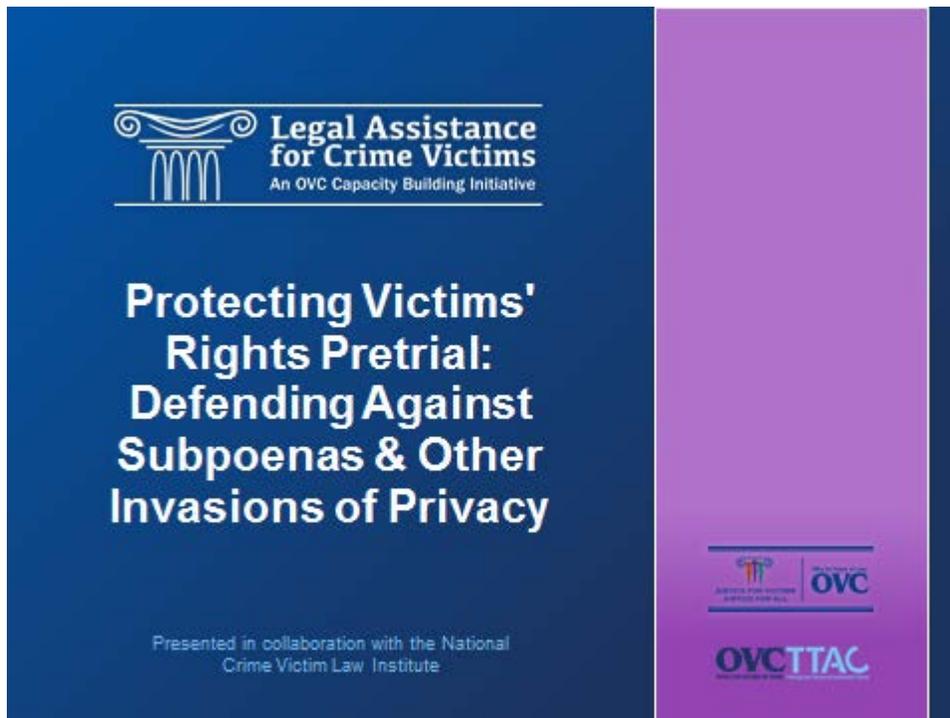




**OVC
Webinar Transcript**

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

July 10, 2013



Welcome

Meg Garvin: Good afternoon, everyone. My name is Meg Garvin. I am the Executive Director of the National Crime Victim Law Institute. And I am here to welcome you to our Webinar. And we will be together for the next 75 minutes talking about *Protecting Victims' Rights Pretrial: Defending Against a Subpoena and Other Invasions of Privacy*. There are approximately 250 of you joining us from across the country, so we are really excited for this training today. I am going to be joined by Amy Liu as a co-presenter on this Webinar. Amy Liu is a lawyer here at the National Crime Victim Law Institute (NCVLI), and she has been with us for just over 3 years. And she brings a wealth of expertise from having done federal clerkships before coming to us, as well as a myriad of other careers in the law. And in her time with us at NCVLI, she has worked on privacy cases in state and federal courts, worked on trainings on this issue, and has helped us file amicus briefs at pretty much every level of court, so you are in for a treat with her being one of the presenters.

Meg Garvin: So really excited to talk about privacy with you. Sadly, an hour is really far too little time to talk about this topic. But we are going to do our best with it. Ideally, we all get about 3 days of training on privacy because it is so fundamental to crime victims. But what we are going to give you are some of the basic tools to talk about how you can protect victim privacy of the clients that you are working with.

Meg Garvin: I want to pause before we launch, and talk about the Legal Assistance for Crime Victims OVC Capacity Building Initiative. This Webinar is part of that Capacity Building Initiative and NCVLI is working in collaboration with OVC TTAC to implement the vision of OVC to really grow the Nation's capacity to provide pro bono and low cost and no cost legal services to victims of crime to protect their rights in civil, criminal, administrative, in every part of the lives of crime victims that get touched and have legal implications. We want to make sure

they have access to well-trained lawyers out there. So we are really excited at OVC's leadership on this and our collaboration efforts with OVC TTAC to help implement that vision, and this is just one piece of that. So we thank you for joining us and hope that you will participate as we go.

Meg Garvin: So a few administrative things before we really get into the meat of the conversation. The way this will work is you are all muted right now, but you can ask questions as you go and participate. And on the next slide I will show you exactly how you can participate actively in the conversation as we go. The questions that you pose we will hold until the end, but we will make sure we get to those. You will then, after this Webinar, receive an e-mail with the PowerPoint slides, and the recording of this Webinar will be available online on both NCVLI's Website, as well as OVC TTAC's Website afterwards, so that you can listen to it again if you would like. And finally, we really ask you to provide feedback. After this is all done, you will receive two surveys on this. The first one will happen automatically when you shut down out of the Webinar. It is very short. It should take you just maybe a minute to complete. And the second one will come as an attachment with a link in the e-mail that we send you. And we ask you to fill in both of those. All told, it will be 2 to 3 minutes of your lives, but it will really help us with this Capacity Building Initiative to make sure we are moving in the direction you need us to. And I am sorry, one last thing, you will also in the e-mail receive a certification of completion. Many of you, we know, need CEU or CLE credits. And you will have attached to the e-mail a certificate of completion. There is a blank spot on that certificate of completion where you need to fill in a completion code to demonstrate that you did stay with us for the full 75 minutes. That completion code will come up on your screen as the last slide of this presentation. So in order to have the certification of completion completed, you have to stay with us for the whole 75 minutes.

Meg Garvin: So next thing I want to show you is just quickly how you can you can participate actively. We will have several polls throughout the training. But if you want to ask questions as you go, you can see a screenshot there up on your screen now. Over on the side bar, there is a box for questions. You can type in your question for us here at NCVLI, and those will be funneled to both Amy Liu and myself. And we will answer those either as we go, if it is part of the flow of what we are doing, or at the end of the Webinar. We will save time to try to get to as many questions as possible. If, for some reason, we do not get to your question, we will respond to you afterwards.

Meg Garvin: And the last bit of technical on all of this is to tell you how, if you are having technical difficulties, what you need to do. Do not contact Amy or myself. We are not the technical folks. Go to www.gotowebinar.com and there is a telephone number on your screen now. I will leave it up for just a second so that you can jot it down. If you are having actual technical problems, contact Go To Webinar and their expert folks can help you.

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.

Meg Garvin: Okay, so what are we going to try and learn in the next, now 70 minutes? We have three learning objectives for you today. We are going to work through identifying the sources of victims' privacy rights. In this short amount of time, we cannot dig too deep. We are going to give you categories of where you can find those rights legally, and examples of those rights legally. But the idea is so that you can go back and hunt around in your own jurisdictions and find (audio breaks up temporarily). We are going to make sure you can identify at least one method of protecting a victim's identity. We hope you learn more than that, but we are hoping you will walk away with at least one. But ideally, you are going to have a handful of tools that you can use to protect the victim's identity. And then we are going to give you some key grounds for resisting "discovery". And I am going to explain when it comes back around to me later in the presentation why that word "discovery" is in quotes. But those quotes are there for a reason and we are going to talk through that. So these are the three things that we are going to try and cover today. And hopefully, you will walk away with some tools to help better protect 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

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Meg Garvin: So why are we spending – why did I say we could spend 3 days on this? Why are we spending a full 75 minutes on it? Well, it is because privacy concerns really arise in a lot of ways during a criminal case. And I am going to put up on the screen here in just a second some of those times and places in which privacy arises for victims. The first one is really when police reports are first sent and filed. So where does privacy arise? Right away. In police reports and indictments. We know that the moment you report a crime, oftentimes the victim’s name is put down right in that police report. So we need to be paying attention to these issues right from the get go. And Amy is going to talk a little bit when she gets there about use of pseudonyms and how that interacts with police reports and indictments.

