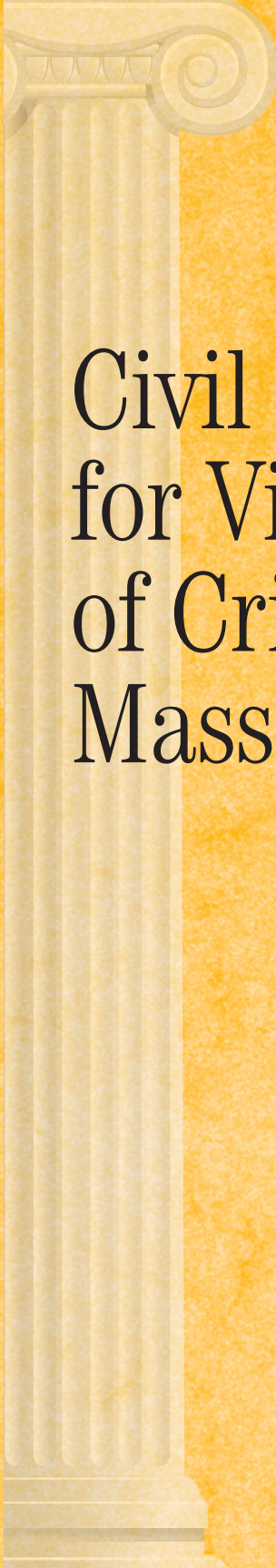


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# Civil Justice for Victims of Crime in Massachusetts

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*The National Crime Victim Bar Association is an affiliate of the National Center for Victims of Crime, a 501(c)(3) not-for-profit corporation.*

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## I. Purpose of This Booklet

Every crime victim has the right to file a civil lawsuit seeking financial compensation from the perpetrator or from other parties whose unreasonable conduct gave rise to conditions which allowed the crime to occur. The purpose of this handbook is to provide victims and service providers with a basic understanding of the civil justice system so that victims might consider this important option and know where to turn for help.

## II. Victims' Financial Losses and Potential Sources of Compensation

More than twenty-three million Americans are victimized by crime each year. The consequences of crime frequently extend far beyond the criminal act. All too often, victims are left with expenses for medical procedures, physical rehabilitation, counseling, lost wages, and property damage. It has been estimated that crime costs society \$450 billion annually.

### Restitution

Restitution is the money a judge orders the offender to pay to the victims to compensate for out-of-pocket expenses related to a crime. Restitution is part of the offender's sentence and can be ordered in both adult and juvenile cases following a conviction or a plea of guilty. The amount of restitution ordered by the judge depends on the victims' expenses which may include insurance deductibles, repairs to damaged property, replacement of lost or stolen property, medical, dental, and hospital expenses, and lost wages or income. A defendant's ability to pay may also be a factor considered by the judge. A criminal court cannot order restitution payments for physical pain, suffering, or emotional trauma. Victims who seek financial compensation for these types of losses must have an attorney pursue a civil lawsuit against the perpetrator or other responsible parties as described in this booklet.

If restitution is ordered, Massachusetts law provides the victim the right to receive from the probation department a copy of the schedule of restitution payments and the name and telephone number of the probation officer or other official who is responsible for supervising the defendant's payments.

Of course, a court order does not guarantee payment of ordered restitution from the offenders. Victims seeking

restitution should provide the prosecutor information on the extent of the loss so that he or she may recommend restitution to the judge. Additionally, the losses of a victim should also be a part of the impact statement given to the judge prior to sentencing.

### Massachusetts Crime Victim Compensation

The Crime Victim Compensation Program assists eligible innocent victims of violent crime and their eligible family members with actual expenses caused by the crime. Crime Victims Compensation is a payer of last resort and does not cover expenses that have been covered by a third-party payer (e.g., insurance, sick leave, worker's compensation). The Massachusetts Crime Victim Compensation Program provides a maximum benefit of \$25,000. Some of the categorical caps are as follows: \$8,000 funeral expenses; \$1,500 for crime cleanup; and \$500 for the replacement, repair or installation of locks or other security devices to promote the victim's safety. Stolen or damaged property, pain and suffering, and attorneys' fees are not covered by the Crime Victim Compensation Program. "Innocent victims" are those who have been physically injured in a violent crime or who suffered extreme psychological trauma and whose behavior did not contribute to the criminal incident.

