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# SECTION 10

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## SEXUAL ABUSE CASES

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**DISCOVERY: PRE-FILING & PROTECTING YOUR CLIENT: STATUTES/CASE  
LAW UNIQUE TO DISCOVERY IN SEX ABUSE CASES**

**By John Manly**

## DISCOVERY: PRE-FILING & PROTECTING YOUR CLIENT: STATUTES/CASE LAW UNIQUE TO DISCOVERY IN SEX ABUSE CASES

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Sex abuse cases consist of many moving parts, often involving a confluence of criminal actions and civil proceedings, where the survivor's injuries are integral to both. Given the vulnerability of sex abuse survivors to self-blame, fear of not being believed, and susceptibility to further emotional and psychological harm, great care and diligence must be taken by counsel to protect the survivor from harassment or intimidation, and/or to impede a defendant's attempts to use civil proceedings to circumvent the narrow parameters of criminal discovery. In California, *General Dynamics Corp. v. Superior Court*, 7 Cal. 4<sup>th</sup> 1164, 1191 (1994), lists the many mechanisms by which a defendant may access the survivor and/or his or her privileged information during the discovery process: "[t]he use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, *in camera* proceedings, are but some of a number of measures that might usefully be explored by the trial courts as circumstances warrant" to access privilege documents, or subject the survivor to potentially harmful questioning. *Id.*

Importantly, *General Dynamics* also refrains from defining these other circumstances at a defendant's disposal to circumvent a survivor's privileges, an ambiguity which defendants often see as an open invitation for legal creativity at the survivor's expense. *Id.* Thus, it is imperative that the counsel for a sex abuse survivor, particularly a child sex abuse survivor, asserts his or her clients' rights early in the proceedings and maintains a keen eye on a defendant's efforts to discredit, intimidate, or harass a survivor. Pre-filing and the earliest stages of discovery often coincide with the criminal proceedings, a stage at which the client is, ironically, not an official party. Survivor's counsel must be vigilant to protect the survivor's privacy during the criminal proceedings, during pre-filing, and throughout the initial stages of discovery. The following article explores ways in which the survivor's broader rights can inform specific steps that survivor's counsel may take to safeguard the client, including: (I) ensuring anonymity of the survivor, (II) enforcing the survivor's enumerated rights, (III) limiting a defendant's access to the victim and/or privileged materials, (IV) potentially staying civil proceedings until the resolution of the criminal actions, and (V) encouraging the survivor's discretion to further protect his or her own privacy.

### I. Ensuring Anonymity of the Survivor

Ensuring the anonymity of the sex abuse survivor should be one of survivor's counsel's first moves in his or her representation. Filing the survivor's case as a John Doe or Jane Doe is appropriate. If a survivor were to file under his or her real name, the grisly, disturbing details of the sex abuse will likely become immortalized online, revictimizing the survivor in perpetuity while he or she is applying for jobs, seeking housing, and pursuing educational opportunities. *Starbucks Corp. v. Superior Court*, 86 Cal. Rptr. 3d 482 (Ct. App. 2008) ("[t]he judicial use of 'Doe plaintiffs' to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web"). Anonymity also minimizes the likelihood of reprisals by those affiliated with the defendant. *See L.H. A.Z., K.K., & D.R. v. Schwarzenegger*, No. CIV. S-06-2042 LKK/GGH, 2007 WL 662463, at \*18 (E.D. Cal. Feb. 28, 2007) (noting that "[w]hen the willingness to file suit is chilled by fear of retaliatory action, the public interest in seeing the suit move forward on its merits outweighs the public interest in knowing the plaintiffs' names"). *See also Protecting Victim's Privacy Rights: The Use of Pseudonyms in Civil Law Suits*, National Crime Victim Law Institute (NCVLI) (2011).

California Civil Code section 1708.85 expressly allows a litigant bringing a lawsuit in California to file his or her case under a pseudonym:

(f)(1) A plaintiff in a civil proceeding pursuant to subdivision (a), may proceed using a pseudonym, either John Doe, Jane Doe, or Doe, for the true name of the plaintiff and may exclude or redact from all pleadings and documents filed in the action other identifying

characteristics of the plaintiff. A plaintiff who proceeds using a pseudonym and excluding or redacting identifying characteristics as provided in this section shall file with the court and serve upon the defendant a confidential information form for this purpose that includes the plaintiff's name and other identifying characteristics excluded or redacted. The court shall keep the plaintiff's name and excluded or redacted characteristics confidential.

