



**Legal Assistance
for Crime Victims**
An OVC Capacity Building Initiative

Protecting Victims' Rights Pretrial: Defending Against Subpoenas & Other Invasions of Privacy

Presented in collaboration with the National
Crime Victim Law Institute



Learning Objectives

- Identify sources of a victim's privacy rights.
- Describe at least one method of protecting the victim's identity.
- Articulate some key grounds for resisting "discovery" requests for the victims.

When Might Privacy Concerns Arise?

Some Examples

Right Away

- Police reports and indictments

Pretrial “Discovery”

- Interviews / depositions/victim’s records

Trial

- Cross-examination — privileged information and prior sexual history

Post-conviction

- Victim impact statement

Throughout

- Open court / public records / media access

Where To Find Right to Privacy

United States Constitution

State Constitution

State
statutes/rules

Federal
statutes/rules

Protecting the Victim's Identity: *Overview of Competing Rights*

Defendant's and the Public's Rights

- ❑ Open courts under the 1st, 6th, and 14th Amendments.
- ❑ Defendant's right to be informed of the nature of the charges against him under the 6th and 14th Amendments.
- ❑ Defendant's protection against double jeopardy.

The Victim's Rights

- ❑ Privacy.
- ❑ Right to access courts protected by 1st and 14th Amendments as well as the Privileges and Immunities Clause.
 - Chilling effect.

Poll #1

Poll #2

Protecting the Victim's Identity: *Use of Pseudonyms/Initials*

Charging Stage

- ❑ An indictment is sound if it—
 - Contains the elements of the offense charged and fairly informs a defendant of the charge(s) he/she must defend against; and
 - Provides a bar to future prosecutions for the same offense.

Pseudonyms/Initials: *Weighing Rights*

❑ **Child victims**

- Victims are often allowed to proceed anonymously as a matter of course, without analysis.

❑ **Adult victims**

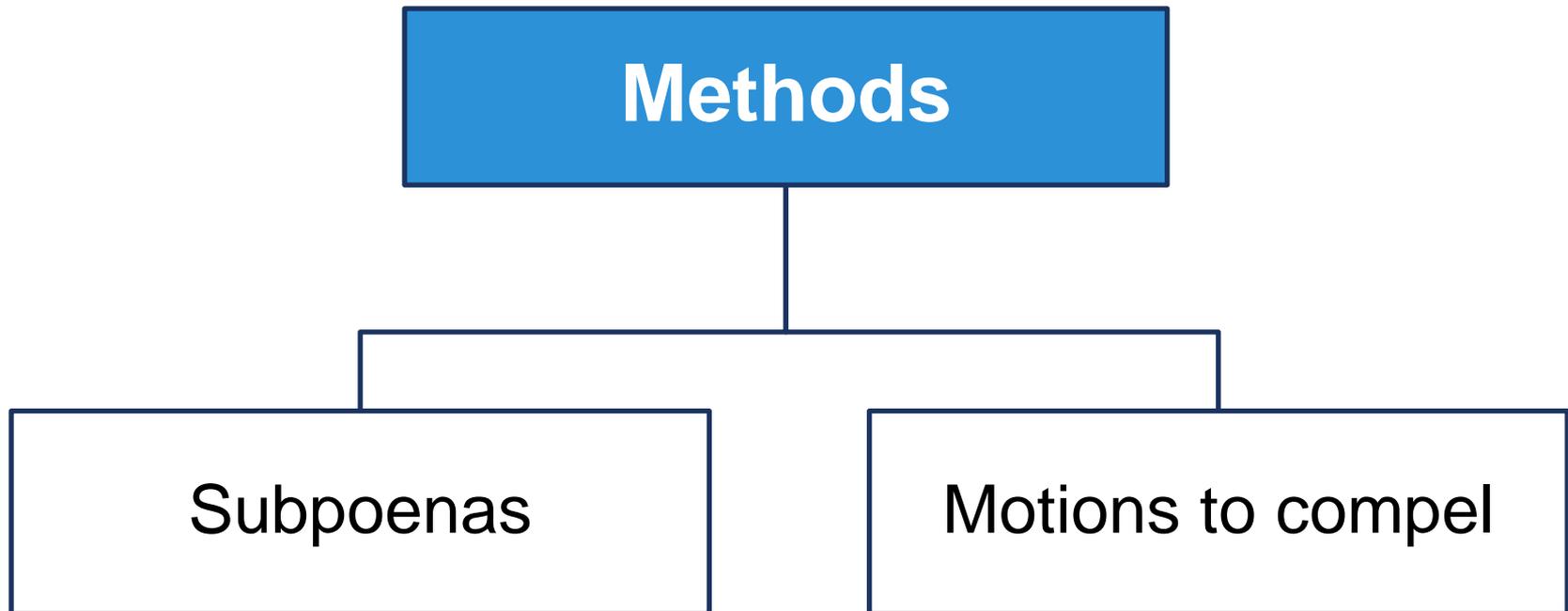
- Some victims are also allowed to proceed anonymously as a matter of course up through trial.
- Courts may employ a weighing test, weighing the right to open access against the victims' privacy rights.

Remedying Violations of Victim's Privacy: *Redaction*

Practice Pointers: *When Pseudonyms or Anonymous Initials Have Not Been Used*

- ❑ Redact or ask the court to redact records that would permit people to identify the victim.
- ❑ Seek substitution.
- ❑ If records already made public:
 - Still seek redaction and substitution.
 - Send letter to search engines and other online databases.

“Discovery” of the Victim’s Records



Poll #3

Participant Poll:

In your experience, what records, items, or information has been the subject of subpoenas issued by criminal defendants?

Two Types of Subpoenas

Direct Subpoenas

Seek information from the “victim” (which, by definition, may include the victim’s parents, family members, or other representatives).

May be sent to the victim’s attorneys.

Third Party Subpoenas

Third parties may include, but are not limited to—

- Cellular phone providers.
- Schools.
- Hospitals / Clinics.
- Mental health providers.
- Employers.
- The victim’s family members.

Motion To Quash

❑ Federal law

- Fed. R. Crim. P. 17(c)(2) (“On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.”)

❑ State law

- Generally similar statutes.
- Consider also the victim’s constitutional or statutory victims’ rights.

Motion To Quash (continued)

Bases To Quash

- Defendant has no constitutional right to pretrial discovery.
- Victim's right to refuse discovery.
- Victim's right to be free from harassment or abuse /
Relevance.
- Privacy rights.
- Privileges & other statutory protections.

Bases for Defendant's Opposition

- Defendant's constitutional right to due process, which includes—
 - Right to a fair trial.
 - Right to present a defense.
- Defendant's constitutional right to compulsory process.
- Defendant's constitutional right to confrontation.

Bases to Quash: *No Federal Constitutional Right to Pretrial Discovery*

- ❑ Defendants have “no general federal constitutional right to discovery in a criminal case, and *Brady* did not create one.”

See Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

- ❑ Defendants have no federal constitutional right to pretrial discovery under the Confrontation Clause.

See Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987).

- ❑ Defendants have no federal constitutional right to pretrial discovery from *non-government* record holders under either the Compulsory Process Clause or the Due Process Clauses.

See Ritchie, 480 U.S. at 55, 57-58.

Bases To Quash Subpoena: *Right To Refuse Discovery*

A growing number of states' victims' rights laws explicitly grant crime victims the right to refuse discovery requests from defendant or persons acting on defendant's behalf.

Bases To Quash Subpoena: *Relevance / Harassment*

Defendant must demonstrate, among other things, that there is a sufficient likelihood that the requested records are relevant, exculpatory, and admissible.

See United States v. Nixon, 418 U.S. 683, 699-70 (1974).

- No “fishing expedition” allowed.
- State laws vary on how much showing is enough.
- Privileged records subject to additional protections.
 - Should be no disclosure, even if showing of relevance.
 - Avoid unnecessary *in camera* review.

The jurisdiction may recognize a victim’s right to be free from intimidation and harassment.

Bases To Quash Subpoenas: *Privacy*

- Privacy rights arising under the U.S. Constitution.
- Privacy rights arising under a state constitution.
- Privacy rights arising under federal or state statutes/rules.

Poll #4

Bases To Quash Subpoena: *Privileges*

Federal Law

- Attorney-Client
- Spousal
- Psychotherapist-Patient

State Law (Varies)

- Attorney-Client
- Spousal
- Psychotherapist-Patient
- DV-SA Counselor-Victim
- Physician-Patient (often just civil)
- Clergy-Penitent
- School-Student
- Accountant

Bases To Quash: *Other Possible Statutory Protections*

- ❑ Federal Educational Rights and Privacy Act (FERPA).

- ❑ Health Insurance Portability and Accountability Act (HIPAA).

- ❑ Violence Against Women Act (VAWA).

- ❑ Electronic Communications Privacy Act (ECPA).

Counter Arguments

- ❑ Defendant's constitutional right to due process, which includes—
 - Right to a fair trial.
 - Right to present a defense.
- ❑ Defendant's constitutional right to compulsory process.
- ❑ Defendant's constitutional right to confrontation.

Additional Points re: Third Party Subpoenas: *Rights to Notice and To be Heard*

- ❑ **Federal:** Rule 17(c)(3) of the Federal Rules of Criminal Procedure — a subpoena seeking the production of personal or confidential information about a “victim” requires:
 - Service on a 3rd party “only by court order” and
 - Notice to the victim with an opportunity to be heard before the court enters the order unless “exceptional circumstances.”

- ❑ **States:** State laws also may explicitly require notice and an opportunity to be heard. See, e.g., Ariz. Rev. Stat. § 13-4071; Utah R. Crim. P. 14(b).
 - Other victims’ rights provisions may also support requiring notice and opportunity to be heard.

Unknown Third Party Subpoenas

Practice Pointers: *Unknown Third Party Subpoenas*

What if you *do not know* about the subpoena and the requested records have already been produced?

Unknown Third Party Subpoenas

Court has records

- Move the court to return the records to the victim.
- Exclude evidence from the proceedings.
- Argue that even *in camera* review is a privacy invasion (with privileged documents).

Defense has records

- Demand turn over of the documents to the victim.
- Exclude evidence from the proceedings.
- Remove defense attorney from case.
- Seek sanctions.
- Ethics violations.

Third Party Subpoenas: *A Recent Case Example*

QUESTIONS?