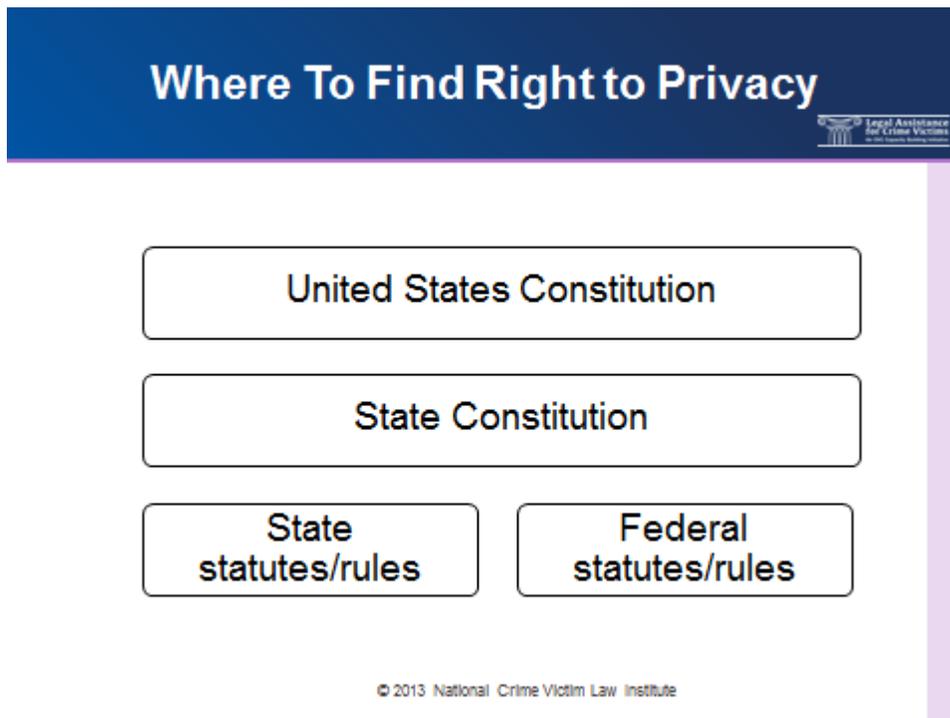
Meg Garvin: And then we all know about pretrial “discovery”. And again, there are the quotations that I will spend more time on later. But these are interviews, depositions, requests and subpoenas for victims’ records. Those are things that we see most often, but we know privacy is at issue there.

Meg Garvin: Then there is trial. Obviously, at trial there are different moments that we have to protect. We may have to keep the media out. We may have to be proceeding by pseudonym at trial. We may have a myriad of things that happen, but then there is also cross-examination and examination. And sometimes, even well-intentioned direct examination can lead to the release or revelation of privileged or private information. So we have to be really vigilant, even at trial.

Meg Garvin: And then at post-conviction. We simply cannot forget that for victims, this is not over after trial. The outcome of the trial is one piece of the puzzle or one part of the story for survivors. Post-conviction, not only on the screen it says victim impact statements, but post-

conviction, there are myriad of times when victim privacy comes into play. And we are going to talk just about how we can use pseudonyms a little bit to protect in those moments.

Meg Garvin: And then, obviously, throughout. There is the open court proceedings, public records requests. Now we have Google and online moments that we have to pay attention to. So, really, the punch line of this slide is that victim privacy is ever present. There is a wonderful quote that NCVLI uses quite often, which is, “Privacy is like oxygen for survivors.” And I think that is why we are spending this hour together and why we think it should be a 3-day training, but really, it is that it is ever present and it is critical to the surviving of folks who have suffered a trauma from victimization. So that is when privacy might arise. And so we are going to jump right into this. So what can you do about it? Where are victims’ rights? Where can you find the law? And so I am going to turn it over to Amy Liu to take over on this part.



Where To Find Right to Privacy

Amy Liu: Hi everyone. Can you hear me? Let us go ahead and start with where to find privacy. So where to find privacy. So when we help a victim assert a legal right, we need to know the source of the right, and that allows us to properly support our legal arguments for when the issue litigated in court. And before we go into the actual sources, I just want to remind folks that legal rights are not always explicitly spelled out in our laws, in our constitutions, and our statutes, or our rules. And a lot of times, courts interpret existing constitutional, statutory, or rule-based protections to find that they implicitly provide a right. So what this means is that if you are the practitioner, you should never assume that a legal right does not exist or cannot be supported by the law simply because a particular word is not spelled out on the law in the books. So the right to privacy is actually a great example of this. Courts have concluded that the right exists, either

explicitly in the laws or implicitly under the federal Constitution, many state constitutions, federal and state statutes, and federal and state rules.

Amy Liu: For example, in the United States Constitution, the word privacy is not found anywhere. But we all know that the Supreme Court has interpreted the Constitution in several cases as including the right to privacy. And one of the key cases is *Roe v. Wade*, where the court stated that a right of personal privacy or a guarantee of certain areas or zones of privacy does exist under the Constitution. And another key case is *Whalen v. Roe*, where the court said that the privacy right encompasses an individual interest in avoiding disclosure of personal matters, as well as the interest of independence in making certain kinds of important decisions.

Amy Liu: Now, state constitutions also may implicitly grant a right, but the fact of the matter is several states, actually, explicitly provide for a right to privacy for all persons. Those states include Alaska, Arizona, California, Florida, Hawaii, Illinois, and a number of other states. For example, in California's Constitution, they have a separate right to privacy in Article 1, Section 1. It says, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending the life and liberty, acquiring and possessing or protecting property and pursuing and obtaining safety, happiness, and privacy." State courts have also, like the Supreme Court, recognized the right to privacy may be implied in their state constitution, even when they do not have the actual word.

Amy Liu: Privacy rights can also be found in state statutes and federal statutes. On the federal side, for example, in the Crime Victims' Rights Act, the victims have the right to be treated with fairness and with respect for the victim's dignity and privacy. And courts have interpreted this provision as allowing for the redaction of victims' names and other procedures to protect the victim's privacy. We have the Child Victims and Child Witnesses Rights Act, and that also provides more specific privacy protections for children, and those protections include requiring all documents that disclose a name or other information concerning a child victim be put in a secure place, limiting disclosure of the information, allowing the filing under seal, and allowing for courtroom procedure, and many other protective measures. And do not forget the federal Rape Shield Law, Federal Rule of Evidence 412. It also recognizes sexual assault victims' right to privacy. And similarly, state statutes may also provide for explicit or implicit privacy rights to protect crime victims. And, of course, there is case law, often where you find support for arguing the existence of an implicit right to privacy.

Amy Liu: So a practice pointer to take away here when talking about where to find right to privacy, as you are reviewing your jurisdiction's laws, when you are litigating this, it is always important to assert the victim's federal Constitutional right to privacy, even if there are no cases that are, perhaps, directly on point to an issue that you are litigating, because in the hierarchy of laws, the U.S. Constitution trumps other laws. And now keep in mind, as I mentioned, that some state constitutions' right to privacy may be more explicit, may be more protective, but even in those instances, you still want to assert the federal Constitutional right, either in your legal briefs or arguments or you preserve the issue for appeal in case you lose at the trial court level.

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.

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Protecting the Victim's Identity: Overview of Competing Rights

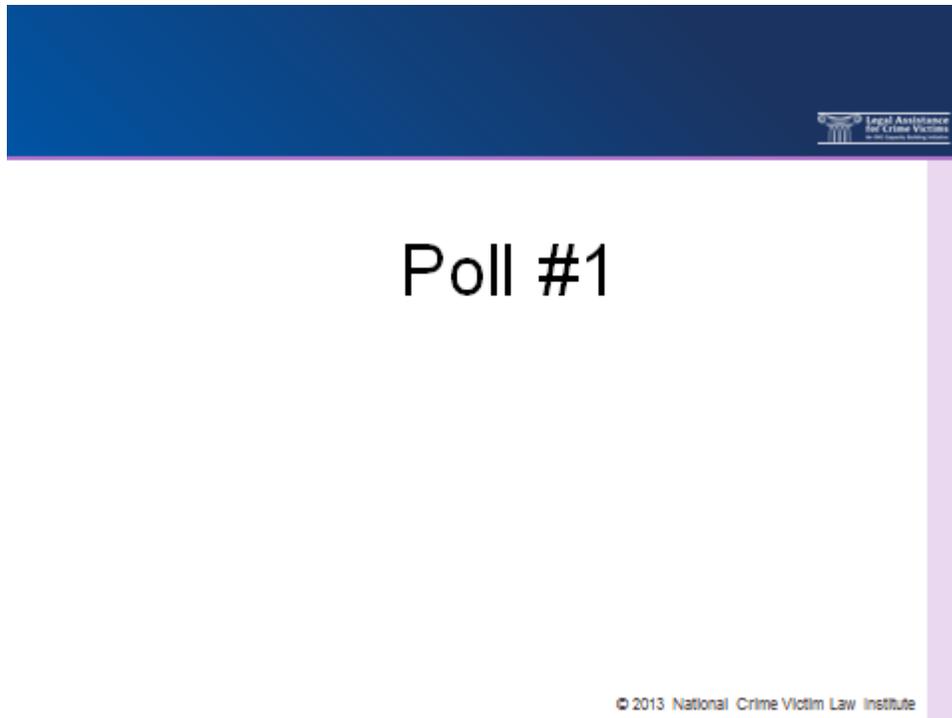
Amy Liu: Now let us talk about protecting the victim's identity. And by that, we mean the need to use pseudonyms or anonymous initials to help the victim maintain anonymity in the criminal justice process. We are going to do a quick review of competing rights. First, on the left side, we have Defendant's and the Public's Rights. And this list starts a number of rights that are non-exhaustive. So we are going to highlight some, but in a particular case, other rights may be implicated.

Amy Liu: Open courts under the First, Sixth, and Fourteenth Amendments. The public, including the media and defendant, have a right to open proceedings under the First and Fourteenth Amendments. And we all know that defendants have a right to open trials under the Sixth Amendment. These rights typically come into play when the prosecutor or the victim seeks to close a courtroom, for example, during a victim's testimony. For example, think about Rape Shield hearings. The case law establishes that none of these rights are absolute and they can be limited. In addition, many states also have open court clauses that may also come into play, but those, too, may not be absolute and cannot be limited. So it is important when looking at these cases to think about arguing to the court that under the circumstances of this case, the victim's rights should prevail when you weigh and take into all the considerations (unclear) policies at issue.

Amy Liu: The next two rights, defendant's right to be informed of the nature and charges against them and the protection against double jeopardy. These are rights that are implicated when the victim wishes to proceed anonymously at the charging stage. The defendant, under the double jeopardy clause, the defendant is protected from being charged twice in the same court for the same crime. And if the victim is able to proceed anonymously, the defense may argue that the

defendant could be charged with the same crime and not be aware of it. And we will address these arguments in a little more detail shortly.

Amy Liu: And on the victim's side, we have the right to privacy. And, as discussed, this could be a right that arises under the state and federal law. Also victims, like the public, have a right to access courts under the First and Fourteenth Amendments, as well as the Privileges and Immunities Clause, and State Constitutional provisions that have similar language. Now, this is rarely raised in litigation, but NCVLI frequently asserts this so that, at some point, an appellate court may very well rule on this. The idea is that you can have a chilling effect if you force certain crime victims to proceed with their true identities in all public records, and by doing so, you can chill the victim's desire to prosecute crimes, to report crimes in the future, and thereby interfere with the victim's right to access courts to seek justice.



Legal Assistance
for Crime Victims

Poll #1

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Poll #1

Amy Liu: The next slide. We have the first poll. Have you helped a victim to proceed by a pseudonym in a criminal case? If you could please select an answer and we will give you a few seconds. Another second. And then we are going to close that poll now.

Amy Liu: So 19 percent of you have helped a victim proceed by pseudonym. But the vast majority of you have not.

Poll #2

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Poll #2

Amy Liu: Let us launch the next poll. If you have helped a victim proceed by pseudonym in a criminal case, at which stages of the proceeding did you secure their anonymity? Please check all that apply. Let us close that poll in another second.

Amy Liu: This is really interesting, but I know that pretrial proceedings is really where we hear about this a lot in trial. But it is great to see that 46 percent have addressed this issue at the indictment charging document stage, and 29 percent in the police report stage. So let us go ahead and go on.

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.

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

Amy Liu: We are going to talk about protecting the victim's identity using pseudonyms and initials at the charging stage here. But as you can see, as Meg mentioned earlier too, that you can certainly proceed by pseudonyms as early as the police report stage. Now, we know that with the electronic filing and electronic access of court documents, these records are easily accessible by lawyers, the public, the media, anybody with access to the court records. And once someone puts a record online, anyone can conduct an Internet search with the victim's name and bring up the details of the victimization. And so there are number of tools that practitioners use to protect the victim's identity. And one of which is the use of pseudonyms in all public records and proceedings. Other tools that may be available, but we do not have time to discuss today, include filing under seal, limiting media access, and closing the courtroom, for example.

Amy Liu: So first, at the charging stage, referring to a victim by a pseudonym, as we mentioned earlier, implicates the defense's constitutional right to be informed of the nature and charge against him or her. And it may implicate the right to be protected against double jeopardy. But the fact of the matter is the law does allow crime victims to proceed anonymously at the charging stage, as long as the charging instrument provides legally sufficient notice of the charges against the defendant and enough information on the identity of the victim to allow the defendant to prepare his or her defense. For example, in several cases, defendants have argued that a charging instrument in an indictment was defective simply because the full name of the victim was not revealed. And courts have rejected that argument across the country when they find information such as the date and time of the incident, street address, the victim's online screen name, the location of the travel dates, and basically enough information to allow the defendant to formulate a defense. And courts have said that there is just simply no requirement that the name of the

alleged victims must be disclosed in the charging instrument when there is sufficient information otherwise to put the defendant on notice in terms of preparing for a defense.

Amy Liu: Now, a number of authorities also have statutes that explicitly allow crime victims to use pseudonyms in all public records, including police reports and charging instruments. For example, Nevada, North Dakota, Texas – they all have statutes that basically allow crime victims to, upon request, to go ahead and use a pseudonym in place of the victim's name in all files and records pertaining to the case. On the federal side, you also have Federal Rule of Criminal Procedure that allows for redaction of information for a good cause, a (unclear) when it comes to crime victims, actually child victims. And you also have the Federal Rule of Appellate Procedure that carries that protection forward to appellate cases if privacy protections were used at the trial level. But keep in mind that even if your jurisdiction does not have a law that explicitly spells out that a crime victim may proceed by a pseudonym, you want to argue that your other existing rights such as the right to privacy, right to protection, right to be treated with fairness and with respect, among others, all support allowing the victim to proceed by a pseudonym in your case. And also, remember that some jurisdictions may also have an informal policy of allowing victims to proceed by pseudonym, even if there is nothing on the books and even if you had (unclear) language in your victims' rights statutes. So be prepared to make the argument and challenge the ruling if the trial court initially denies the request.

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.

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Pseudonyms/Initials: Weighing Rights

Amy Liu: Next we are going to talk about using pseudonyms or anonymous initials beyond the charging stage. So for child victims, they are routinely allowed to proceed by pseudonyms after the charging stage and throughout all stages of the proceedings without much discussion about any analysis or weighing tests. And this happens in courts across the country. So when you are

representing a child victim, your practice should be to proceed by a pseudonym as a matter of course. That should simply be a routine practice.

Amy Liu: When it comes to adult victims, the national trend that we have observed is that certain adult victims, such as adult victims of sexual assault or trafficking, are often routinely allowed to proceed, I assume, without much dispute or analysis, generally throughout the stages up to trial. And then some courts will allow those victims to continue to maintain their anonymity during trial, while other courts have been reluctant to do so. Some courts may employ some kind of a weighing test, and weigh the need for anonymity against the presumption of public openness.

Amy Liu: If you do seek to help a crime victim proceed by a pseudonym during trial, one useful case to read is a California Court of Appeal case from 1997. It is called *People v. Ramirez*. And this case predates California's privacy law, their victims' rights constitutional amendment. It addresses the validity of a state statute. California has a state statute that allows a court, upon the request of the victim, to order the identity of the victim in all records and proceedings, including trial, to proceed either by Jane Doe or John Doe. And in this case, the defendant was convicted of attempted rape and other charges, and challenged the trial court's decision to allow the victim to proceed as Jane Doe during trial. Defendant argued, among other things, that this procedure violated his right to a fair and impartial jury, and his right to confront and cross-examine the witness. The Court of Appeal in this case rejected the defendant's argument. The opinion has a lot of useful language regarding the victim's right to privacy, the state's strong interest in protecting this crime victim's privacy, and the fact that allowing the victim to proceed as Jane Doe during trial was no more than a minimal intrusion on an accused's non-absolute right of confrontation. So I highly recommend that everybody take a look at this case if you are going to litigate this issue.

Amy Liu: Some practice pointers here, if you are working with a crime victim, regardless of age, who may benefit from proceeding with the use of a pseudonym, make the request really early – as early as filing the police report or the charging stage, or as soon as you enter the case if you are representing the crime victim. And you want to style the request to cover all proceedings, including trial and beyond. If you have the choice, elect to proceed by a pseudonym instead of initials because it offers more privacy protection. In some cases, using the initials could still reveal the victim's identity, particularly if you are in a small town and the case record also includes information about friends and family. And if the court allows a victim to proceed with a pseudonym or initial, also ask for a protective order, so that if the defendant were to find and reveal the victim's name to anybody else, the court has basically a stick in the form of criminal contempt if the defendant, or counsel, or other agents violate the court order. And also – oh, I just wanted to touch upon this before moving on. You want to protect victim's privacy in higher education settings also as they pertain to police reports and university reports.

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.

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Remedying Violations of Victim's Privacy: Redaction

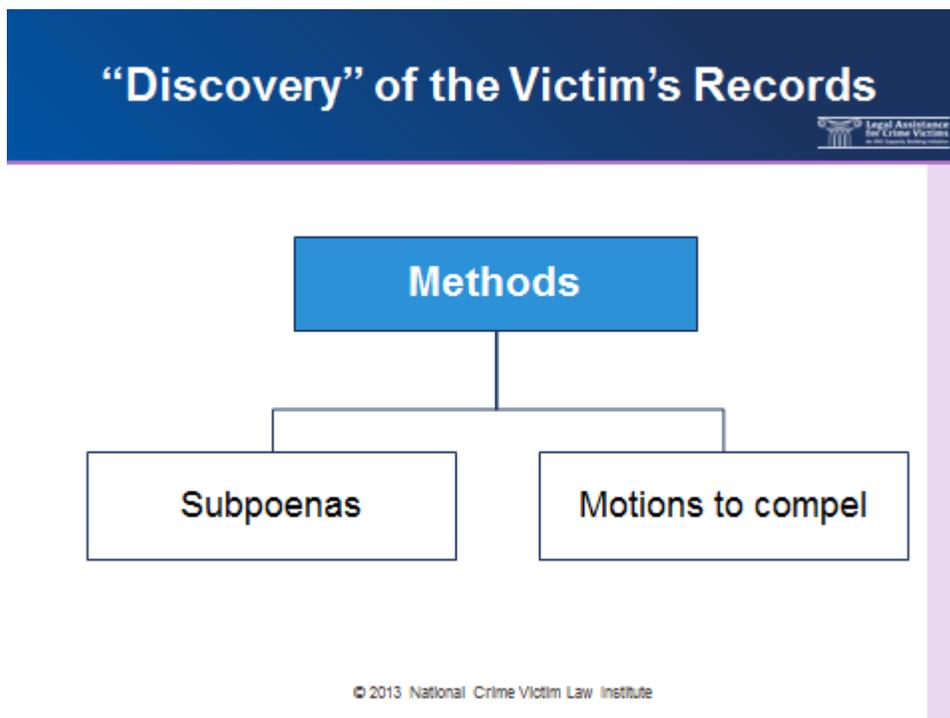
Amy Liu: What about a situation when you are entering the case and pseudonyms or anonymous initials have not been used? Case records have already revealed the victim's name. When you become aware of this, you should seek redaction and substitution. So first, if the document's opinion that has not found its way online, you want to immediately request the court substitute the opinion with a redacted version. And this will be consistent with most courts' own standard practices anyway. And this should prevent future dissemination of the non-redacted version.

Amy Liu: If the document is not a court opinion, but some other record in the case file, still request the court permit you to substitute a document with a redacted version as well. What if the document is already online or otherwise subject to public disclosure under the Safe Public Records law? Well, you are still going to seek redaction and substitution, right? Redact the victim's name and substitute that redacted version for the previously filed version. And you should contact the owner of all of the Websites with a copy of the non-redacted records, or Websites that are reporting the information from the non-redacted records, and asked that they replace the information with the redacted versions, and to use a pseudonym in all of their references to the victim's name. And if they refuse to comply with this request, contact NCVLI for technical assistance. And let us turn to Meg.

Meg Garvin: Great. Thanks, Amy. So what Amy has just covered for us I think is really critical stuff. And so I am going to pause before we transition. When you are thinking about victim privacy, one of the keys is not to be reactive, but Amy was teaching us how to be proactive. And what that means is getting in with the motion practice from the beginning to proceed by pseudonym. And Amy noted cases we have for indictments, we have them for police records.

There is explicit law in some jurisdictions and then other jurisdictions, there is not. So big picture privacy stuff. We have to be thinking about anonymity from the beginning.

Meg Garvin: Someone posed a question. I am going to go ahead and use this as a transition moment. Someone posed a question about, can we do this in other settings, such as higher ed settings? And Amy started to touch on this, too. The big law of privacy applies to all settings, so the federal Constitutional right to privacy certainly applies. Unfortunately, when we start to move down the chain of laws, they shift a little bit. So sometimes the victims' rights provisions will say during criminal proceedings. That is when privacy attaches. In those tricky moments, please, please, please ask for help when you litigate because we have some creative arguments to say that the victims' rights provisions that facially only attach to criminal proceedings necessarily have to apply to higher education moments. But it takes some creative lawyering, and so ask for help in those because we think we can do it.



“Discovery” of the Victim’s Records

Meg Garvin: So Amy got us thinking on the proactive side. And now we are in that moment where, I think, probably all of you have seen, right? The “discovery” moments. And now I am finally going to explain the quotation marks to you. Discovery, the legal term discovery in a criminal case, properly only is about that (audio breaks up) that has to be exchanged between the prosecution and the defense. So materials that are already in the possession of the prosecution are subject to discovery by the defense. And the rules of each jurisdiction govern how that has to happen. Legally, and Amy is going to talk more about the specifics of law, but legally, there is no

such thing as discovery from non-parties. There is really a right of production, not a right of discovery against non-parties. So we are going to talk about that, but part of what NCVLI is all about is making sure that we become a little more legally accurate when we are talking about victims' rights. And one of those accuracy moments is understanding that discovery is simply the wrong term when it comes to asking for information for victims. So that said, it happens all the time. What happens out there is the idea that subpoenas and motions to compel are going to issue against service providers whose work is with victims, against victims themselves, and against record holders of folks who hold the records of victims. So before we tell you the how-to of victims, protecting victims' privacy in these "discovery" moments, we are going to have you take another poll. And I am going to have Goldan go ahead and launch Poll #3 for us.



Poll #3

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Participant Poll:



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

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Poll #3

Meg Garvin: And so you see on your screen it is a question because we really want to know what have you seen most? Which of these things are you seeing be subject of subpoenas? Facebook records, cell phone records, e-mails, Google searches, medical and mental health. And just take a second to click on those.

(silence)

Meg Garvin: Okay. Go ahead and close out that poll. And let us see what you guys are seeing most out there in the field. We know what we see here. Interesting. Okay. So we have 74 percent of you are seeing medical and mental health records be subpoenaed. Only 6 percent Google searches. I am just going to let you all know that one is coming down the tracks. If you have not seen it yet, you are going to. E-mail, 31 percent. Cell phone records, 52 percent. Facebook records, 26 percent. We would hazard a guess, also, based on what we are seeing, that all social media, whether it is Facebook, Twitter, all the ones I do not even know the names of, those are increasing quite a bit also, without much differentiation between the Facebook page and the messages, and all the other component parts. So really interesting diversity. And what is not up there, because we did not have enough space in the poll, is educational records. We certainly see those being subpoenaed a lot. So you are seeing all these things being subpoenaed, so now let us go back to the primary presentation.

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.

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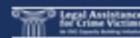
Two Types of Subpoenas

Meg Garvin: What do subpoenas really look like? And really, there are two types of subpoenas. And for many of you, this is super basic. But just to make sure everyone, all 200 of you, are on the same page vocabulary-wise, we are going to distinguish them.

Meg Garvin: So there is direct subpoenas. And these are the subpoenas that go directly to the victim, which, of course, could be the victim’s parents, family members, or other representatives. They might actually be served on the victim’s attorney. Hopefully, more and more will happen that way rather than directly to the victim, which would be the proper way to do it. But these are the ones that just come directly to you. They say, “Meg, I am subpoenaing your diary,” right? Or, “Meg, I am subpoenaing your education records. Could you please turn over all your education records?” These are these direct subpoenas that in some ways are a little easier to deal with from a legal standpoint. From an emotional standpoint, when that shows up in the victim’s mailbox, directly, that can be an emotional moment. So as lawyers and counselors for victims, we have to be talking to them about subpoenas, direct subpoenas. We hope they come to us as their lawyer, but sometimes they do not. And regardless, we really, really need to be talking to victims about that reality.

Meg Garvin: And then there is third party subpoenas. And these are the ones that most of us end up fighting. These are the ones that do not go to Meg, that do not go to me saying, “Meg, give me your Facebook page.” They go to Facebook, or to my cell phone provider, or to my school, to my hospitals, my clinics, my mental health providers, my bosses – all of these things. They could receive the subpoena. And we are going to talk a little bit later about what if you do not even know that that third party subpoena happened. But that is going to come later.

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.

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Motion to Quash

Meg Garvin: So you get a subpoena, and legally, there are a lot of things you can do to respond to it. The first thing, of course, the very first thing, and lots of lawyers forget this, especially – I remember my first 6 months as a lawyer, I would draft motions in opposition or motions to quash, and I would have failed, utterly failed, to look at, was it even properly served on me? So obviously, there can be some administrative and technical deficiencies in subpoenas. That is our starting point, because we do not even want to waste our time on substantive matters if procedurally they messed up and served the subpoena incorrectly.

Meg Garvin: With that said, we then to look at where do we find the authority to move to quash. Obviously, victims’ laws provide us the substantive law on how to move to quash. But procedurally, you have to find where your hook is on what does the motion look like. And so under federal law, it is 17(c)(2). You can move the court to quash or modify a subpoena if compliance would be unreasonable or oppressive. State law is going to have very similar statutes or rule provisions. And then you get to the meaty stuff, the substantive stuff of how you can oppose it by looking at the Victims’ Rights Provisions, which will likely – and I am going to go out on a limb there, and say will likely include things that you can use to move to quash or modify the subpoena. And do not dismiss the idea of modifying. When you go in to oppose, you really want to think about, yes, primary thing, get it stopped completely. But have your second defense ready, which is what does a modification look like? And sometimes all of that conversation used to happen directly with your client to find out what he or she really wants. Do they want quashing? Do they want it to go away completely? Do they not care if one thing goes to the state or to the defense through a subpoena? Have that conversation first, then know quashing, modifying, and how you are going to do it.

Meg Garvin: So there are a number of ways to do this. There are arguments on both sides. And I am going to have Amy walk through what each of them are in detail. But I am going to give them to you in highlights so that you know what is coming up. Because we are getting a handful of questions about, what do you do with mental health records? What do you do with counseling records? I have seen two of those questions come in so far. And, really, the arguments are the same.

Motion To Quash (continued)



Bases To Quash	Bases for Defendant's Opposition
<ul style="list-style-type: none"> <input type="checkbox"/> Defendant has no constitutional right to pretrial discovery. <input type="checkbox"/> Victim's right to refuse discovery. <input type="checkbox"/> Victim's right to be free from harassment or abuse / Relevance. <input type="checkbox"/> Privacy rights. <input type="checkbox"/> Privileges & other statutory protections. 	<ul style="list-style-type: none"> <input type="checkbox"/> Defendant's constitutional right to due process, which includes— <ul style="list-style-type: none"> ➤ Right to a fair trial. ➤ Right to present a defense. <input type="checkbox"/> Defendant's constitutional right to compulsory process. <input type="checkbox"/> Defendant's constitutional right to confrontation.

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Meg Garvin: On your screen in front of you right now is the checklist that NCVLI essentially lives by. And what I mean by that is when a subpoena comes, you should have this checklist ready to go and make sure your motion to quash or motion to modify has each of these component parts in there. An argument that defendant does not have constitutional right to the material, that the victim does have a right to refuse it, that they have the rights to be free from harassment and abuse, that there is no relevancy to them, that there are privacy rights and issues, and that there are privileges or confidentiality provisions at issue. And that is all on the left side. Those are the affirmative tools you have and Amy is going to give you the details on those.

Meg Garvin: On the right side, the defendant is going to try to make these arguments, and you, in the second half of your motion probably – might be in the first half – you are going to rebut every single one of those and say, “No, no, no, no, no.” And so what is on your screen is your motion to quash. And now Amy is going to take it over and walk through what each of those bullet points actually means that you are going to argue in your motion to quash.

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.

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Bases to Quash: No Federal Constitutional Right to Pretrial Discovery

Amy Liu: Bases to quash. So the first one will be no federal constitutional right to pretrial discovery. Now whenever a defense subpoena for a victim’s record has been challenged, we often see, as the defendant’s first argument, is that he or she has a federal constitutional right to discover the information at issue. And that is just simply not the case. Defendants have no general federal constitution right to discovery in a criminal case. And the Supreme Court said that back in 1977 in the *Weatherford v. Bursey* case and the Supreme Court has not ruled otherwise in the decades since. So keep that in mind. And oftentimes when we are litigating the issue, that is the first thing that we put in our merit section.

Amy Liu: The second argument defendants often use is that they have a constitutional right to pretrial discovery under the Confrontation Clause. And oddly enough, I often see them cite the *Pennsylvania v. Ritchie* case in support of that statement. Well, when they do so, they are misconstruing and misreading the case because, in fact, the plurality court rejected that Confrontation Clause argument there. And the court said, the plurality said, that nothing in the case law supports transforming the Confrontation Clause into a constitutionally-compelled rule of pretrial discovery. And the court emphasized that the right to confrontation is a trial right. And since the *Ritchie* case, the predominate view across the country in lower courts is that the denial of pretrial discovery does not violate the defendant’s confrontation rights.

Amy Liu: Defendants often also argue that they have a federal constitutional right to pretrial discovery even from non-government record holders. We know that if you are a government record holder, you have *Brady* obligations. But when it is against a non-government record holder, they argue that they have a right under the Due Process Clause or the Compulsory Process Clause. And again, I often see them cite *Ritchie* in support of that statement. But the fact of the

matter is the majority of the court in Ritchie said that they have – the court has never held that the Compulsory Process Clause guarantees a right to pretrial discovery and the court expressly declined to reach the issue. So Ritchie cannot support that argument. With regard to the Due Process Clause, it is true that the Ritchie court concluded that the Due Process Clause can provide a basis for their requested discovery in that case. The case involved state child welfare agency's records pertaining to a minor child victim. But the court concluded that the Due Process Clause applied because a government agency had possession or control of the records at issue. And because the case involved a statutory privilege that explicitly says disclosure may be allowed when the agency is directed to do so by a court order. So those are very important distinguishing facts. And on the face of the opinion does not support any claim that the Due Process Clause or the Compulsory Process Clause could possibly support pretrial discovery from a non-government record holder. And there have been cases that have made such distinction. And found that when a victim's records are not in the possession or control of the government, a defendant has no due process constitutional right to pretrial discovery of the records.

Amy Liu: If you happen to practice in a jurisdiction with bad case law, and there are jurisdictions where the courts have misconstrued Ritchie, contact us for technical assistance. Let us help you craft your arguments on appeal.

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.

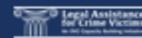
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Bases to Quash Subpoena: Right to Refuse Discovery

Amy Liu: The next base to quash that was highlighted by Meg is the right to refuse discovery. Now, several states provide crime victims with a right to refuse requests for production of documents and all other discovery in criminal proceedings. For example, Arizona, California, and Oregon, crime victims actually have a constitutional right to refuse any interview, any deposition, or any other discovery requests that are initiated by the defense. Now California Constitution also, interestingly, grants crime victims the right to prevent the disclosure of confidential information or records to the defense that could be used to locate or harass the victim, or the

victim's family, or which discloses confidential information made in the course of medical or counseling treatment. Or which are otherwise privileged or confidential by law. So California has some of the strongest constitutional protections against any kind of discovery, whether the information is in the victim's hands or in third party's hands. And many states also have statutory protections in this respect. But you should be aware that even in these states with the great language on the books, many trial courts are still routinely allowing pretrial production of the victim's records in a criminal case. So you need to be prepared to challenge those rulings, either asserting the right to refuse discovery or any of the other rights that we are addressing now as bases to quash.

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.

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Bases to Quash Subpoena: Relevance/Harassment

Amy Liu: The next base to quash, the relevance/harassment. The relevance is pretty basic. They know we often think about. You must demonstrate, among other things, that you have a sufficient likelihood that the requested records are relevant, exculpatory, and admissible. The defendant must have some clearly articulated basis for believing that the information sought is relevant before subpoena should be allowed to issue, otherwise you are just allowing a "fishing expedition". And in courts across the country, they have often, you will find case law that says you are not allowed to basically go fishing here, based on unsubstantiated assertions that there might be a possibility that there may be some relevant information that can be uncovered if the court were to allow us to review these records. And remember, when you are dealing with requests for information relating to a victim's sexual history, in addition to these relevance arguments, also look into your state's Rape Shield provisions for additional protection as well.

Amy Liu: Now the jurisdictions may vary quite a bit on their interpretation of how much of a showing is needed to be sufficient, right? For the court to allow the production of records. So, for example, on the stringent test side in Utah, a defendant has to show with reasonable certainty that exculpatory evidence exists which would be favorable to the defense in order to obtain an in-

camera review of privileged documents. And if the defendant does make such a showing, the court will review the records in camera and will turn over information if there is a reasonable probability that if the evidence is disclosed, the result of the proceeding will be different.

Amy Liu: Now in contrast, you have states on the other end such as Wisconsin, they have a much looser interpretation in terms of what showing the defendant must make. In Wisconsin, in order to obtain in-camera review of privileged documents, defendants must set forth in good faith a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence. But the courts have said that the standard is not intended to be unduly high for the defendant. And in cases where it is a close call, courts should generally provide in-camera review. So it is a very loose standard there. Usually a defendant's hunch that there might be something useful in the material that is sought is not enough to grant disclosure of the documents.

Amy Liu: We will talk about privilege as a separate basis shortly, but it is important to observe that when evidence is privileged, a defendant must demonstrate that some exception exists to privilege in order to justify the production of the material.

Amy Liu: Now, many victims' rights laws also grant crime victims with a right to be treated with fairness, and with respect, and dignity, and to be free from intimidation, harassment, or abuse throughout the criminal justice process. So if your jurisdiction has such language in your laws, also consider including argument that the right to be treated with fairness, and with respect, or to be free from intimidation or harassment, also supports your motion to quash a subpoena for confidential or privileged information, particularly if in your case a defendant is looking for broad swaths of information or if the defendant has already acted in other ways that suggest that he or she is attempting to intimidate or harass the victim.

Amy Liu: One troubling issue that practitioners should be aware that we have seen in many jurisdictions is that it is really common for courts to review victim records in camera to determine whether they should be produced. And many times, this is such a routine practice that attorneys often do not often think anything of it. Sure, that is not a problem since you are only allowing the court to review. But if you think about it, even that in-camera review itself is a privacy invasion for the victim. It is exposing the victim's records to review not just of the judge, but the judge's law clerks, maybe the docket clerk who is processing the information, the appellate courts and their staff, and many others in the court system. And that practice alone may also have a chilling effect on crime victims if they know that their detailed mental health record is going to be revealed by some strangers. It does not matter that it might be one or a handful of people. So practitioners should be vigorous when you are opposing defendant's attempts to demonstrate that records may contain exculpatory information and try to avoid any unnecessary in-camera review by the court. And in the event that in-camera review becomes necessary, victims may wish to request that only the trial court, only the trial judge – not a law clerk or any other staff member, review their records at issue because of the sensitive nature and because of the need to limit the number of people allowed to review the information.

Amy Liu: And before I go on, I just noticed a question asking for the citation to a case that I mentioned earlier. I just want to mention that I will cover that at the end. And I have not forgotten that.

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.

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Bases to Quash Subpoenas: Privacy

Amy Liu: Another base to quash, of course, is the victim's right to privacy. We discussed this earlier. Privacy exists under the federal law and many states' laws. And this slide is just simply a reminder that the rights arise under the U.S. Constitution. Remember, it trumps rights grounded in state constitutions, federal statutes, and state and federal rules as well. So always assert it, so that you preserve the argument for appeal.

Poll #4

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Poll #4

Amy Liu: And we come to our next poll, poll #4. Can we please put that up? If your communication with a crime victim is privileged, do you believe that the privilege can ever be pierced? If you can please check yes or no.

(silence)

Amy Liu: Now let us go ahead and close that poll. So 84 percent of you believe that the privilege can be pierced. That is really interesting. We are going to talk about privilege next. And before I go on, I want to make clear that we are talking about privileged information as opposed to – some of it is merely confidential such as diary, right? Privileged information such as attorney-client communications.

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

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Bases to Quash Subpoena: Privileges

Amy Liu: So both federal and state law recognize certain common law and statutory privileges. Under these privileges, the information is protected from disclosure, either absolutely protected or to some lesser degree. And when we talk about whether you believe that privilege can be pierced, we are talking about cases where it is not absolutely protected. It can be pierced to some – it is protected to some lesser degree. Now the rationale behind these privileges, of course, is that for a person to be able to speak candidly in a certain context where we want them to speak candidly, that person must be assured that whatever he or she says will be kept confidential and protected from disclosure. So, for example, every jurisdiction recognizes attorney-client privilege. That is the one we often hear about. Everyone is familiar with it. Under this privilege, there are very few exceptions and, generally speaking, information shared between a victim/client and his or her attorney cannot be subsequently discovered.

Amy Liu: Privileges can be characterized usually in three ways. We talked about absolute earlier. The other two ways we characterize them is diluted or qualified. That is when they are protected to a lesser degree. So when we talk about absolute privilege, we are stating that the law, as written on its face, it prohibits disclosure of the privileged information absent consent or a waiver by the privilege holder. So if it applies to the victim, we are saying that the law says very clearly that you cannot disclose this information if the victim does not consent or does not waive the privilege. And there are no exceptions, not even in-camera review. And we are saying that courts have upheld that absolute protection.

Amy Liu: When we talk about diluted privilege, we are saying that, again, the statute seems absolute on its face. There is no exceptions. You have to have either consent or waiver. But case

law has established, and the courts have diluted the privilege by concluding that the privileged records can still be disclosed under certain circumstances.

Amy Liu: And the last realm of protection is what we call qualified privilege. And that is when a privilege, the language itself and on the books, expressly qualifies the protection by contemplating some disclosure of material under certain circumstances, such as a clause that says, “Or when the court orders disclosure”. And one of the trickiest areas to navigate is with regard to the counselor or advocate victim privileges. And if we had a chance to do another poll, I would want to know, for those who answered that you believe your privilege cannot be pierced, I am wondering what percentage of that are from victim advocates or counselors out there, because this is one of the areas where we often see the issue come up in victims’ rights litigation. While many states recognize its privileges, they are very rarely absolute. And they are, in fact, often pierced.

Amy Liu: There is a minority of states that recognize an absolute privilege for the counselor or advocate victim records. And those states include Illinois, Indiana, Colorado, and Pennsylvania. And a really good case, a recent case came down in 2011 by the Indiana Supreme Court, *In Re Subpoena to Crisis Connection*. The citation is 949 N.E. 2d 789. And in this case, a court found the statutory advocate victim privilege absolutely protected the records at issue. And the court emphasized the compelling interests in protecting, in preventing any review, including in-camera inspection, in order to fully protect the child victims in the case. And this truly is the best practice. And it is really the only way to fully optimize the chances of crime victims seeking the much needed therapeutic, or medical, or other types of help.

Amy Liu: Now the vast majority of states, when it comes to the advocate or counselor victim privilege, recognizes the qualified or diluted privilege for these records or information. And these states’ courts will generally allow an in-camera review of the victim’s privileged records if defendant can make some kind of particularized factual showing that the information contained in the records is relevant or material to the defense. Now, the outlier here is Massachusetts. Now usually, even in the qualified or diluted privileged cases, the courts will conduct the in-camera review on its own and then decide, okay, this has satisfied the showing necessary and perhaps allowed disclosure to the defendant. In Massachusetts, however, if a defendant makes the showing that there is good cause that the privileged documents are relevant, that they are not otherwise procurable in advance of trial, that the defendant cannot prepare for trial without them, and that they are asking for these records in good faith, it is the defendant’s attorney instead of the court who is entitled to inspect the documents.

Amy Liu: And again, when it comes – when we talk about in-camera review with these qualified or diluted privileges, remember that every chance you get when you are litigating this, you want to continue to argue that the disclosure, any disclosure of the victim’s records, even in-camera review by a court is a violation of the victim’s privacy and may have a chilling effect and try to limit that disclosure. As I suggested earlier, if you must, perhaps you can have the court agree that only the court can review those records.

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).

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Bases To Quash: Other Possible Statutory Protections

Amy Liu: And the next slide that I have, the last slide, is simply other statutory protections that may be available. And this list, again, is not meant to be exhaustive. Here, we just want to flag that there may be other grounds to quash a subpoena, other statutes that recognize victims' rights related to disclosure of certain materials. We will not really have time to go through all of this. I just want to highlight that when it comes to certain information, take a look at these provisions as well. So, for example, the Federal Educational Rights and Privacy Act (FERPA). Schools are at risk of losing federal funding if they permit the release of student records without written consent of the parents. But a court order can get access to the information. Health Insurance Portability and Accountability Act (HIPAA) applies to patient health data. The Violence Against Women Act (VAWA) prohibits grantees from disclosing any client's personally identified information without the informed written consent of the person to whom services are being provided. And you have to provide notice to victims if release is required by subpoena. And the Electronic Communications Privacy Act (ECPA) may come into play when someone is seeking records, for example, of social media records such as Facebook, online Facebook. Although usually that provision is asserted by the service provider, internet service provider, as opposed to the crime victim itself.

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.

Counter Arguments

Amy Liu: So if you remember back when Meg started, she highlighted our checklist of points. And I just addressed the grounds that we would assert commonly while we are quashing a subpoena, arguments on the victim's side. Now we just went through a lot of this when I was addressing that the grounds to quash a subpoena. So I am not going to go into all this, except to remind you that the confrontation right, compulsory process right, those are really baseless when it comes to asserting that those give them any grounds for any kind of pretrial discovery. And we talked about due process. That the right way to analyze the existing Supreme Court case law is that only applies when you have state action, the Due Process Clause applies when you have state action. And that should only apply when you are talking about records that are being held by the government as opposed to non-government agencies. And courts have rejected the argument that the right to a fair trial or to present a defense is infringed by denied pretrial discovery against non-government actors.

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.

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

Amy Liu: And lastly, this is just sort of an additional point. When it comes to third party subpoenas, do not forget that many state laws or federal laws also include a provision that the victims have a right to notice and to be heard. And this is so that victims can have the opportunity to quash or modify the subpoena or otherwise object. So the failure to give proper notice may be another ground, although it is more of a procedural ground for quashing a subpoena. It will only delay the matter as opposed to the merits. But we want to flag that as well as something – another tool that you can use. And with that, I am going to turn to Meg.

Meg Garvin: Great. Thanks Amy. So if you remember way back when I said on your screen you have the arguments to be made in a motion to quash. That was really quite literal. Amy just walked through the arguments. Defendant has no constitutional right to discovery. Victims have a right to refuse discovery. Victims have the right to be free from harassment or abuse. Relevancy, materiality, privacy rights, privileges, and other statutory protections. Those are all the arguments that you need to have in your materials.

Meg Garvin: A question came into us about, well, is not the federal constitutional right to privacy, does not that only govern state action, and therefore is not it always an issue?” Well, yes and no. Yes, it governs state action. Subpoenas can fall under that, and so you can use federal constitutional privacy in arguments against defense subpoenas and, obviously, if the state is the one issuing the subpoena you have a ready-made (audio breaks up) state action. So you can absolutely use federal constitutional privacy as Amy laid it out.

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?

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Unknown Third Party Subpoenas

Meg Garvin: So Amy ended her section here on notice and that you need to be on notice of these subpoenas to third parties. So quickly, and then we are going to get to the rest of the questions, quickly we are going to talk about so what happens when you do not have notice. And so these are the unknown third party subpoenas. And these are, sadly, very common, and I hazard to guess that if we did a poll right now, that many of you would indicate that you have seen this. And I am going to have Goldan, if you could (audio breaks up) the controls for a just a second, thanks, so I can move it forward, that would be great.

Meg Garvin: So unknown third party subpoenas. This is – what do you do when you do not know? And in our situations, the ones we have seen is the subpoena goes to the counselor or to the hospital even. And you would think at a hospital they would have some built-in counsel/lawyers there reviewing things and not releasing right away. But we have seen far too often that the subpoena issues, and then they get turned over with no notice going to the victim. Even though, as Amy pointed out, you are supposed to have some level of notice.

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.

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Meg Garvin: So what do you do when you find out after the fact? Very quick, if the court already has the records, if they were turned over to the court, you are going to want to jump into high speed or high gear, whatever metaphor you want to use, and move the court to return the records to the victim making all the arguments that Amy just laid out. And then adding the additional argument of, there was no notice and either by explicit provision notice was required or implicitly because due process is at an issue, and I was losing my privacy rights without notice, "I have the right to notice, so you have got to return them and we have start this thing over again." Again, if the court has them already, you are going to say, "And you should not have them, court, so they should not be entered into evidence or used at any proceedings until you return them and we do the process appropriately." And you say, as Amy has already really well pointed out, even in camera, because some judges or courts might say to you, "You know what? I already have them. I am just going to do a quick review, right? And if there is nothing in here, the defendant is not going to get them anyhow, so what is the big deal?" Well, Amy already told you what the big deal is. Every review matters.