There are other eligibility requirements, including reporting the crime to the police within five days and cooperating with law enforcement, unless there is reasonable excuse for the delay or failure to cooperate. Applications for compensation must be submitted within three years of the crime. Victims under the age of 18 at the time of the crime may apply until age 21. For more information, please contact the Victim Compensation & Assistance Division of the Office of the Attorney General at (617) 727-2200 ext. 2160 or visit <http://www.mass.gov/ago/public-safety/resources-for-victims/victims-of-violent-crime/victim-compensation.html>.

### Civil Actions May Help Where Restitution and State Compensation Cannot

Restitution and compensation often do not cover a victim's full economic losses, and neither source pays anything for hard to quantify damages such as pain and suffering. A civil lawsuit may provide more complete compensation to a victim. Victims do not have to choose among restitution, compensation, and filing a civil lawsuit. Victims may receive funds from all three sources, although there are checks and balances in each system to ensure that no victim is compensated for the same

loss more than once. Victims may decide to pursue all three financial options at the same time to have the best chance of receiving just compensation from the appropriate source as soon as possible.

### III. Why File a Civil Suit

Some of the benefits of civil actions may include:

- **Control of the Case** - Victims have greater control in a civil suit than in a criminal case because they are a party to the civil case, cannot be excluded from the courtroom, and have final approval of settlement proposals.
- **Compensation** - Civil actions can provide compensation for victims for the monetary damages they suffered, such as medical expenses or lost income. Civil actions can also compensate victims for the emotional damage they have suffered.
- **Justice and Accountability** - Civil suits can hold offenders directly accountable to victims. These suits give victims their “day in court,” regardless of whether there was a criminal conviction or any prosecution at all.
- **Crime Prevention** - In addition to suing perpetrators, victims can often sue other responsible parties. Civil actions provide economic incentives for crime prevention. Businesses such as hotels, apartments, and shopping centers sometimes fail to enact proper security measures because they view such expenses as unnecessary. When businesses are held accountable for safety lapses, proper security becomes cheaper than the cost of defending lawsuits. Crime victims’ civil suits have resulted in increased security protection in public places, better oversight and supervision of daycare facilities, and countless other improvements.

### IV. Comparing Civil and Criminal Justice

Both the civil and criminal justice systems have important roles in securing justice for victims of crime. These systems are not mutually exclusive, so victims do not have to choose one system over the other. Many victims choose to go through both systems. Because the criminal and civil justice systems were designed to address different needs, victims are best served when these systems work together. A significant difference

between the criminal and civil court systems is that in a civil case, the victim controls essential decisions shaping the case. It is the victim who decides whether to sue, accept a settlement offer, or go to trial.

#### The Criminal Justice System

The criminal justice process begins after a crime has been committed and reported to law enforcement. If an arrest has been made and charges have been filed, the offender may be prosecuted. In a criminal prosecution, the crime is considered to be “a crime against the State.” The victim’s role is primarily defined as a witness for the prosecution. Although the prosecuting attorney may be very helpful to the victim and the victim’s family, the prosecutor’s primary responsibility is to represent the interests of the state, not the victim.

The criminal justice process judges the guilt or innocence of accused offenders, and when offenders are found guilty, attempts to punish or rehabilitate them.

#### The Civil Justice System

The civil justice system does not attempt to determine the innocence or guilt of an offender. Offenders are also not put in prison. Rather, civil courts attempt to determine whether an offender or a third party is liable for the injuries sustained as a result of the crime.

A civil court’s finding of liability usually means that the defendant must pay the victim, or the victim’s family, monetary damages. The civil justice system can provide victims with monetary resources necessary to rebuild their lives.

While the criminal justice system holds defendants accountable for their “crimes against the State,” the civil justice system holds defendants who are found liable directly accountable to their victims.

#### Burden of Proof

In the civil justice system, liability must be proven by a fair preponderance of the evidence, which simply means that one side’s evidence is more persuasive than the other’s. In other words, the plaintiff must prove there is a fifty-one percent or greater chance that the defendant committed all the elements of the particular wrong. This standard is lower than the “proof beyond a reasonable doubt” required for a conviction in the criminal justice system. Therefore, it is sometimes possible to find the defendant liable in a civil case even though a verdict of “not guilty” was rendered in the criminal case. (A civil case can also be successful even if the offender was never prosecuted.)

## CRIMINAL CASES

### In a CRIMINAL case

...the goal is to hold the defendant accountable to the State.

...the State prosecutes and controls the case.

...the victim is a witness. Although the victim may have rights to participate in the criminal justice process, the victim does not have the right to direct the prosecution of the case or to veto the prosecutor's decisions.

...the State must prove that the perpetrator is guilty beyond a reasonable doubt.

...the perpetrator is presumed innocent until proven guilty.

...if a perpetrator is found guilty in a criminal court, the perpetrator is subject to punishment, such as probation or jail, and is held accountable to the State. The victim will not obtain money unless the court orders the defendant to pay restitution for the victim's out-of-pocket expenses. The court cannot order restitution for non-economic damages.

...if the perpetrator is found not guilty, the state cannot initiate a second prosecution.

## CIVIL LAWSUITS

### In a CIVIL lawsuit

...the goal is to hold the defendant accountable to the victim.

...the victim initiates and controls the case.

...the victim is a party, and as such, is entitled to all important information relating to the case, and can make decisions about the direction of the case, such as settlement of the claim.

...the victim must prove that it is more likely than not that the perpetrator is liable.

...the civil system does not presume a person is innocent or guilty. The victim and the perpetrator appear as equals.

...if the perpetrator is found liable in a civil court, the perpetrator owes an obligation to the victim, such as money to compensate the victim for economic costs, such as medical expenses, mental health counseling, and lost wages. A civil court can order the perpetrator to pay for non-economic damages, such as pain and suffering, damage to family relationships, and psychological injuries. The civil court can also order punitive damages.

...the victim can sue the perpetrator in a civil court regardless of whether the perpetrator has been found guilty in a criminal prosecution.

A good example of this principle is the O.J. Simpson case. Simpson was prosecuted for the murder of his former wife, Nicole Brown, and Ronald Goldman. The jury in the criminal case found Simpson "not guilty" of the murders. Despite Simpson's acquittal, the victims' families filed and won a civil wrongful death lawsuit against Simpson. The jury in the civil case awarded the victims' families monetary damages. While a criminal conviction may increase the chances of a perpetrator being held civilly liable, it is not a requirement for bringing a civil action.

## V. Parties in a Civil Suit

### Plaintiffs

The main parties in a civil suit are called plaintiffs and defendants. Plaintiffs are the individuals who file the suit. They control the action, are entitled to all information relating to the case, and make decisions, such as whether to accept a settlement. Plaintiffs in a civil suit can be the victims, survivors of the victim, or persons responsible for the victim.

### Family Members

Family members who might bring a civil suit include the parents, spouse, children, or siblings of the victim.

## Defendants

The defendants are the parties against whom a civil action is brought. The defendants in a civil suit can be the perpetrators, individuals who have assisted the perpetrators, or individuals or organizations whose negligence has in some way contributed to the commission of the crime known as “third parties.”

## Offenders

The offenders are the individuals who committed the original offense, whether or not they were found guilty by a criminal court.

## Third Parties

In some civil cases, a “third-party” defendant may be held liable. Third-party defendants are not the persons who actually commit the crimes, but instead are those parties who may have contributed to or facilitated them. A few examples of possible third-party defendants in a victim’s case would include:

- **Landlords who do not provide adequate security measures**, such as locks on doors and windows and adequate lighting;
- **Colleges that fail to provide adequate security** for students or fail to notify students of campus assaults, leaving students vulnerable to victimization;
- **Shopping malls that do not employ security guards** or take other necessary measures, despite a likelihood of criminal attacks on customers;
- **People who allow children access to firearms** or other dangerous instruments when the children, in turn, use the weapons to injure other people;
- **Childcare centers, schools, and churches that do not properly check the backgrounds of their employees**, or simply transfer employees to other locations following allegations of abuse; or
- **Tavern owners who serve alcohol to known alcoholics or to minors** who subsequently injure other people in drunk driving crashes.

## VI. Statutes of Limitations

The law sets time limits for filing civil suits, called “statutes of limitation.” Any time after the expiration of the statutory period, unless a legal exception applies, the right to file a civil suit is “time-barred” and cannot proceed.

Although people often speak of “the statute of limitations,” there are many statutes which apply limitations periods to different types of civil actions. Sometimes it is difficult to keep track of the various statutes and their exceptions. **Therefore, a qualified attorney should be consulted to determine which statute applies and to help preserve your right to recover damages.**

In Massachusetts, the statute of limitations applicable to actions against a perpetrator for personal injury is 3 years; that is, a lawsuit must actually be filed before 3 years from the date of the injury-producing event (M.G.L.c. 260 § 2A ).

For claims for wrongful death, the statute of limitations is 3 years. (M.G.L.c. 229, § 2).

The statute of limitations for child sex abuse was amended in 2014. Now, an action of tort alleging that the defendant negligently supervised a person who sexually abused a minor or that the defendant’s conduct caused or contributed to the sexual abuse of a minor by another person must be commenced within 35 years after the acts or 7 years after the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by such act, whichever is later. The time limit to commence such an action is tolled until a child reaches the age of 18. (M.G.L. c. 260, sec. 4c1/2).

Public employers are liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting in the scope of his or her office or employment. (M.G.L.c. 258 § 2). Before a lawsuit can be filed, the injured person must present a written claim for damages within 2 years. The injured person cannot file a lawsuit until the written claim has been denied in writing by the executive officer of the public employer, or if no denial is made, until 6 months after the claim is presented. The lawsuit must be filed within 3 years of the date that the cause of action accrued. (M.G.L.c.258 § 4). Intentional wrongdoing, including assault, battery, false arrest, intentional mental distress, and the like, by the public employee is not covered. (M.G.L.c. 258 § 10(c)). Moreover, damages for claims against public employers are capped at \$100,000 and punitive damages are not available. (M.G.L.c. 258 § 2).

There are a number of oftentimes complicated issues that one must deal with when asserting a claim against a governmental body. Claims involving a governmental body

or employees of a governmental body should be dealt with promptly and properly to avoid disallowance of a claim.

## VII. Types of Civil Lawsuits

There are numerous claims under which civil actions may be brought. They include wrongful death, assault and battery, intentional or negligent infliction of emotional distress, and negligence. Some of these claims are described below.

In civil cases, the crime or wrongful act is referred to as a tort. For most criminal offenses, there is a corresponding tort for which a crime victim may bring a civil suit. Some examples of torts include:

- **Assault** - putting the victim in fear of immediate injury while the perpetrator has the ability to inflict such injury.
- **Battery** - intentional physical contact with a person without that person's consent. Battery includes the crimes of sexual battery, rape, molestation, fondling, forcible sodomy, malicious wounding, and attempted murder.
- **Wrongful Death** - a death caused by another person which occurs without justification or excuse, including murder, manslaughter, and vehicular homicide.
- **False Imprisonment** - holding a victim against his or her will for any amount of time, no matter how brief. This often occurs in rape and kidnapping situations.
- **Intentional or Reckless Infliction of Emotional Distress** - causing a victim emotional distress or anxiety through extreme and offensive conduct. This is frequently seen in stalking cases.
- **Fraud** - an intentional misrepresentation of facts made to deceive the victim, resulting in damages. This is often seen in white collar or economic crimes such as criminal fraud, telemarketing schemes, or racketeering.
- **Conversion** - the theft or destruction of personal property or money. This includes larceny, concealment, and embezzlement.
- **Negligence** - the failure to use such care as a reasonably prudent person would use under similar circumstances, when such failure is the cause of the plaintiff's injury. Examples include negligent security and negligent hiring.

## Common Defenses

There are several defenses that defendants of a civil lawsuit may use in an effort to avoid civil liability. These defenses include: self-defense, comparative negligence, assumption of risk, and immunity.

- **Self Defense** - perpetrators claim their actions were justified because they were defending themselves or someone else.
- **Comparative Negligence** - the defendant claims that the victim's negligent conduct caused or contributed to the victim's injuries. In Massachusetts, if the injured person shares less than 50% of the fault, the amount of money a successful plaintiff collects will be reduced by the plaintiff's proportional share of the blame for the injury. If the injured person shares greater than 50% of the fault, then damages are eliminated.
- **Assumption of Risk** - defendants claim they should not be held liable because the victims voluntarily and knowingly exposed themselves to the danger.
- **Immunity** - under certain circumstances, the law provides immunity from civil liability to government agencies, government employees, and other parties.