On any and all public documents, survivor's counsel should only reference the survivor via the Jane Doe or John Doe pseudonym. Doing so protects legitimate privacy interests, readily recognized in California, particularly when a litigation is of a sexual nature. *See Starbucks Corp., supra, citing Doe v. City of Los Angeles*, 42 Cal. 4th 531 (2007) ("former Boy Scouts sued under pseudonyms based on allegations that city police officer sexually assaulted them while they were teenagers"); *also citing Johnson v. Superior Court*, 80 Cal. App. 4th 1050, 1072 (2000) ("parents entitled to depose sperm donor with family history of kidney disease, but donor's name protected from disclosure to outsiders through an appropriate order 'which maintains the confidentiality of John Doe's identity'"). "Doe designations may be appropriate even where sealing orders are not." *See H.B. Fuller Co. v. Doe*, 151 Cal. App. 4th 879 (2007).

## II. Enforcing the Survivor's Enumerated Rights

Defendants will often try to subject survivors to a deposition or interview. California provides sex abuse survivors with explicit rights as well as other protections during civil and criminal proceedings. In California, through a 2008 referendum, voters amended the California Constitution to provide survivors with specific, enumerated rights. This Amendment, titled the California Victims' Bill of Rights Act of 2008, is better known as "Marsy's Law." Prior to its passage, California defined "victim" as "the person against whom a crime had been committed." With the implementation of Marsy's Law, however, the definition of "victim" has expanded, now defined as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term 'victim' also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime survivor who is deceased, a minor, or physically or psychologically incapacitated." *See Cal. Const., art. I, § 28* ("Marsy's Law").

### (a) Invoking Marsy's Law: Right to Refuse a Request for Deposition, Interview, or Other Discovery Requests

Subdivision (b) of Marsy's Law allows a survivor, the survivor's retained attorney, or a legal representative of the survivor or prosecutor to enforce the survivor's enumerated rights. As a practical matter, *a sex abuse survivor's attorney should assert the survivor's rights immediately*. Foremost, survivor's counsel should enter his or her appearance at the proceedings as soon as possible. In doing so, survivor's counsel should demand recognition of the survivor's rights under Marsy's Law, *by filing with the court in writing*. Making a record with the court, particularly at the outset of any criminal proceedings that may precede civil proceedings, alerts the court to the importance of protecting the survivor from the psychological trauma of a criminal proceeding as well as protecting the survivor from potential intimidation or harassment from defendants or their counsel, and putting the court on notice.

Mitigating the survivor's exposure to further trauma is always a concern during sex abuse discovery. The Supreme Court of Minnesota once concisely articulated the importance of shielding a sex abuse survivor during the criminal prosecution of a sex abuse case and the practical concerns at play:

"[B]ecause B.Q. is a minor and an alleged survivor of sexual assault by [Defendant], *the risk of intimidating or harassing her is particularly high*. Both the state and the public have an interest in preventing harassment intimidation. Even if [Defendant] is not present during the deposition, questioning B.Q. about the abuse and any other topics that may lead to discoverable evidence could place B.Q. in severe distress. B.Q.'s possible distress also places the criminal trial in jeopardy because '[i]n the investigation and prosecution of *most sexual assault cases, the role of*

*the survivor is much more important than in other crimes since the survivor is usually the sole witness to the crime.” See State v. Deal, 740 N.W.2d 755, 766 (Minn. 2007) (emphasis added).*

These competing factors are no less true in California, as the vulnerabilities and traumas of sexual abuse may result in survivors being particularly susceptible to further harm or intimidation throughout the entirety of the civil and criminal proceedings, particularly via deposition. Enforcing the enumerated rights under Marsy’s Law, thus, becomes imperative to protecting the client during a case’s earliest stages.

