



Sample Motion to Quash Subpoena Seeking Crime Victim Records

The following pages contain sample briefing designed for a Michigan Circuit Court, to support the argument that where custody cases involve domestic violence, supervised parenting time is in the best interests of the children. This includes content from The National Crime Victim Law Institute (NCVLI) and MCEDSV. Neither MCEDSV nor NCVLI make any warranty, express or implied, regarding any information it may provide via this sample motion. This sample motion is intended for educational purposes only. It does not constitute legal advice; nor does it substitute for legal advice. No attorney-client relationship is formed between MCEDSV or NCVLI and the recipient. For additional resources relating to the protection, enforcement, and advancement of crime victims' rights, please visit www.ncvli.org and the website of our membership alliance, the National Alliance of Victims' Rights Attorneys & Advocates, www.navra.org.

Attorneys should tailor this document as they see fit, based on their knowledge of the particular preferences of the judge in their case. We encourage advocates to include as many arguments as possible in their trial briefing so that the issues they raise are preserved for appeal. The highlighted portions are intended to facilitate the entry of facts pertinent to an individual case. At several points along the way, this sample language contains bracketed sentences [] suggesting that advocates tailor the writing to their own cases. Before finalizing, we recommend doing a control + F search for “[” to be sure the briefing is fully tailored to your case and any irrelevant language is removed.

If advocates anticipate that a particular judge is likely to be especially skeptical about these arguments, attorneys may choose to call a domestic violence expert to respond to questions about the dynamics of domestic violence, common abuser behavior, and non-intuitive victim behavior. MCEDSV maintains a list of experts on these issues statewide, and advocates should feel free to contact Elinor Jordan, Lead Attorney of the Survivor Law Project, at ejordan@mcedsv.org or (517) 347-7000 ex.10 with questions.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF _____

Case No: _____
Hon. _____

_____,
Plaintiff,

vs.

_____,
Defendant.

[Attorneys Names] (Bar # [numbers]) [Addresses] [Phone Numbers] [Email addresses]

**_[Crime victim / Pseudonym]_____’S MOTION TO QUASH SUBPOENA &
FOR PROTECTIVE ORDER**

_[Crime victim / Pseudonym]_____, by and through undersigned counsel, moves this Court for an order quashing the subpoena issued [date] seeking [information on what was sought] pursuant to MCR 2.305 and for a protective order pursuant to MCR 2.302. This motion is based on the attached brief, exhibits, and any other evidence presented at a hearing on the motion.

Dated: _____

Respectfully submitted,

By: _____

BRIEF IN SUPPORT

[Summarize facts of current case to demonstrate that the client is a “victim”. Pursuant to statute this requires proving: client suffered a covered harm, the defendant’s conduct is punishable by imprisonment for more than 1 year or is expressly labeled a felony, and defendant is charged with the crime. Further explain how the particular discovery right treads on the articulated victim’s rights of fairness, privacy, protection and dignity.]

MCR 2.302

Protective Orders On motion by a party or by the person from whom discovery is sought, and **on reasonable notice and for good cause shown**, the court in which the action is pending may issue any order that justice requires to **protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense**, including one or more of the following orders:

- (1) **that the discovery not be had;**

* * *

If the motion for a protective order is denied in whole or in part, the court may, on terms and conditions as are just, order that a party or person provide or permit discovery. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

I. This Court should prevent Defendant from circumventing victims’ rights.

The Michigan Constitution provides crime victims with “[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.”¹ Const

¹ [practitioners may consider their court and the extent to which the federal citations here will be persuasive] All persons, including victims of crime, are also guaranteed a federal constitutional right to privacy. *See Roe v Wade*, 410 US 113, 152-153 (1973) (recognizing that “a right of personal privacy . . . does exist under the Constitution”); *see also Whalen v Roe*, 429 US 589, 599 (1977) (noting cases finding protected privacy interests include an “individual interest in avoiding disclosure of personal matters”). Protecting this right is critical. *See Ilene Seidman & Susan Vickers, The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U.L. Rev.

1963, art 1, § 24. The process of criminal discovery is circumscribed and calculated to respect the privacy of crime victims. See MCR 6.201. Continued litigation of this civil matter during the pendency of the criminal trial would subject _____ [crime victim / pseudonym] _____, who is the victim in the criminal prosecution, to further discovery that is inconsistent with the design of Michigan's criminal justice process.

Invasive civil discovery by a criminal defendant is a substantial disincentive for victims to report the crimes perpetrated against them; a reality which negatively implicates the effective administration of justice and undermines the victims' constitutional right to access the courts.² In *Moldowan v City of Warren*, 578 F3d 351 (CA6 2009), a case arising out of Michigan, the criminal defendant sought damages through a civil action after being acquitted of a crime. The victim, a named defendant in the civil action, sought immunity, arguing that “[i]f a woman who has been sodomized, beaten and left permanently disabled can be sued and subjected to an endless retread of the brutalization against her through deposition and discovery, the entire criminal justice system is put at risk.” *Id.* at 373 (citation omitted). The Sixth Circuit agreed. *Id.* This Court has a chance to prevent this same type of abuse of process and protect victims' rights.

This Court should hold that the protections afforded by victims' constitutional and statutory rights extend to this related civil proceeding and require quashing/staying the civil discovery. Case law across the country supports this approach, reflecting an understanding that, in order for crime victims' rights to be meaningful, their protections must extend to civil proceedings that share a substantial nexus to the crime. For instance, in *State v Lee*, 245 P3d 919

467, 473 (2005) (“For most [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.”).