Meg Garvin: So that is what you do if the court has the records. What if the defendant has the records? So the defense has the records. You do the same thing. You demand the turnover of the documents or the return of the documents to you, the victim's attorney, or to the victim directly for all – based again on all the same arguments. You make either the motion to the court or you get the defense to agree not to use them in evidence in any proceedings. And this is not just facially, "Do not use them." It is not, "Hey, you have my diary and therefore you cannot use my diary." We have to be thinking really creatively and inventively about how to protect victims' privacy. And so this is where you start to draw upon other areas of criminal law and start to make the creative argument of fruit of the poisonous tree. "All right, you have my diary, which led you to these other things. You never would have found those other things, but for my diary, which you improperly obtained, therefore you cannot use that." Now fruit of the poisonous tree has been brought up under the state action, police searches, all of that. But the theory behind it is good and

we need to start using it. “So you got my diary improperly,” or, “You got my Facebook page or my privileged counseling records. You cannot use them and you cannot use what you got from them.”

Meg Garvin: You can even ask to remove the defense attorney from a case if the defense attorney cannot operate without knowing – without acting on what he or she now knows from the material he or she should not have, you can ask for the defense attorney to be removed. You could seek sanctions or you could seek ethics violations. Now the removal of a defense attorney and seeking sanctions against the defense attorney, those might seem scary to lawyers out there. We do not often like to do that. But you need to contemplate it. If someone really cannot operate in a case without operating on knowledge they should not have in the first place, they should not, in the interest of justice, be the one on that case. It is setting us all up for having to do the entire thing over or for justice to fail. And you can make those in the interest of justice arguments for the court. So that is what you do when you do not know.

Meg Garvin: And I was going to walk through a recent case that we had. But before I do that, I think we want to make sure we have time for some of these questions that we have. So I will give you the scenario in about a minute of a case that we have had. And then if we have time, I will come back to it. But basically, this is your time. If you have not typed in a question to us yet, type it in and we are going to answer a bunch of those.

Third Party Subpoenas: *A Recent Case Example*



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Third Party Subpoenas: A Recent Case Example

Meg Garvin: The case scenario that we wanted to talk about that just wraps all this in is we had a young victim in California, a sexual assault victim, whose diary, counseling records, and Facebook page, and messages were all subpoenaed. They were subpoenaed both by – she was sexually assaulted by two defendants – an adult male and a juvenile male. And both of those cases were proceeding. And her materials were subpoenaed in both cases. And the arguments, the checklist that we had – that we had on the screen, and that you will have access to again in print after this Webinar, we marched through that checklist because in California, victims have a state constitutional right to privacy, a state constitutional right to refuse discovery, federal constitutional privacy. All of these things came into play, and so we were able to fight for the victim's privacy. Now I will be very transparent with you. It did not make its way all the way up to the Supreme Court such that we have a citable case. But, basically, we had every single one of these arguments at play in the case, and we had to fight for her privacy, and proceed by pseudonym. So do not forget the first half of this training, which was about pseudonyms. So every pleading we made, every pleading we helped file, and when we saw someone else's error, we jumped on the, "Hey, use her pseudonym. Hey, use her pseudonym. Do not use her real name."

QUESTIONS?



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Questions?

Meg Garvin: So we are going to get to some of the questions. And I will field some and, Amy, if you will chime in on a few. Amy, I think this one is going to be for you if you want to come back online. During restitution proceedings, how much information must be shared with the defense? What are good boundaries for information sharing or not? I will let you take the first stab at that, and then I will come in afterwards.

Amy Liu: Yes, when it comes restitution, I am guessing when you are asking how much information must be shared, that this includes mental health treatment, therapy, and really there is no requirement in terms of how much you have to share. One way is to simply keep the

information to a minimum, right? You do not want them to be able to come and say, “Well, now we need to actually depose the therapist and ask questions about the types of treatment,” and so forth. So this is where, if you have a particular situation and certain records that you are concerned about, please contact us so we can help work with you on a case-by-case basis and kind of figure out what is it that you actually need within the parameters of what your law requires, so that you can make the showing you need to prove up the costs or the expenses that you should be able to receive in restitution, and not do so in a way that will unnecessarily infringe upon the victim’s privacy. And Meg, I do not know if you have anything else to add.

Meg Garvin: No. I totally echo that. You have a showing to make, but it is pretty de minimis because you do not have as high of hurdles, so you give very little and you certainly do not give content. You might give an affidavit and that is it.

Meg Garvin: So let us see – another question. It is actually flipping things around a little bit which is – and I will answer this one, Amy, and then you can chime in. As a victim’s attorney, I am having trouble getting information. How does a victim attorney get information such as police reports? I am being told I have to get them through the prosecution, that I cannot get them directly. This is a really interesting situation that we actually are seeing nationally, which is this is the flipside of discovery. This is when you want to discover something. You want to get access to something as the victim’s attorney, and the system is still operating on the assumption that the prosecutor should share what he or she wants to, but not anything else. You actually do have a right to get this information. And in some jurisdictions it is explicit and in most it is implicit. And what it is implicit to is you have to make a creative argument about it. In order to exercise your other rights, you need access to this information in order to reasonably exercise those rights. So whether it is the right to be heard at a proceeding, you need to know what is happening, what everyone else in the room is going to know, so you have to access to that information. If it is about restitution, you need to know what either the PSR, or the police report, or any of those things say. So the argument is there that, in order to exercise your other rights, you need access to this information, but it is an argument at this point in most jurisdictions. And, unfortunately, we are having some police reticence, and even some prosecutorial reticence in terms of sharing it under the guise too often of, “Well, if I give it to you, then your victim, who is my witness, is going to (unclear), and then they are subject to worse cross-examination.” Well, the response to that is, “Yes. Could they be cross-examined on whether they have seen the police report before?” Sure. Yes. They can, but that is not a reason to deny them information that is necessary to exercise their rights. So that is the argument to be made. We are certainly willing to help you make that argument. Amy, do you have anything to add on that one?

Amy Liu: Yes. I just want to add that, in terms of how to go about getting it, if you assert all of these rights and the police or the DA is not being cooperative, you need to be prepared to file papers in the court to force them to turn the police report over, and we are happy to help.

Meg Garvin: Absolutely. Yes. Try the nice way, and then you may have to file. Let us see. I think we have time for one more question. What are you seeing for victims’ attorneys that sit in on law enforcement interviews, and are then called as witnesses to the interview by the defense? Interestingly enough, about 2 years ago, someone had flagged this issue for us, and we said, “Oh, no, no, no. Nobody will really do that,” and then lo and behold, people really are trying to subpoena victims’ attorneys who have sat in on interviews. And the response back is that you are acting as their lawyer, and it would be like calling the defense attorney as a counsel, who is counsel to the defendant to be a witness. And there is no way a court would tolerate that. And so, similarly, when you are acting in the attorney-client capacity, there is no way that you should be subject to a subpoena and required to then not act as a counselor, but act as a witness in the case.

So you are going to have to fight it. Unfortunately, we certainly have seen it, and we are happy to help with that one, too.

Meg Garvin: A quick look through to see if we have any other questions because I know we are just over time. A quick question here, Amy, I will direct it to you first and then we will close with this one. So what advice do you have for a civil attorney who receives a subpoena for depositions records in a civil case, but there is an ongoing criminal matter happening?

Amy Liu: We would suggest that you seek a stay if you can. We have seen this in several states. And, in fact, if your jurisdiction has on the criminal side a right to refuse any defense-initiated discovery, you should argue to the court on the civil side that that should also bar discovery on a civil matter as well until the criminal case, at least, is resolved. We have seen successes in Arizona and in California. In fact, in Arizona, there is an appellate case, if I believe I am correct, that actually addresses this very issue in terms of parallel civil/criminal proceedings.

Meg Garvin: Great. And I will give a little teaser to everyone as we close out. We actually are about to issue a legal bulletin that addresses that very issue, so a multi-page document that walks you through how you would fight a civil – how you would move to stay a civil discovery during the pendency of a criminal case. So that is yet to come. And I know we have run over by almost 5 minutes, so we are going to end here. Thank you all for being here. And I will tell you that all the questions that we did not get to, we will answer and be sending you – either FAQs will go up on our page or we will send you the answers directly. Thanks so much.