

**The Minnesota Governor's Council on
Developmental Disabilities**

Promoting Independence, Productivity, Self-Determination, Integration and Inclusion

THE PERFECT, INVISIBLE VICTIM

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Section 1

Introduction

This paper has been prepared by The Minnesota Governor's Council on Developmental Disabilities in consultation with individuals with developmental disabilities, families, and professionals in the field of developmental disabilities.

The purpose of this paper is to highlight an issue that has low visibility within the legal profession: People with developmental disabilities experience a high rate of crimes including abuse, neglect, exploitation, and injuries; but they do not have equal access to justice.

This paper is a brief summary of the issues with the following goals guiding the discussion:

1. The State of Minnesota should increase awareness of the issues surrounding people with developmental disabilities as victims of crime.
2. The State of Minnesota should increase the number of investigations and prosecutions of crimes against people with developmental disabilities.
3. The State of Minnesota should adjudicate less people with developmental disabilities incompetent to testify and enable more people with developmental disabilities to testify with the help of accommodations.
4. The State of Minnesota should increase access to attorneys and other legal resources available to the general public.

Section 2

Victims with Disabilities

People with developmental disabilities may be the perfect, invisible victims. They are taught to be compliant. They may be unable to physically defend themselves, communicate, or describe past events or situations. People with developmental disabilities experience a higher rate of abuse, neglect, exploitation, and homicides simply because they have a disability. Unique barriers contribute to this reality including social isolation, physical accessibility barriers, attitudinal barriers, underreporting of crimes and limited advocacy resources.

Due to their disabilities, people with disabilities may be targeted as victims because of the offender's perception criminal prosecution is less likely. Crimes against victims with disabilities are less likely to be reported, investigated, or prosecuted due to the misconception victims with disabilities are neither competent nor make credible witnesses. People with developmental disabilities who have been victims or other witnesses of crime, have had limited access to the criminal justice system, often on the basis of assumptions about their incapacity to be interviewed by the police and to give evidence in court. Additionally, people with disabilities tend to have limited access to attorneys for a multitude of reasons.

Section 3

DIFFERING CATEGORIZATIONS

Crimes perpetrated against the general population are often described differently than when people with disabilities are the victims. The terms abuse, neglect or maltreatment are commonly used when the victim has developmental disabilities instead of assault or battery. Abuse, for example, is the term often given to actions including hitting, slapping, torturing, violating someone's body, or even causing someone's death. For a typical citizen, these actions would be assault and battery, and murder. Under-identification of crimes against person with disabilities may occur when such crimes are characterized euphemistically; euphemisms are used to decriminalize offenses. Because such actions are perpetrated upon a segment of the population that, historically, is recognized as second class at best, they are not recognized as criminal activities. They do not result in the same kind of reaction or response and the consequences may be few, if any. Use of these euphemisms has diminished the significance of abuse of people with disabilities as a criminal issue. The less-severe-terminology has been explained as a means to make criminal prosecution more likely to succeed by reducing the burden of proof. Below is a table of euphemisms used to decriminalize offenses committed against people with disabilities:¹

Generic Term	Disability Term
Assault	Psychological abuse, threat
Battery	Abuse, aversive treatment
Crime	Infraction
Criminal Offense	Infraction, discrimination
Homicide	Euthanasia, neglect, medical discrimination
Kidnapping	Detention
Murder	Euthanasia, assisted suicide, neglect
Poisoning	Chemical restraint
Police (investigators)	Personnel relations (investigators)
Rape	Abuse, professional misconduct
Sexual Assault	Abuse, professional misconduct
Slavery	Exploitation of labor
Torture	Treatment
Unlawful imprisonment	Restraint, seclusion, detention

¹ Dick Sobsey, *Violence and Abuse in the Lives of People with Disabilities: The End of Silence Acceptance?* (Paul H. Brookes Publishing 1994).

Section 4

The Law and Adjudicated Competency

I. Minnesota Statutes Sections 595.02 and 595.06

Minn.Stat. § 595.02, subd. 1(f) (2008) provides in pertinent part: “Persons of unsound mind . . . are not competent witnesses if they lack capacity to remember or to relate truthfully facts respecting which they are examined.” In addition, Minn.Stat. § 595.06 provides: “When an infant, or a person apparently of weak intellect, is produced as a witness, the court may examine the infant or witness to ascertain capacity, and whether the person understands the nature and obligations of an oath . . .”

II. Two-Part Test for Witness Competency

Minnesota courts have developed a two-part test for witness competency. The test requires: (1) a witness to understand the obligation of taking an oath; and (2) to be capable of correctly narrating the facts to which his or her testimony relates. *State v. Cermak*, 350 N.W.2d 328, 332 (Minn. 1984)(citing *State ex rel. Dugal v. Tahash*, 278 Minn. 175, 177-78, 153 N.W.2d 232, 234 (1967)). The obligation of the oath has been interpreted as primarily an understanding of the necessity to tell the truth. *State v. Levy*, 23 Minn. 104 (1876). Witness competency is a matter of trial court discretion.

The trial judge’s finding of competency will not be reversed unless it is a clear abuse of discretion. *Ellington v. Great Northern Railway Co.*, 92 Minn. 470, 475, 100 N.W. 218, 220 (1904); *Levy*, 23 Minn. at 108.

In *State ex rel. Dugal v. Tahash*, 278 Minn. 175, 177, 153 N.W.2d 232, 234, the Minnesota Supreme Court said:

Determination of a person’s competency as a witness is within the sound discretion of the trial court and is ordinarily made by such preliminary examination of the proposed witness as may be deemed necessary by the court. If it appears from the examination that the witness understands the obligation of an oath and is capable of correctly narrating the facts to which his testimony relates, the witness is competent in fact and should be permitted to testify.

Section 5

POLICE INVESTIGATIONS, PROSECUTION & ACCESS TO ATTORNEYS²

I. Investigator Training

In October 2002, the United States Department of Justice, Office of Crime Victims, published a book entitled First Response to Victims of Crime Who Have a Disability. One chapter is devoted to “Crime Victims Who Have Mental Retardation” and contains nineteen tips on responding to crime victims. Some of the tips include showing respect, avoiding use of the terms retardation or retarded, establishing trust, not assuming incompetence, allowing adequate time and taking breaks, treating adults as adults and not as children, and understanding that people may be open to suggestions.

Additionally, the Department of Justice has issued several publications regarding the Americans with Disabilities Act and information for law enforcement. A videotape is also available that featured scenarios for use in police roll calls. The scenarios included interviewing a witness with developmental disabilities and teaching police officers how to search a suspect who uses a wheelchair. A facilitator’s guide was also included. The videotape has been posted at the Department of Justice’s ADA website (<http://www.ada.gov/policeinfo.htm>) and can be viewed free of charge.

In an attempt to aid police officers in London with investigations involving vulnerable witnesses, officials in London issued a pocket size card for assisting vulnerable witnesses. Over 170,000 copies were distributed to every police officer in England and Wales. London has also issued a Vulnerable and Intimidated Witness Policy that specifically mentions how to work with people with disabilities.

Furthermore, in 2000, South Wales (United Kingdom) published a comprehensive guide for police entitled, *Vulnerable Witness: A Police Service Guide*. Topics in the guide include recognizing who might be vulnerable or intimidated, prompts that can be used to assist vulnerable witnesses, officer conduct, communication issues, recollection of events, witness support and follow-up, support at the trial, flow charts about communication accommodations, support mechanisms, and other special measures that can be taken during a trial.

² Senator Joe Biden introduced The Crime Victims with Disabilities Act in October 2008 to help increase the awareness, investigation, prosecution, and prevention of crimes against individuals with disabilities. States would receive grants and funds would be provided to the United States Attorney General’s Office to collect valid and reliable data about crimes against individuals with disabilities.

II. Decisions about Prosecuting Crimes against People with Developmental Disabilities

Prosecutors may opt not to bring charges where the victim has a developmental disability due to lack of physical evidence and the underestimation of victims with disabilities capacity to act as an effective witness.

In an attempt to aid investigators and prosecutors in Massachusetts, the Essex District Attorney's Office in Massachusetts has published a policy and brochure about investigating and prosecuting crimes against people with disabilities.

Additionally, the Liverpool Social Services Department has developed a witness profiling system to assist people with developmental disabilities who are crime victims. The Liverpool effort began in 1997 when people with disabilities, who had been abused, were denied justice because police and lawyers underestimated their capacity to act as effective witnesses. In order to tackle the issue, a witness profiling unit was created to respond and rectify a pattern and practice of witnesses with developmental disabilities being "screened out." The unit prepares and supports witnesses by preparing a profile that is customized to the specific witness with a disability. The profile addresses accommodations, communication methods, language, pacing, avoiding double negative questions, and nonverbal behavior issues. This witness profiling and the related background are presented in a 2000 article, *Silenced witnesses*.

III. Access to Attorneys

People with disabilities often have limited access to attorneys. They may not have the financial means to retain an attorney, do not know how to go about retaining one, or are not self-advocates. Additionally, attorneys may decline taking cases where the victim has a disability because of the perception their chances of prevailing are unlikely or they do not have the resources or skills to work with clients with disabilities, especially with developmental disabilities.

Section 6

IN THE COURTROOM: ACCESSIBILITY AND WITNESS EXAMINATION

I. Accessibility

Courtroom areas that are not fully accessible to people with disabilities reinforce their being treated as “second class citizens.”

