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Victim Law Bulletin

LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL

Protecting Victims' Privacy Rights: Addressing the Unauthorized Release of Victim Information in Federal Criminal Cases*[1]

Compelling disclosure of a victim's identity as part of a criminal case subjects victims to the risk of revictimization at the hands of the justice system—often referred to as "secondary trauma" or "secondary victimization"[2]—and may also weaken confidence in the criminal justice system as a means to protect and serve the public.[3] With the advent of electronic filing and online access to court documents, a simple Google search of a victim's name can reveal highly personal details of victimization described in court opinions, pleadings, and other court documents thereby exponentially increasing the potential harm to the victim. Thus, it should be standard practice for courts, prosecutors, and other system participants to ask crime victims for their preference regarding anonymity; and if the victims so choose, their privacy should be protected through the use of pseudonyms in the place of their names and redaction of identifying information in all records associated with the criminal proceedings.[4]

Unfortunately, too few victims or their advocates know that victims' rights support a request for these protections. Even when victims or their advocates know to claim such protections, victims' rights to be notified of and participate in criminal proceedings are routinely denied, making it difficult for many victims to have the notice and opportunity necessary to assert their desire to proceed by pseudonym and to otherwise protect their privacy. And even when victims are able to timely request such protections they are routinely denied—most often because prosecutors or courts are insufficiently familiar with privacy law—thereby violating the victims' rights and making them vulnerable to harassment, intimidation, and other repercussions.

Importantly when opinions or other court documents contain the victim's name or other identifying information and either have or have not been made a part of the public record, all is not lost. Victims have remedies to reclaim their privacy and minimize or prevent harm associated with ongoing disclosure. Among these remedies are: a prompt request made to the court to substitute the pleading, record, or court opinion with a redacted version omitting the victim's name and other identifying information; if the document has made it online, substitution and redaction should be accompanied by a letter request—known as an Internet take-down letter—to public and private online databases and other service providers to remove links to the document or to substitute a link to a redacted version; and if the criminal proceedings are ongoing—whether by initial prosecution, appellate review, or post-conviction processes—a request to the court to issue a protective order requiring parties and other system participants to refer to the victim only by pseudonym and omit other identifying information from court documents. Finally, victims may seek to seal pleadings, records, and other court documents. Together, these remedies can be effective, albeit imperfect, tools in addressing unauthorized releases of victim information as part of criminal proceedings.

*Originally published in *NCVLI Newsletter, 16th Edition*, with lead authorship by Sarah LeClair.

[1] Although some state authorities are referenced in this *Victim Law Article*, an analysis of this topic in the context of state proceedings is outside the scope of this *Article*. To submit a technical assistance request to NCVLI seeking help in preventing or addressing unauthorized releases of victim information in either state or federal proceedings, please visit https://law.lclark.edu/centers/national_crime_victim_law_ institute/professional_resources/technical_assistance/.

[2] Research has demonstrated that people are "harmed in a significant, cognizable way when their personal information is distributed against their will." Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. Pa. L. Rev. PENNumbra 52, 61 (2007) (critiquing a recent article on privacy and arguing that it fails to adequately label and categorize the very real harms of privacy invasions). *See also generally, Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), March 2013, at 1 & 4 n.6, *available at* http://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool (describing some of the deleterious effects of secondary victimization on victims and the proper administration of justice); Suzanne M. Leone, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 New Eng. L. Rev. 883, 909-10 (1993) (quoting Laurence H. Tribe, *American Constitutional Law* § 12-14, at 650 (1st ed. 1978)) (a victim's right to control information about him or herself "constitutes a central part of the right to shape the 'self' that any individual presents to the world. It is breached most seriously when intimate facts about one's personal identity are made public against one's will . . . in defiance of one's most conscientious efforts to share those facts only with close relatives or friends."); *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) (internal citation omitted) ("The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behavior and opinions are to be shared with or withheld from others.").

[3] *See Protecting Victims' Privacy Rights: The Use of Pseudonyms in Criminal Cases*, NCVLI Newsletter of Crime Victim Law, 16th Ed. (Nat'l Crime Victim Law Inst., Portland, Or.), Dec. 2013, at 4 n.9 (citing authorities, including: Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 San Diego L. Rev. 745, 763 (2007) ("Privacy . . . is not the trumpeting of the individual against society's interests, but the protection of the individual based on society's own norms and values.")).

[4] For more information about the use of pseudonyms by victims in criminal proceedings, including an analysis of why the use of pseudonyms does not create a per se violation of the public's or media's right of access or the defendant's right to a public trial or to prepare a defense, see Nat'l Crime Victim Law Inst., *The Use of Pseudonyms in Criminal Cases*, *supra* note 3. As described in that *Victim Law Article*, "[d]epending upon the nature of the crime charged and the size of the community in which the crime occurred, the victim may be readily identifiable even when referred to only by initials, therefore the use of pseudonyms is preferable." *Id.* at 1 & 3 n.3. For information about the use of pseudonyms by victims in civil proceedings, see *Protecting Victims' Privacy Rights: The Use of Pseudonyms in Civil Law Suits*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), July 2011, *available at* http://law. lclark.edu/live/files/11778-protecting-victims-privacy-rights-the-use-of.