

NATIONAL ALLIANCE OF VICTIMS'
RIGHTS ATTORNEYS & ADVOCATES

A Project of the National Crime Victim Law Institute

Ethical Considerations for Safeguarding Victim Privacy in a Digital World

Presenter:

Jane Anderson, JD

Rebecca Khalil, JD

November 17, 2017

Who is NCVLI?

Mission: To actively promote balance and fairness in the justice system through crime victim centered legal advocacy, education, and resource-sharing.

What is NAVRA?

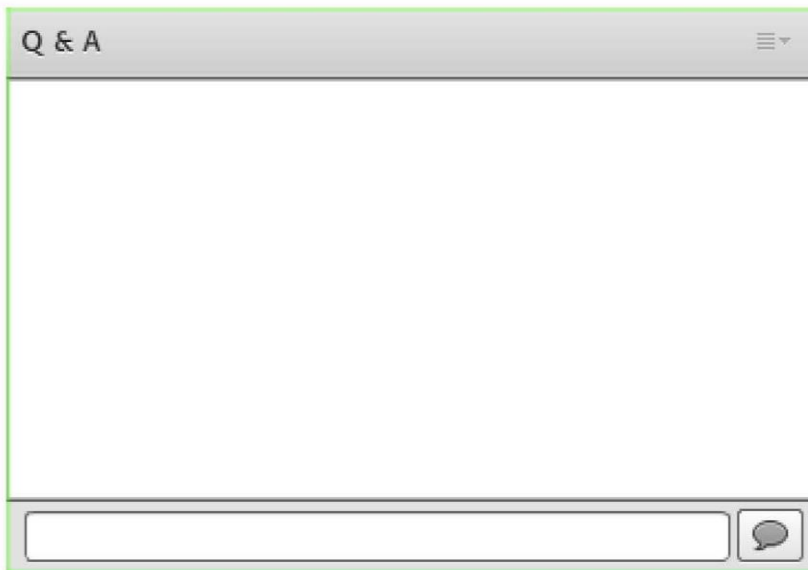
A membership alliance committed to the protection, enforcement, and advancement of crime victims' rights nationwide.

Housekeeping Matters

- This webinar is being recorded
- You will receive an e-mail with the PowerPoint slides and a link to our survey after the training.
- You are muted, but you can ask questions & participate – and we hope that you do
- Certificates of attendance will be available after the presentation. CA participants will be emailed their certificate after the presentation as State Bar requirements advise that they be personalized.

Housekeeping Matters

How to Participate:



ETHICAL CONSIDERATIONS FOR SAFEGUARDING VICTIM PRIVACY IN A DIGITAL WORLD

SUPPORT

This project was supported in part by Grant No. 2015-TA-AX-K051 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions, findings, conclusions, and recommendations expressed in this presentation are those of the authors and do not necessarily reflect the views of OVW.

FAIR USE

This presentation includes the creative work of others. This property is being used by permission or under claim of “fair use” (17 USC § 107). This presentation was created pursuant to fair use guidelines, and further use or distribution is prohibited.

PRESENTERS

JANE ANDERSON, JD



REBECCA KHALIL, JD





INNOVATIVE

Sustaining effective practices
and promoting systemic
change

INFORMED

Training, resources, and
assistance supported by
research and experience

PRACTICAL

Customized strategies that
are accessible, responsive,
and easy to apply

AEQUITAS

AVAILABLE 24/7 VIA TELEPHONE AND/OR EMAIL

TECHNICAL ASSISTANCE

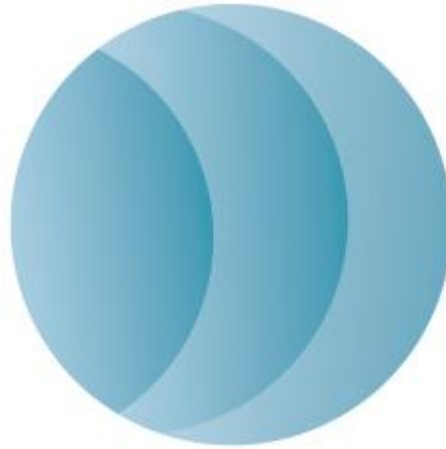
- Case consultation
- Policy review
- Legal research
- Motions prep
- Identification of experts
- Peer review

TRAINING

- Live
- Web-based

RESOURCES

- Recorded webinars
- Model briefs, motions, expert reports, etc.
- Sample Voir Dire questions, expert examinations, etc.