² All individuals have a fundamental right to access the courts. See, *eg*, *Chappell v Rich*, 340 F3d 1279, 1282 (CA 11 2003) (“Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment.”); *Ryland v Shapiro*, 708 F2d 967, 971 (CA 5 1983) (noting that access to courts is a fundamental right).

(Ariz Ct App 2011), a civil forfeiture proceeding with a parallel criminal case, the defendant obtained a court order compelling depositions of the named victims in the criminal proceeding. On review, the court of appeals held that the trial court erred as a matter of law in denying the victims a protective order precluding the depositions. Relying on the victims' constitutional rights "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, through the criminal justice process," the court held "that victims retain their constitutional right to refuse to be deposed by the defense in a civil proceeding where the subject matter of the proposed deposition is the criminal offense committed against those victims." *Id.* at 920. *See also In re Doe*, 22 SW3d 601, 611-12 (Tex App 2000) (holding that the rape shield laws protected the victim from being asked questions about her past and present sexual history at a civil deposition even though Texas' rape shield law explicitly applies only in criminal cases); *Tennessean v Metropolitan Government of Nashville*, 485 SW3d 857, 878,882 (Tenn 2016) (Wade, J., dissenting) (noting that in this civil proceeding—a public records request by media for police investigation file—the crime victim opposed releasing the information as it related to her victimization and that she had the right to be free from intimidation, harassment and abuse, and to be treated with dignity and compassion).

II. Courts have a duty to maintain the integrity of the justice system and prevent abuse of process.

Trial courts have a duty to prevent a defendant in a criminal case from exploiting the relaxed rules of civil discovery to gather evidence for the criminal case that is not otherwise available under criminal discovery rules.

Unlike the constitutionally enshrined rights afforded crime victims in the state of Michigan, the right to discovery by the defendant in a criminal case is not a constitutional one; instead it is "constrained by the limitations expressly set forth in the reciprocal criminal

discovery rule promulgated by [the] Supreme Court, MCR 6.201.” *People v Greenfield*, 271 Mich App 442, 447 (2006). *See also People v. Elston*, 462 Mich 751, 765-66 (2000) (“There is no general constitutional right to discovery in a criminal case.”). As explicitly set forth in the Rules, “[d]epositions and other discovery proceedings under [the civil rules of procedure] may not be taken for the purposes of discovery in cases governed by this chapter.” MCR 6.001(D). Thus, defendants’ right to discovery in criminal cases is far narrower than in civil cases and this has been recognized by this state’s courts. *See, eg, Greenfield*, 271 Mich App at 447 (“Unlike in civil litigation, in which the rules permit far-reaching discovery[,] . . . discovery in criminal cases is constrained by the limitations expressly set forth in the reciprocal criminal discovery rule promulgated by our Supreme Court, MCR 6.201”).

Courts have recognized the need to abide by the distinction:

A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.

Campbell v Eastland, 307 F2d 478, 487 (5th Cir 2009). *See also In re Kunstler*, 914 F2d 505 (CA4 1990) (imposing sanctions against criminal defendant who filed a Section 1983 complaint and moved for expedited discovery to depose state agents finding complaint was filed for improper purposes that included obtaining discovery for use in the criminal proceedings); *In re Film Recovery Sys, Inc*, 804 F2d 386, 389 (7th Cir 1986) (noting that a trial court should take caution “where a criminal litigant initiates a civil suit in order that he might circumvent the limitations on discovery imposed in criminal proceedings.”); **[unpublished case check court rules and potentially attach before citing]** *Lizarraga v City of Nogales*, No CV 06-44 TUC DCB, 2008 WL 4079991, at *3 (D Ariz, July 1, 2015) (granting the state’s motion to intervene and stay the

civil proceedings where the victim's medical records, obtained as part of the civil discovery, were introduced into criminal case, thereby circumventing the Victim's Bill of Rights that protects victims from being forced to disclose records of medical treatment); *United States v Phillips*, 580 F Supp 517, 518-19 (ND Ill 1984) ("Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other."); *Ledvina v Cerasani*, 146 P3d 70 (Ariz Ct App 2006) (holding that since the civil lawsuit arose directly from the crime victims' reports to police, this parallel civil lawsuit would vitiate the Victim's Bill of Rights and therefore the victims were entitled to absolute immunity when complaining to the police); *State v Deal*, 740 NW2d 755, 765 (Minn 2007) (finding that the public policy of "[m]aintaining the integrity of a criminal proceeding by preventing circumvention of the criminal discovery rules" can constitute "'good cause' to issue a protective order staying civil discovery"); **[unpublished case check court rules and potentially attach before citing]** *Doe v County of Milwaukee*, No 14-C-200, 2014 WL 3728078 (Wis July 29, 2014) (opining that to permit a defendant in a criminal case to use information obtained from discovery in a related civil action would undercut the important purposes of restrictive criminal discovery rules).

A court "can exercise its discretion to manage civil litigation to avoid interference with a criminal case." *Degen v United States*, 517 US 820, 827 (1996). The relief the court can provide to a crime victim when the perpetrator attempts to circumvent the crime victims' rights and the limited criminal discovery rules includes either a protective order prohibiting the deposition or subpoena, or a stay of the civil discovery altogether, until the criminal prosecution is resolved.⁴ In *United States v Kordel*, 397 US 1 (1970), the Court noted that courts have stayed civil proceedings until related criminal cases are completed "when the interests of justice

PROOF OF SERVICE

I hereby certify that on the , I served the foregoing Motion to Quash and for Protective Order with the Clerk of the Court via overnight mail and all attorneys of record via first-class mail at their respective business addresses as disclosed by the pleadings of record herein.

Dated:

By:

