.denverpost.com/2014/07/18/both-sides-vie-for-victims-support-in-theater-shooting-case/>.
- 42 See, e.g., Tex. C.C.P. Art. 56A.051 (Rights of Crime Victims: Crime Victim’s Rights). An extreme example of this consent requirement can be found in the Colorado’s proposed H.B. 15-1218 (Concerning the Right of Parties in a Class I Felony Case to Refuse Contact with Defense-Initiated Victim Outreach Specialists) which would have required written authorization for defense counsel to contact victim survivors contravening defense counsel’s duty to interview witnesses. See Thomas M. Susman, *Letter to Hon. Daniel Kagan and Hon. Pete Lee of the Colorado House Judiciary Committee* (AM. BAR. ASS’N 2015), [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/2015mar16\\_righttorefusevictimspecialistcontact.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2015mar16_righttorefusevictimspecialistcontact.pdf) (last visited Sept. 1, 2021).
- 43 See generally, Manual for Defense, *supra* note 10.
- 44 *Id.* at 21-22.
- 45 Branham & Burr, *supra* note 25, at 1024.
- 46 *DIVO Victim Outreach Specialists*, IRJRD, <https://irjrd.org/divo/vos/> (last visited Aug. 9, 2021).
- 47 Branham & Burr, *supra* note 25, at 1025.
- 48 Manual for Defense, *supra* note 10 at 14.
- 49 Branham & Burr, *supra* note 25, at 1029.
- 50 Manual for Defense, *supra* note 10, at 19-20.
- 51 *About DIVO*, *supra* note 30; Branham & Burr, *supra* note 25, at 1026.
- 52 Manual for Defense, *supra* note 10, at 20 (“The principle of confidentiality is underscored in the Memorandum of Understanding (MOU) that states that the VOS cannot be called to testify nor can the VOS’s records be subpoenaed.”); See also, *id.* at 68, ¶3(b) (sample MOU).
- 53 Manual for Defense, *supra* note 10, at 20-21.
- 54 *Id.* at 7.
- 55 *Id.* at 11.
- 56 Branham & Burr, *supra* note 25, at 1026.
- 57 Manual for Defense, *supra* note 10, at 22-23.
- 58 See also Prosecuting Attorney Manual, *supra* note 10, at 20 (“DIVO is being applied in non-capital cases, even in non-homicide cases, with positive results . . . .”); Cf. Frogge & Cruz, *supra* note 27 (addressing implementation of defense outreach in homicide and other criminal cases, generally); James E. Boren and Alyson Lang, *Using Lessons from the Capital Arena for Sentencing Advocacy in All Cases*, 42 JUL. CHAMPION 42-47 (2018) (humanizing the client in capital and non-capital cases).
- 59 Pamela Blume Leonard, “*All But Death Can Be Adjusted*,” 30 DEC. CHAMPION 40, 41 (2006).
- 60 Branham & Burr, *supra* note 25, at 1022; See also Leonard, *supra* note 59, at 42.
- 61 Branham & Burr, *supra* note 25, at 1026.