NATIONAL CRIME
VICTIM LAW INSTITUTE

WHO IS NCVLI?

Mission: To actively promote balance and fairness in the justice system through crime victim centered legal advocacy, education, and resource-sharing.

OBJECTIVES

- Identify sources of a victim's privacy rights.
- Consider individual ethical obligations in relation to victim privacy concerns.
- Identify information and records that may be confidential and/or privileged.
- Engage in effective and ethical pretrial litigation to protect victim privacy.
- Successfully respond to defense attempts to obtain confidential records.

KEY PLAYERS

Prosecutors

Victim Lawyers

- Does not include prosecutors who are bound by additional ethical rules

Defense Counsel

POLL

- ◉ Who do we have participating in the webinar?
 - Prosecutor
 - Victim Attorney
 - Defense Attorney
 - Law Enforcement
 - System-based Victim Advocate
 - Community-based Victim Advocate
 - Other Service Provider

SOURCES OF ETHICAL RULES

- ◉ Model Rules of Professional Responsibility (www.americanbar.org)
- ◉ ABA Criminal Justice Standards
- ◉ State-specific rules
- ◉ Case law

What privacy concerns do victims have?



Medical records



Educational records



Counseling records



Diaries



Emails



Social media



Phone records



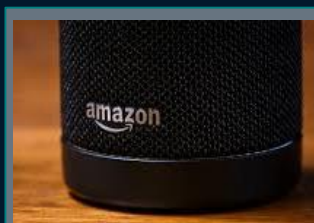
Smart phones



Internet searches

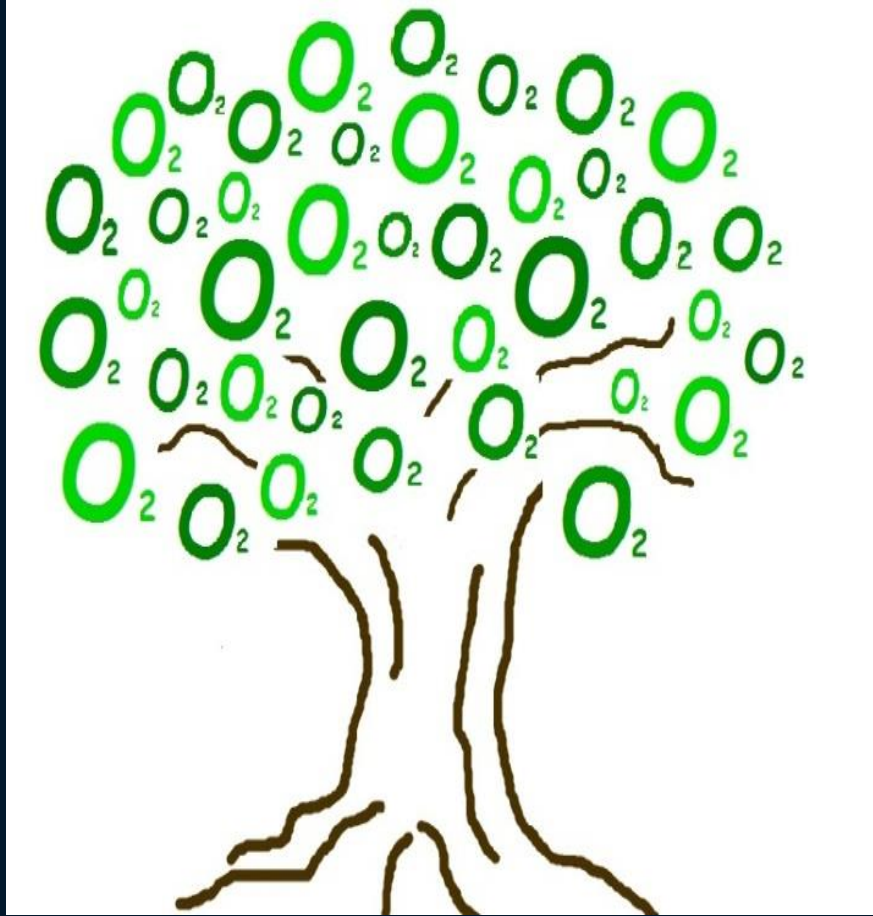


Smart TVs



WiFi Home Devices

And more...