## VIII. Victim Privacy

Attorneys may employ various methods to protect victims' privacy. Victims' names and other personal information can be kept out of public records by filing suits under pseudonyms, such as Jane or John Doe. Victims can also use confidentiality agreements with the offender, or third-party defendant; file cases "under seal" (closed to the public); and videotape depositions. Each of these techniques allows victims to fight for their rights in a safer manner.

## IX. Filing a Civil Lawsuit

A victim begins the civil case by filing a document that in Massachusetts is called the complaint. This document sets out the facts of the case and the legal claims being made. Defendants then have a certain amount of time to file a document called the answer. In this, defendants set forth their version of the facts and any defenses which apply. As a part of the process of the case, either side can request information from the other side. (For more information, see "Discovery.") In addition, either party can file motions asking the court to throw out certain claims or defenses or dismiss the entire case.

## X. Discovery

In a lawsuit, each side can ask the other side for information and documents relating to the case. This process is called discovery. Civil discovery involves investigations of the facts and circumstances of the case, interviewing witnesses, obtaining relevant documents, and questioning parties and other witnesses under oath. The investigation may include a review of police records, informal interviews of eye witnesses, and photographing the location of the crime.

### Request for Production of Documents

Document requests are a formal procedure by which one side can ask the other side to produce documents and other materials relevant to the case. Requests for production of documents must be answered in a specified amount of time.

### Interrogatories

Interrogatories are a list of questions sent to the opposing party. They are usually limited in number by the court rules of the jurisdiction in which the case has been filed. Both requests for production of documents and interrogatories must be answered in a specified amount of time.

### Depositions

A deposition is a proceeding in which a party's attorney has the opportunity to question opposing parties and potential witnesses under oath. Deposition testimony is transcribed. The transcripts may be used at trial for various reasons, including if the witnesses are no longer available or if the witnesses offer trial testimony which conflicts with the deposition.

After documents have been produced, interrogatories have been answered, and depositions have been completed, each side should know much more about the other side's case. At this point, the parties sometimes engage in negotiations which lead to settlement of the case.

## XI. Trial

If a settlement is not reached, the case proceeds to trial. A plaintiff wins at trial if the plaintiff has met his or her burden of proof and the defendant has not successfully asserted a defense to the claim. If the plaintiff wins, the judge or jury awards damages and the matter is over unless the defendant appeals. A defendant wins at trial

if the plaintiff has not met the burden of proof or the defendant has successfully asserted a defense. If the defendant wins, the case is finished unless the plaintiff appeals.

## XII. Damages

Damages refers to the amount of money awarded to the plaintiff. There are three main types of damages that can be awarded in civil cases: special damages; general damages; and punitive damages. Special damages (also known as economic damages) are direct damages that must be proven with certainty such as medical bills, lost wages, and other expenses and are awarded to "pay back" the victim for actual monetary damages they suffered. General damages (also known as non-economic damages) are more discretionary and include damages for physical and emotional pain and suffering and the amount of general damages are typically left to the conscience of the jury. Punitive damages are rarely awarded, but in special circumstances, punitive or "vindictive" damages are awarded to punish the defendant.

## XIII. Judgment and Enforcement

A victim contemplating a civil lawsuit should understand that obtaining a civil judgment is only half the battle. In many cases, it may be difficult to collect the money awarded by the court. Some defendants do not or cannot pay judgments entered against them. However, there are potential sources of payment, such as insurance or various types of income, which should always be considered.

## XIV. When a Perpetrator Sues a Victim

On very rare occasions, offenders may sue or counter-sue victims. Defendants may take this step to harass or intimidate victims into dropping charges or withdrawing their civil suits.

Sometimes these suits are filed in response to the victim's civil complaint, along with answers to the complaint. Victims need to know that truth is an absolute defense to defamation and slander, which are the most common civil claims filed by perpetrators.



## XV. About Lawyers

### Finding a Lawyer

The National Center for Victims of Crime established the National Crime Victim Bar Association (NCVBA) to facilitate civil suits by crime victims. The NCVBA offers victims free referrals to attorneys for consultation through its Attorney Referral Service (ARS).

Victims seeking more information or attorney referrals should call the NCVBA at 202-467-8716 or Toll Free at (844) LAW-HELP.

Whether you select an attorney through the NCVBA ARS or another avenue, carefully consider who you retain as your attorney.

### Selection Considerations

More attorneys than ever are representing crime victims in civil lawsuits, though relatively few specifically list themselves as “crime victim” attorneys. Typically, these attorneys can be found handling premises liability, personal injury, wrongful death, or professional malpractice claims on behalf of plaintiffs. Finding qualified attorneys to represent victims in civil lawsuits often requires diligence.

A productive attorney-client relationship is based on the ability of both sides to communicate fully and effectively with each other. Although relating sensitive details can be difficult for crime victims, they should feel as comfortable as possible in fully disclosing all details and information to their attorneys. Attorneys should be able to effectively explain all aspects of legal proceedings to victims, and they should be responsive to victims’ needs and requests.

Victims should fully understand all the details of any retainer agreement (contract to hire the attorney) prior to signing it. If victims have questions, they should feel comfortable discussing them with their attorneys. If questions persist, local bar association personnel may be able to explain laws, regulations, and common practices pertaining to contracts with attorneys.

Victims should be clear about what they wish their attorneys to do, and attorneys should be clear about what services they are providing. Understanding each other’s expectations—as well as avoiding unrealistic expectations—can minimize the possibility of disappointment and frustration.

Victims should feel free to consult with several lawyers before selecting one. Lawyers are professionals, and it is good consumer practice to obtain a second opinion in selecting professional legal counsel.

Victims should cooperate, as fully as possible, with their attorneys. Such cooperation is necessary for successful representation of their interests. By the same token, victims have the right to expect their attorneys to be understanding, respectful, and responsive to their needs. Attorneys have the right to expect their clients to be honest and willing to participate in building their own cases.

### Information Your Attorney May Need

When crime victims consult with an attorney, they should be prepared to answer detailed questions about the case that will allow the attorney to conduct a proper evaluation. Attorneys might request information such as the following:

*About the Criminal Event:*

- Date and time of criminal occurrence;
- Location of events, addresses, and description of premises;
- How the perpetrator gained access to the victim;
- Identification of witnesses to any stage of the occurrence;
- Identification of known physical evidence;
- Whether a police report was filed, and if so, identification of: the police department where the complaint was filed, the detective or officer assigned to the case, the complaint or report number, and statements taken as part of an investigation;
- Whether there was or is a criminal case, and if so, identification of: the prosecutor, current stage of criminal case, and description of the case investigation conducted; and
- If a third party might bear some liability for the occurrence of the crime, details surrounding the crime and where it was committed become increasingly important, such as whether there was any security.

### *About the Perpetrator:*

- If the perpetrator is known to the victim: nature of relationship with victim, perpetrator's name and aliases, address, date of birth and Social Security number, employment information, and any information known about the perpetrator's assets and insurance coverage;
- If the perpetrator is not known to the victim: physical description of the perpetrator, identifying features;

### *About Damages Sustained by the Victim:*

- Medical information: degree of physical, emotional, and psychological injuries sustained, and extent and cost of anticipated treatment;
- Identification of hospital, physician services;
- Identification of property damage;
- Lost amount of victim's or victim's spouse's time from work, lost wages, money recouped from workers' compensation, or state or private disability insurance; and
- Source of funds to cover damages or losses such as insurance (policy number), crime victims' compensation, Medicare, and restitution.

### **Fees and Retainers**

Usually, the types of civil cases brought by victims of crime are billed by attorneys on a contingency fee basis. This means the attorney is only paid if the victim is awarded a monetary settlement or judgment. Attorneys will be paid a predetermined percentage of the total award.

There are also costs, such as filing fees, deposition fees, and service of process fees the victim might be responsible to pay before a suit is filed or during the course of the suit. Some attorneys require that plaintiffs pay a retainer fee. A retainer is money paid to an attorney, but kept in a special account from which the above-mentioned costs can be paid. Money not used in the retainer may be returned to the client at the conclusion of the suit.

## **XVI. Conclusion**

The civil justice system offers victims of crime another opportunity to secure what they seek most—justice. Regardless of whether there was a successful criminal prosecution or any prosecution at all, victims can bring their claims before the court and ask to have the responsible parties held accountable. While money awarded in civil lawsuits can never fully compensate victims for the trauma of their victimizations or the loss of loved ones, it can provide valuable resources for crime victims to help rebuild their lives.

For more information about civil justice for crime victims, or to order more copies of this booklet, please contact the National Crime Victim Bar Association.