In 2004, the United States Supreme Court held that under Section 5 of the Fourteenth Amendment, Congress has the power to abrogate the States’ sovereign immunity in cases implicating the fundamental right of access to our courts. *Tennessee v. Lane*, 541 U.S. 509 (2004). Access to the courts is a fundamental right. Evidence before Congress in enacting Title II of the Americans with Disabilities Act established that physical barriers in courtrooms and courthouses effectively denied people with disabilities the opportunity for such access.

II. Examination of Witnesses with Disabilities

Research has been conducted on the types of questions to ask a witness with a developmental disability, the process, the timing, and the wording. Almost all of the research has been conducted in the United Kingdom.

In 2001, researchers analyzed the transcripts of sixteen court cases involving witnesses with developmental disabilities compared to sixteen court cases involving witnesses without developmental disabilities. The authors concluded people with developmental disabilities can be competent witnesses in court, but hostile lawyers can use constraining and coercive questions which have a negative impact on the testimony of witnesses with developmental disabilities. The authors concluded that judges should be informed of questioning strategies in advance of trials.³

In a comprehensive report of several studies conducted in the United Kingdom about people with developmental disabilities as witnesses three conclusions were reached:

1. The way witnesses are examined does little to ensure their memories are as accurate as possible;
2. Cross examination is particularly poor for eliciting accurate memory reports, a problem that is likely to compound the general memory problems associated with people with developmental disabilities; and

³ Mark R. Keibell, Chris Hatton, Shane D. Johnson, and Caitriona M. E. O’Kelly, *People with Learning Disabilities as Witnesses in Court: What Questions Should Lawyers Ask?*, *British Journal of Learning Disabilities*, v. 29, Issue 3, pp. 98-102 (Blackwell Publishing, Ltd. December 20, 2001), available at <http://www3.interscience.wiley.com/journal/119024645/abstract?CRETRY=1&SRETRY=0>

3. The accounts of witnesses with developmental disabilities are shorter and more likely to agree with a leading question than those from the general population. Nevertheless, the evidence suggests that people with developmental disabilities can provide reasonably accurate accounts of events they have witnessed if their needs are taken into account, although these accounts are usually less complete and are greatly influenced by the way in which witnesses are questioned.

Similarly, child witnesses can present some unique and troubling issues. The fundamental question and concern is with respect to the possible mental health risk to the child witness, even in non-violent cases. In “The Child Witness in Tort Cases: The Trials and Tribulations of Representing Children” (William Mitchell Law Review, Vol 24, November 1, 1998), Attorney Chris Messerly advises attorneys regarding this dilemma and relies, at least in part, on Rule 1.14 (a) of the Minnesota Model Rules of Professional conduct, which states:

“When a client’s ability to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability, or for some other reason, the lawyer shall, as reasonably as possible, maintain a normal client-lawyer relationship with the client.”

Messerly adds that determinations of competence should be performed by an outside expert, such as a neuropsychiatrist, and not by a lawyer or a judge.

The Israeli Ministry of Justice authored draft legislation that would modify investigative procedures and courtroom testimonial procedures in order to meet the needs of people with developmental disabilities. A number of accommodations were included: Questioning would be completed by special investigators trained to interview people with disabilities; witnesses could testify by closed circuit television; cross examination would occur in the judge’s chambers, and conducted by an intermediary who would translate questions into plain and clear language; and a writ of excusal from testimony could be issued with the special investigator testifying by presenting the videotape of his/her questioning of the witness.

Section 7

ADDITIONAL RESOURCES

I. International Resources

Bizchut, the Israel Human Rights Center for People with Disabilities, *Due Process for People with Disabilities*, available at <http://www.bizchut.org.il/eng/upload/activities/people.html>

G. H. Gudjonsson, G. H. Murphy and I. C. H. Clare, *Assessing the Capacity of People with Intellectual Disabilities to be Witnesses in Court*, *Psychological Medicine* 30:2:307-314 (Cambridge University Press 2000), available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=26215>

Keith Bradley, *Vulnerable Witnesses, A Police Service Guide*, available at http://frontline.cjsonline.gov.uk/includes/downloads/guidance/victims-and-witnesses/Vulnerable_witnesses_police_service_guide.pdf

Mark Kebbell, Christopher Hatton, and Shane D. Johnson, *Witnesses with Learning Disabilities in Court: Full Report of Research Activities and Results*, available at http://www.lancs.ac.uk/fass/ihr/publications/witnesses_report.pdf

Mark R. Kebbell, Chris Hatton, Shane D. Johnson, and Caitriona M. E. O'Kelly, *People with Learning Disabilities as Witnesses in Court: What Questions Should Lawyers Ask?*, *British Journal of Learning Disabilities*, v. 29, Issue 3, pp. 98-102 (Blackwell Publishing, Ltd. December 20, 2001), available at <http://www3.interscience.wiley.com/journal/119024645/abstract?CRETRY=1&SRETRY=0>

Silenced Witnesses, CommunityCare.co.uk (posted April 27, 2000), available at <http://www.communitycare.co.uk/Articles/2000/04/27/24053/silenced-witnesses.html>

UN Convention on the Rights of Persons with Disabilities, available at <http://www.un.org/disabilities/>

Witnesses in Scotland Website for People with Learning Disabilities, available at <http://www.witnessesinscotland.com/wis/341.html>

ICAD: International Center on Abuse and Disability (ICAD provides news and commentary on the problems of violence and abuse faced by people with disabilities. It also includes information on research and resources to help address these problems), available at <http://icad.wordpress.com/>

II. National Resources

Americans with Disabilities Act: Information for Law Enforcement, Department of Justice, available at <http://www.ada.gov/policeinfo.htm>

Disability Rights Education and Defense Fund (DREDF), available at <http://www.dredf.org/>

Massachusetts: <http://www.mass.gov/> search for Essex District Attorney's Office

National Organization for Victim Assistance <http://www.trynova.org/victiminfo/ovc-disabilities/promisingpractices.html>

US Department of Labor <http://www.disabilityinfo.gov> (Community life -> Crime Victims with Disabilities)

Victim Handbook Bulletin

<http://www.ojp.gov/ovc/publications/infores/firstrep/2002/welcome.html>

<http://www.ojp.usdoj.gov/ovc/publications/factshts/disable.htm>

III. Research Data and Other Resources

Hughes, Celia M. Stop the violence, break the silence: Training guide: building bridges between domestic violence and sexual assault agencies, disability service agencies, people with disabilities, families, and caregivers. Austin, TX: Disability Services ASAP, Safe Place, [2000].

Lefkowitz, Bernard. Our Guys. New York, N.Y. Random House, [1997]

McAfee, James K. Assisting victims and witnesses with disabilities in the criminal justice system: a curriculum for law enforcement personnel. Philadelphia, PA: The Institute on Disabilities, Temple University, [2002].

National Online Resource Center on Violence Against Women

http://new.vawnet.org/category/Main_Doc.php?docid=369 (article - *Abuse and Women with Disabilities*)

National Sheriff's Association. First response to victims of crime who have a disability : a handbook for law enforcement officers on how to approach and help crime victims who have Alzheimer's disease, mental illness, mental retardation, or who are blind or visually impaired, deaf, or hard of hearing. Wash. D.C: U.S. Dept. of Justice, [2002].

Representing People with Disabilities. Johnson, Patricia W., Maurer, Nancy M., Surgalia, Kathleen E., Editors. Mental and Physical Disability, Third Edition, 2007 Revision

Roper, Mary Catherine and Ace, Kelly J. Assisting victims and witnesses with disabilities in the criminal justice system: a curriculum for lawyers. Philadelphia, PA: The Institute on Disabilities, Temple University, [2002].

Safety zone: cop talk. Portland, Or: Portland Police Bureau, [1999].

Steinberg, Mary A and Hylton, Judith R. Responding to Maltreatment of Children with Disabilities: A Trainer's Guide. Portland, OR: Oregon Institute on Disability and Development, Oregon Health Sciences University, [1998].

Tyiska, Cheryl Guidry. Working with Victims of Crime with Disabilities, Wash. D.C: U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, [1998].

Vulnerable Witnesses, Their Right to be Heard, University of Derby, London.

IV. Minnesota Resources

Minnesota Center against Violence and Abuse, *available at* <http://www.mincava.umn.edu>

Minnesota Victim Assistance, *available at* <http://www.ojp.state.mn.us/mccvvs>

V. Selected Videos

Access to Justice, Richmond, Va.: Virginia Commonwealth University, [2006].

Disability, Violence, and Survival: A Personal story, Austin, Tex: SafePlace, [2002].

Justice Isn't Served Until Crime Victims Are, Washington, D.C. U.S. Department of Justice. Office for Victims of Crime, [2005].

Mercurio, Robyn Gonzalez. Serving Crime Victims with Disabilities: Meet Us Where We Are, Wash. D.C: Office for Victims of Crime, [2001].

Mercurio, Robyn Gonzalez. Serving Crime Victims with Disabilities: The Time is Now, Wash. D.C: Office for Victims of Crime, [2001].

Safe and Strong: Personal Safety Strategies for People with Developmental Disabilities: Part 1 Safety in the Community, Cicero, NY: Program Development Associates, [2001].

Sonneborn, Lisa. End the Silence, Philadelphia, Pa: The Institute on Disabilities, Temple University, [2002].