For many victims, “privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.”

Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 473 (2005).

“[J]ustice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”

Justice Cardozo, *Snyder v. Massachusetts*, 291 U.S. 97 (1934)

VICTIMS' RIGHT TO PRIVACY

Key sources of privacy rights:

- Federal constitutional right to privacy
- State constitutional right to privacy
- Federal and state statutory and rule-based rights to privacy

PRIVACY

“Right to be let alone”

- Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4(5) HARV. L. REV. 193 (1890)

“Fundamental right”

- *Griswold v. Connecticut*, 381 U.S. 479 (1965)

“Safeguard the ability of a person to restrict dissemination of personal information”

- Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 649 (2006-2007)

“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.”

Daniel J. Solove, *“I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 763 (2007)

BEYOND PRIVACY

**Right to
Protection**

**Right to
Access
Courts**

**Right to
Be
Treated
with
Fairness,
Dignity,
and
Respect**

**Right to
Refuse
Discovery**

CASE FILE

Sarah

911 CALL

- Dispatch receives a 911 call from a woman who is clearly very upset
- Caller tells the dispatcher that her husband just choked her and threw her on the ground
- Caller identifies herself as Sarah and says that she ran to her neighbor's house to call 911 after her husband grabbed cell phone away from her

FIRST RESPONDERS

- Police arrive and find Sarah at her friend Kristen's house
- Sarah directs an officer to her house next door and says that she thinks her husband is still inside where he has a rifle
- A second officer stays with Sarah and notes visible redness to her neck and the smell of alcohol on her breath

GONE UPON ARRIVAL

- Officer goes to Sarah's house and finds it in disarray, with several beer cans on the kitchen table
- Sarah's husband is not in the house, but the officer finds a young boy in his bedroom playing by himself

FOLLOW-UP

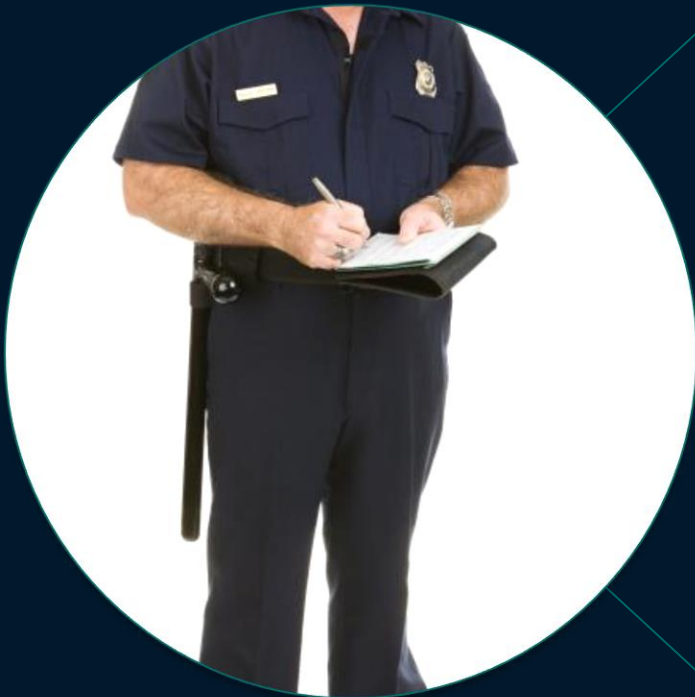
- Police call Fire / Rescue who treat Sarah on the scene and transport her to the hospital for treatment
- Photographs are taken of Sarah's injuries and the house
- Sarah's son, Boyd is taken to her mother's house to stay the night

ARREST

- Sarah's husband, Michael, is arrested the next day after Sarah's friend, Kristen calls 911 saying Michael returned to the house
- At the time of his arrest, police seize two cell phones from his pockets
- Sarah later identifies one of the phones as hers and the police return the phone to her

CHAT

- What privacy concerns do you think Sarah might have?



Medical

- Fire / Rescue
- Hospital Records

Home

- Alcohol
- Child

Digital

- Cell Phone
- 911 Call

VICTIM LAWYERS: FIRST STEP

**Talk with the victim about
his or her preferences
regarding privacy.**

Victim Lawyers

BEFORE YOU
BEGIN YOUR
RIGHTS
ENFORCEMENT
REPRESENTATION:

*Who is the victim
and who is the
client?*



FURTHER INVESTIGATION

You learn that the detective assigned to the case let the prosecutor know the following:

- She has had previous cases with Sarah
- Sarah's son is from a previous relationship that was also abusive
- Michael is an amateur UFC fighter who has an internet following on Facebook where he posts training videos under the user name, "Machine Mike"

POLL

- Can the prosecutor share this information with the victim's attorney?
 - Yes
 - No
 - Only if the victim has signed a waiver of confidentiality

SHARING INFORMATION

- Since the prosecutor does not have a confidential relationship with the victim, there is no ethical limit on sharing the information with Sarah's attorney

This does not work the other way around

POLL

- ◉ Can the prosecutor Google the defendant's name and/or "Machine Mike"?
 - No, that is the detective's job
 - No, that is an intrusion into the defendant's privacy
 - Yes, anything on the internet is public
 - Yes, as long as the prosecutor understands the effect of doing this type of independent investigation

ONLINE SEARCHES

- It is not ethically impermissible to conduct online searches
- Caution: Conducting an online search may be considered “investigation”

WHY IS THIS IMPORTANT?

ABSOLUTE IMMUNITY

IMBLER v. PACHTMAN, 424 U.S. 429 (1976)

Prosecutors have absolute immunity for functions that are “intimately associated with the judicial phase of the criminal process.”

“Intimately associated with the judicial phase” includes:

Initiating the prosecution

Presenting the State's case

Drafting legal documents

Determining probable cause to proceed

Deciding to file charges

Presenting information and motions to court

DOES NOT INCLUDE

- Acting as your own investigator
- Giving legal advice to police during investigation
- Attesting to the truth of facts in support of an arrest warrant
- Signing a search warrant affidavit

Kalina v. Fletcher, 522 U.S. 118 (1997); Imbler v. Pachtman, 424 U.S. 429 (1976); Burns v. Reed, 500 U.S. 478 (1991)

QUALIFIED IMMUNITY

BUCKLEY v. FITZSIMMONS, 509 U.S. 259 (1993)

- Offering legal advice to police about an un-arrested suspect
- Police investigative work
- Administrative activities

“When the functions of prosecutors and detectives are the same ... the immunity that protects them is also the same.”

STANDARD

HARLOW v. FITZGERALD, 457 U.S. 800 (1982)

“...government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

POLL

- ◉ As either a prosecutor or a victim's attorney, can you “friend” Mike on social media? Can you “follow” him?
 - Yes to both
 - No to both
 - Yes to friending, No to following
 - No to friending, Yes to following

QUESTIONS TO ASK

- Is sending a “friend” request communication?
- Can you articulate a difference between sending a “friend” request and “following” a publicly accessible social media account?
- What ethical obligation is implicated? Is this different for prosecutors v. victim attorneys?

COMMUNICATION

ABA MODEL RULE 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

VICTIM MEETING

- You meet with Sarah who tells you that Michael has been abusive for most of their three year relationship
- She also tells you that two days before this incident, he forced her to have sex
- Her son, Boyd walked in on the rape after hearing his mother cry out

RAISE YOUR HAND

- Do you think that the prosecutor has a duty to report this information?
- Do you think that Sarah's attorney has a duty to report this information?

MANDATORY REPORTING

PROSECUTORS

- Likely mandatory reporters
- No confidential relationship with victim
- Is the information relevant or material to the case?
- Exculpatory?

VICTIM'S ATTORNEY

- Ethical obligation is different
- Confidential communications
- Consider local rules regarding mandatory reporting
 - May disclose v. must disclose

Understand Privilege and Confidentiality

```
graph TD; A[Understand Privilege and Confidentiality] --> B[As the victim's attorney, explain client-attorney privilege & limits]; A --> C[As the prosecutor, explain your role]; B --> D[Explain role of systems-based and community-based advocates]; C --> D;
```

As the victim's attorney, explain client-attorney privilege & limits

As the prosecutor, explain your role

Explain role of systems-based and community-based advocates

VICTIM'S CELL PHONE

- Victim informs you that she has received text messages from the defendant since his arrest
- She shows you the texts on her cell phone
- The texts from Michael are in violation of the Court's protection order

CONSIDERATIONS

- Does the victim want to proceed with additional charges against Michael?
 - Violation of a protection order
 - Stalking
- Does the victim want the defendant's bond to be revoked?

CHARGING DECISION

The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.

CRIMINAL JUSTICE STANDARDS, Standard 3-3.9(b).
Prosecution Function (American Bar Ass'n)

FACTORS

- i. The prosecutor's reasonable doubt that the accused is in fact guilty;
- ii. The extent of the harm caused by the offense;
- iii. The disproportion of the authorized punishment in relation to the particular offense or the offender;

CRIMINAL JUSTICE STANDARDS, Standard 3-3.9(b).
Prosecution Function (American Bar Ass'n)

FACTORS

CONT'D

- iv. Possible improper motives of a complainant;
- v. Reluctance of the victim to testify;
- vi. Cooperation of the accused in the apprehension or conviction of others; and
- vii. Availability and likelihood of prosecution by another jurisdiction.

CRIMINAL JUSTICE STANDARDS, Standard 3-3.9(b).
Prosecution Function (American Bar Ass'n)

THE BOTTOM LINE

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

NATIONAL PROSECUTION STANDARDS §1-1.1 (Nat'l District Attorney's Ass'n 3d ed. 2009)

VICTIM BILL OF RIGHTS

- Along with other rights, victims may have a right to confer with prosecutors about charging decisions
- A victim-centered approach requires that victim's wishes, safety, and autonomy must be respected

CHAT

- How can you preserve the text messages to present in Court?

COLLECTING EVIDENCE

Forensic Examination

- Law Enforcement
- Privately retained expert

Record

- Screenshot
- Photograph phone
- Video record

Download

- Email to yourself
- Cloud service
- Electronic storage device

COUNSELING VICTIMS

- Explain privacy implications
- Offer options to facilitate limited disclosure:
 - Printing pictures/files
 - Screenshots/photographs of content
 - Downloading certain information to an electronic storage device
 - Suggesting alternate sources of information
 - Retaining a private technology company to extract specific information
- Caution that the prosecution may be impacted by court rulings on admissibility of evidence; e.g. Best Evidence Rule

DISCOVERY

Prosecution files a Discovery Notice providing the following:

- Copies of screenshots of the text messages on the victim's cell phone
- A video downloaded from Machine Mike's public Facebook account showing the defendant striking a punching bag saying, "this is how you deal with a bitch!"

WHAT WILL THE DEFENSE FILE IN RESPONSE?

Subpoena

- Court order requiring someone to appear and/or provide documents or evidence

Motion to Compel

- Motion asking the Court to order that the prosecutor turn something over

SUBPOENA

- Attorney for the victim may oppose a motion or move to quash a subpoena for the victim's records.

VICTIM'S ATTORNEY

- The victim's position may not always align with that of the prosecutor.
- Motions to Quash or Filing an Opposition
- Don't forget technical and/or procedural defects.

MOTION TO COMPEL

VICTIM HAS THE PHONE

- Prosecutor should argue that the phone is not in their “care, custody, or control”
- Victim is not subject to criminal discovery
- Victims’ rights

PHONE IS IN EVIDENCE

- Entire phone is not subject to discovery
- Defense is going on a fishing expedition
- Defense expert can only have limited access
 - Protective Order
- In camera inspection

CELL PHONES & PRIVACY

RILEY v. CALIFORNIA, 134 S. CT. 2473 (2014)

Court recognized “several interrelated privacy consequences”

- Massive amounts of storage
- Interconnectivity of data
- Information dating back years

...more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives.

UNITED STATES v. TADROS

310 F.3D 999, 1005 (7TH CIR. 2002)

“Brady prohibits suppression of evidence, it does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel.”

POLL

- If Sarah had consented to a forensic examination of her cell phone, would that be discoverable?
 - Yes
 - No
 - Only the portions that are relevant, material, and/or exculpatory

DIFFERENT APPROACH

- Default approach to discovery is to turn everything over
 - Cannot be accused of not complying with *Brady*
 - Open file policies
- What is your actual discovery obligation?

DISCOVERY RULE

FED. R. CRIM. P. 16

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.

STATE DISCOVERY RULES

- Most state's also require that the prosecutor provide the defense with any evidence that is “material” and “relevant” to the case


EXCULPATORY INFORMATION

BRADY

- Evidence favorable to the accused
 - Negates a defendant's guilt
 - Reduce a defendant's potential sentence
- Evidence going to the credibility of a witness.

GIGLIO

- Disclosure of any “deals” made by the government to a witness
- Any impeachment evidence for any witness



Victim confidence
in the system &
willingness to
participate



Protecting
victim's
privacy

PLEA OFFER

- The last time the prosecutor talked to Sarah, she said she did not want to go to trial
- The defense attorney approaches the prosecutor with a plea offer his client will accept

RAISE YOUR HAND

- Can the prosecutor accept the plea offer?

NOTICE TO THE VICTIM

(i) Consistent with any specific laws or rules governing victims, the prosecutor should provide victims of serious crimes, or their representatives, an opportunity to consult with and to provide information to the prosecutor, prior to making significant decisions such as whether or not to prosecute, to pursue a disposition by plea, or to dismiss charges.

CRIMINAL JUSTICE STANDARDS, Standard 3-3.4.
Prosecution Function (American Bar Ass'n)

NOTICE, CONT.

The prosecutor should seek to ensure that victims of serious crimes, or their representatives, are given timely notice of:

- (i) judicial proceedings relating to the victims' case;
- (ii) proposed dispositions of the case;
- (iii) sentencing proceedings; and
- (iv) any decision or action in the case that could result in the defendant's provisional or final release from custody, or change of sentence.

CRIMINAL JUSTICE STANDARDS, Standard 3-3.4.
Prosecution Function (American Bar Ass'n)

GOING FORWARD

- Proactively and ethically protect victim privacy
- Respond effectively to defense motions and subpoenas
- Cite privacy laws, confidentiality laws, and victims' rights laws
- Understand the unique role of victims' attorneys
- Collaborate and identify local and national resources



ÆQUITAS

**THE PROSECUTORS' RESOURCE
ON VIOLENCE AGAINST WOMEN**

Jane Anderson
Attorney Advisor

1100 H Street NW, Suite 310
Washington, DC 20005

P: (202) 596-4229
F: (202) 393-1918

janderson@aequitasresource.org
www.AEquitasResource.org

REBECCA S.T. KHALIL

Attorney

National Crime Victim Law Institute

1130 SW Morrison St., Suite 200

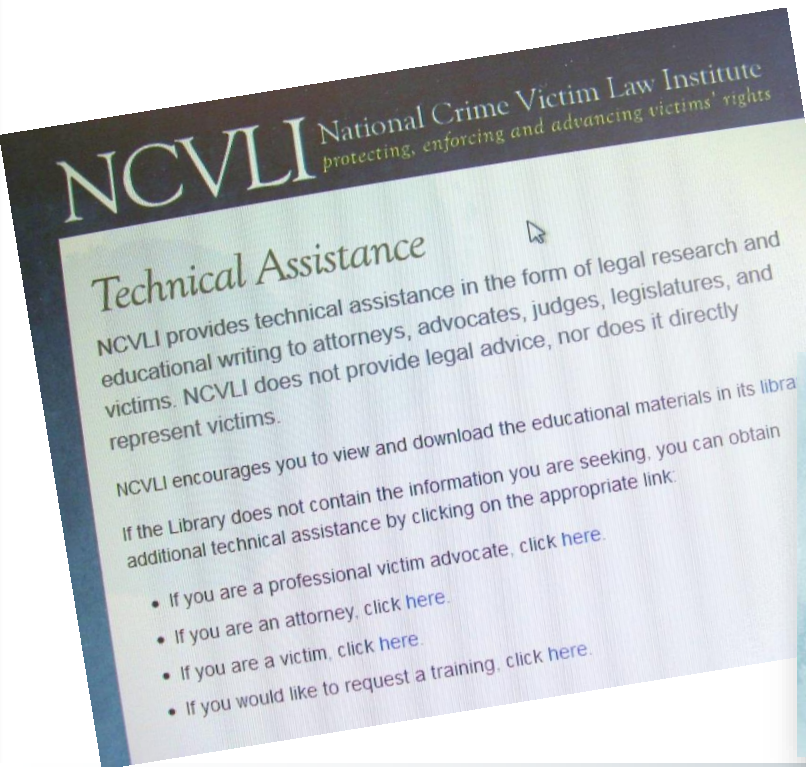
Portland, OR 97205

503.768.6973

rebeccak@lclark.edu

FOR MORE INFORMATION

www.ncvli.org
ncvli@lclark.edu



NCVLI National Crime Victim Law Institute
protecting, enforcing and advancing victims' rights

Technical Assistance

NCVLI provides technical assistance in the form of legal research and educational writing to attorneys, advocates, judges, legislatures, and victims. NCVLI does not provide legal advice, nor does it directly represent victims.

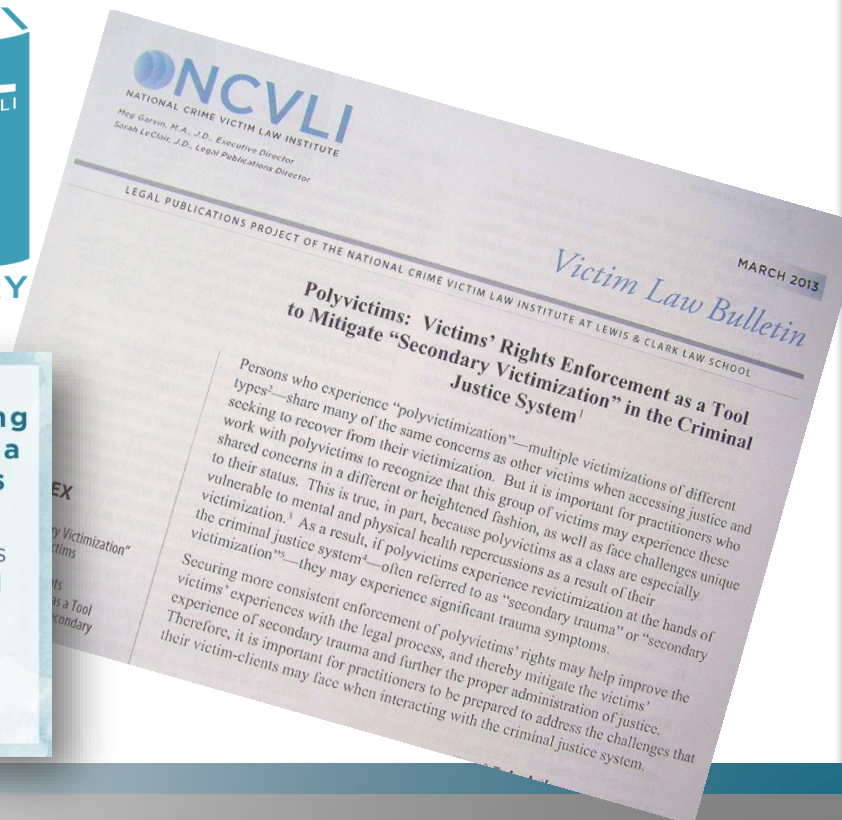
NCVLI encourages you to view and download the educational materials in its library. If the Library does not contain the information you are seeking, you can obtain additional technical assistance by clicking on the appropriate link:

- If you are a professional victim advocate, [click here](#).
- If you are an attorney, [click here](#).
- If you are a victim, [click here](#).
- If you would like to request a training, [click here](#).



**Are you working
on a case with a
victims' rights
issue?**

NCVLI provides
legal technical
assistance to
practitioners
serving crime
victims.



NCVLI
NATIONAL CRIME VICTIM LAW INSTITUTE
Meg Garvin, M.A., J.D., Executive Director
Sarah LeClair, J.D., Legal Publications Director

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

MARCH 2013

Victim Law Bulletin

Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System¹

Persons who experience "polyvictimization"—multiple victimizations of different types²—share many of the same concerns as other victims when accessing justice and seeking to recover from their victimization. But it is important for practitioners who work with polyvictims to recognize that this group of victims may experience these shared concerns in a different or heightened fashion, as well as face challenges unique to their status. This is true, in part, because polyvictims as a class are especially vulnerable to mental and physical health repercussions as a result of their victimization.³ As a result, if polyvictims experience revictimization at the hands of the criminal justice system⁴—often referred to as "secondary trauma" or "secondary victimization"⁵—they may experience significant trauma symptoms.

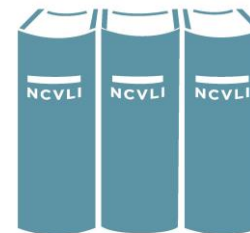
Securing more consistent enforcement of polyvictims' rights may help improve the victims' experiences with the legal process, and thereby mitigate the victims' experience of secondary trauma and further the proper administration of justice. Therefore, it is important for practitioners to be prepared to address the challenges that their victim-clients may face when interacting with the criminal justice system.



**RIGHTS ENFORCEMENT
TOOLKIT** that guides
practitioners through
the steps of asserting
victims' rights



Basic victims'
rights information
in short video
QUICKTOOLS



**VICTIM LAW
LIBRARY** filled with
innovative legal
articles



National, regional,
local, and online
TRAININGS on
victim law



**TECHNICAL
ASSISTANCE** in
the form of legal
research, writing,
strategic advice,
and amicus curiae
briefing



Listings of victims'
rights and resources
by location and topic
in an online **VICTIM
RESOURCE MAP**

For More Information

[Home](#) | [About](#) | [Support](#) | [Join NAVRA](#) | [Contact](#) | [Member Login](#)

 **NAVRA** NATIONAL ALLIANCE OF VICTIMS' RIGHTS ATTORNEYS & ADVOCATES

Enhanced Member Resources

[Searchable Databases](#)

Basic Member Resources

[Member Directory](#)
[New & Noteworthy](#)
[Pro Bono Highlight](#)

NCVLI Resources

[Request Technical Assistance](#)
[Request a Training](#)
[Sign up to Receive News Digests](#)
[Victim Law Library](#)
[Victim Resource Map](#)

[Join Now](#)

[Join Now](#)

National Alliance of Victims' Rights Attorneys & Advocates

Welcome to the new NAVRA website!

If you had an account on the old NAVRA site, you will need to reset your password. Please [click here](#) to to reset the password and an email will be sent to the email account associated with your account with further instructions.

If you are unable to login to your account or are having any issues using the new site, please [contact us](#) and we will get back to you to resolve your issue.

2018 Crime Victim Law Conference

June 7-8, 2018 | Portland, OR



NCVLI's annual Crime Victim Law Conference, now in its 17th year, continues to be the only national conference focusing on rights enforcement in criminal cases, which is a critical but often overlooked component of holistic victim services. The Conference provides participants with the knowledge and practical skills necessary to provide effective legal services to victims of crime.

[Click here](#) to register for the conference
Early bird registration expires May 4, 2018!