### **(b) Executing Protective Orders to Safeguard throughout Civil and Criminal Proceedings**

Following the assertion of rights under Marsy’s Law, the survivor’s counsel should seek a protective order to either postpone or substantially limit civil discovery, quashing any pending discovery requests by the defendant upon the survivor that may exist upon retaining the client. The court’s authority to execute protective orders often arises from the rules of civil procedure of a particular jurisdiction. Under federal law, a court may issue a protective order, upon showing “good cause,” to protect a “party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *See Fed. R. Civ. P. 26(c)(1)(G)*. California Penal Code section 136.2 mirrors this federal principle, also requiring “good cause.” Courts generally do not grant protective orders for ethereal, hypothetical reasons. The rationale for the protective order should be grounded and substantial, referencing how responding to discovery requests would cause further psychological or emotional injury to the survivor. *See also Protecting Crime Victims from Discovery Requests in Civil Proceedings During the Pendency of a Related Criminal Case, NCVLI (2013)*.

Narrowness and specificity are imperative in asking the court for a protective order. Articulating the precise harm that the survivor will likely suffer, whether intimidation, harassment, or exacerbated psychological injury, is integral. Additionally, survivor’s counsel can explain the survivor’s unique and personal susceptibility to intimidation from the defendant. Furthermore, given the stakes of losing a protective order motion (and since defendants may use the civil discovery process to circumvent criminal discovery to undermine the survivor’s credibility), the use of testimony by an expert, explaining the likely ramifications of injury from compliance with discovery requests, may be advised.

Furthermore, if litigating against an educational entity, the Family Educational Rights and Privacy Act of 1974 (FERPA) protects a student from the revelation of personally identifiable information. To protect students against unwitting exposure in sex abuse cases against public schools, survivor’s counsel should assert that defendant schools must obtain written authorization from the parents of minor students or, if eligible, the students themselves, should defendant seek identifying information.

### **(c) Depositions and Marsy’s Laws: Stipulating Limitations on Discovery**

As noted, Marsy’s Law gives survivors a broad range of rights. While no California case construes the interplay of Marsy’s Law with civil depositions, an Arizona case (which has a Survivors’ Bill of Rights [VBR] within its State Constitution) includes the same provision as the California Constitution in relation to depositions of criminal survivors, including the right to refuse a deposition. In *State v. Lee*, defendants sought to depose the survivors of the concurrent criminal case in a civil proceeding. 245 P.3d 919, 920 (Ariz. Ct. App. 2011). Arizona Court of Appeals found that the expressed purpose of Arizona’s Marsy’s Law was best realized through the total prohibition on depositions within civil and criminal matters alike. *Id.*

To ensure that a defendant cannot use depositions in a civil proceeding to gain advantage during a criminal proceeding, survivor’s counsel should stipulate, prior to letting the survivor sit for any deposition during the criminal proceeding, clear and unambiguous parameters for the deposition. Allowing a survivor to be deposed without these safeguards can seriously and irrevocably jeopardize a pending civil matter while potentially revictimizing the survivor in the process.

#### **(d) Serving as a Conduit During the Criminal Proceedings**

During the criminal proceeding, it also is important to reach out to the prosecutor. During the criminal action, the survivor is not a party to the proceedings. However, the survivor—and his or her story—will play a pivotal role in the criminal processing and, of course, impact the survivor. Foremost, survivor’s counsel should explain that, as the client’s civil counsel, he or she is there to help, not steer the criminal proceeding from the backseat. It is important that counsel convey a willingness to serve as a conduit between the prosecutor’s office and the client. Not only is this practical, given survivor’s counsel’s interactions with the survivor and his or her therapist, but *counsel is not under the same obligations to turn over communications in discovery that govern the prosecutor’s interaction with the survivor*. From a practical standpoint, serving as a barricade between the survivor and the criminal proceedings helps safeguard against revictimizing the survivor, as the violations and injuries sustained by the survivor—as well as the veracity of these injuries in the jury’s eyes. See Claire Chiamulera, *Representing Child Abuse Victims: Criminal Court Strategies*, American Bar Association. (June 5, 2019), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/videos/representing-child-abuse-victims--criminal-court-strategies/](https://www.americanbar.org/groups/public_interest/child_law/resources/videos/representing-child-abuse-victims--criminal-court-strategies/)

### **III. Limiting a Defendant’s Access to the Survivor and/or Privileged Documents**

#### **(a) Protecting the Survivor from a Defendant’s “Fishing Expeditions”**

Survivors are entitled to privacy as a constitutional right in California. Furthermore, barring pretrial discovery of the privileged records of survivor does not violate the defendant’s federal constitutional rights. See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“[t]here is no general constitutional right to discovery in a criminal case”). Since survivors have rights to withhold privileged information, survivor’s counsel should ensure that a court is not swayed by arguments that a criminal defendant’s due process rights are infringed by a survivor’s decision to invoke Marsy’s Law rights.

Furthermore, survivors of sexual assault, harassment, or abuse are afforded additional protections under California Civil Procedure section 2017.220 (emphasis added):

- (a) In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, *any party seeking discovery concerning the plaintiff’s sexual conduct with individuals other than the alleged perpetrator shall establish specific facts showing that there is good cause for that discovery*, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be made by a noticed motion, accompanied by a meet and confer declaration under Section 2016.040, and shall not be made or considered by the court at an ex parte hearing.
- (b) *The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for discovery under subdivision (a), unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.*

Code of Civil Procedure section 2017.220 serves as an important tool to limit defense counsel’s exploration into the survivor’s sexual history. As digging into sexual history can be used as a tool for intimidation or harassment, even if it does nothing to exonerate the alleged perpetrator, it is important for the survivor’s counsel to assert.

To circumvent discovery limitations or a survivor’s invocation of privilege, a defendant may try to acquire privileged documents or correspondences through craftier means. If a defendant tries to obtain privileged documents through third parties, for example, survivor’s counsel should immediately intervene

and quash defendant's effort to circumvent discovery rules that protect a survivor. Survivor's counsel must explain to the court that the survivor, particularly as a survivor of sex abuse, has a fundamental and *expressed* constitutionally-enshrined right to privacy in California. Cal. Const., art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying the defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy"). Survivor's counsel should articulate that a defendant's "fishing expedition" undermines the obvious policy goals of maintaining a survivor's privacy. A sex abuse survivor's healing process is difficult to predict, and unfettered discovery of the survivor's conversations, for instance, would have a chilling effect on seeking help. The NCVLI defends the common law privilege between counselor and survivor, for instance, noting that:

"If a court were to routinely turn over privileged documents, then '[sexual assault] counselors [would] feel obliged to warn their clients beforehand that communications between them may be used as evidence in court, and they report that this knowledge often has an important chilling effect on the client's willingness to be forthcoming... [t]o this end, it is imperative to recognize any disclosure of the survivors' records – including to a court in camera – is a violation of the survivor's privacy and may have a chilling effect on this and future survivors."

*See Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, NCVLI (2011).

Survivor's counsel is thusly tasked with emphasizing the survivor's privacy interest at every turn, even within the context of the criminal proceeding. Safeguarding the survivor alone is insufficient. Survivor's counsel must be vigilant in identifying whether a defendant is seeking to access materials protected by privacy interests through third-parties or other indirect means, impeding it as necessary.

#### **(b) Limiting Access to Privileged Documents: Fighting Back Against *In Camera* Review**

Despite the existence of alleged "absolute privileges" surrounding certain materials involving the survivor, defendants may try to seek *in camera* review of privileged documents by the court, arguing, for instance, that a survivor may have waived his or her privileges protecting certain materials.

Fortunately, California rules are especially robust in preventing the release of privileged information. Evidence Code section 915(a) states that "the presiding officer may not require disclosure of information claimed to be privileged... in order to rule on the claim of privilege." Furthermore, the California Supreme Court has contextualized Evidence Code section 915, noting that section 915 "prohibits a court from ordering in camera review of information claimed to be privileged in order to rule on the claim of privilege." *Costco Wholesale Corp. v. Super. Ct.*, 47 Cal. 4th 725, 739 (2009). Nonetheless, if defendant can substantiate the argument that the privilege is subject to some exception, then Evidence Code section 915 would not apply. *See* Scott B. Garner, *July 2012 – The Perils of Protecting the Privilege*, Orange County Bar Assoc. (July 2012), <http://www.ocbar.org/All-News/News-View/ArticleId/829/July-2012-The-Perils-of-Protecting-the-Privilege>. In general, defendants' arguments for *in camera* review are often baseless, but, if left insufficiently addressed, reviews can result in privileged material entering the courtroom. Consequently, survivor's counsel must be vigilant to ensure that the policy concerns of California statute are aggressively enforced, despite defendants' efforts to contort requested evidence into various exceptions.

#### **IV. Staying Civil Proceedings until the Resolution of the Criminal Action**

Courts wield the authority to stay civil proceedings until the completion of related criminal proceedings. Unless the criminal statute of limitations bars criminal prosecution, a survivor of sexual abuse may face the hurdles associated with the parallel tracks of criminal and civil proceedings. The basis for granting a stay is inherently discretionary, hinging on whether a stay is in "the interests of justice." *See United States v. Kordel*, 397 U.S. 1, 12 n. 27 (1970). California courts mirror these federal principals and have often ruled that a defendant is generally entitled to a discovery stay in a civil proceeding until the criminal

prosecution has resolved, particularly when the two legal proceedings arise from the same set of facts. See *Pacers, Inc. v. Superior Court*, 162 Cal. App. 3d 868 (1984).

Either the defendant or the plaintiff may call for a stay in civil proceedings. Courts are often hesitant to deny the defendant's request unless multiple factors cut heavily in favor of the plaintiff, centering on whether, or to what extent, the plaintiff would endure significant prejudice as a result of the delay. However, it bears mentioning that the court in *Avant! Corp. v. Superior Court* denied the defendant's request for a stay of a civil proceeding until the end of the criminal proceedings, allowing the two proceedings to occur simultaneously. 79 Cal. App. 4th 876 (2000). In *Avant!*, a corporate defendant sought to stay the civil proceeding, since the corporation and several of its current and former employees were defendants in the criminal proceeding. *Id.* In denying the stay, the *Avant!* Court explained that a corporation itself did not have any Fifth Amendment interests that may be undercut by civil discovery. *Id.* Critically, the *Avant!* Court also stated that the interest of the employees in staying the proceeding were not to be "reviewed on Fifth Amendment grounds, but on abuse of discretion grounds even where the employees are defendants and the request for admissions and interrogatory are directed to those employees." *Id.* at 886. Courts will review a stay request, whether from plaintiff or defendant, through the factors in *Keating v. Office of Thrift Supervision*. 45 F.3d 322 (9<sup>th</sup> Cir. 1995). *Keating* sets forth five factors to be considered when evaluating the appropriateness of a stay during parallel criminal and civil proceedings: (1) the interests of the plaintiff in proceeding expeditiously with the litigation or any aspect of it, and the potential prejudice to plaintiff due to the delay; (2) the burden that any particular aspect of the proceedings may impose upon defendant or defendants; (3) the convenience to the court in the management of its cases, and efficient use of its judicial resources; (4) third-party interests in the civil litigation; and (5) the public's interest in the pending civil and criminal proceedings. *Id.*

Survivor's counsel can also avert a stay by demonstrating that the two proceedings are only tangentially related, or that the legal theories underlying each proceeding are unrelated. In any case, it is important that survivor's counsel understand that these *Keating* factors are not listed in descending or ascending order of significance, and a court may, in its discretion, uphold or deny a stay through its own weighing of the *Keating* factors. The granting or denial of a stay request should not be taken for granted.

#### **V. Encouraging Discretion: Advising the Survivor to Protect His or Her Privacy**

As a practical note, defendants will seek whatever information they can obtain, particularly online via social media platforms. Survivors should be advised that social media profiles give dangerous opportunities for a defendant to glean materials to later undermine a survivor's credibility or even sympathy in the eyes of a jury. It is often wise to advise a survivor to make his or her social media settings private and, if possible, limit postings to which a defendant may gain access. Even seemingly innocuous post that imply a survivor's positive state of mental wellness could be turned against the survivor at a later date in an effort to discredit damages. Articulating these stakes to the survivor plays an important role in minimizing a defendants' subtler ways of accessing the survivor.

#### **Conclusion**

Sex abuse litigation may involve particularly vulnerable clients. However, this vulnerability is matched by a depth of rights in California that aim to protect the identity, privacy rights, and privileges of survivors of sexual abuse. Nonetheless, sufficient daylight still exists in many statutes (or strained statutory interpretations) to allow defendants to jeopardize a survivor's well-being in order to pursue greater leverage within a civil litigation relating to the sexual abuse. Vigilance by survivor's counsel is imperative, and it is paramount that counsel not merely rely on the air of protection surrounding rights of survivors and forfeit the need to relentlessly fight for their recognition, even at the case's earliest stages.