

Shielding the Identity of Child Victims: A Checklist for Federal Prosecutors



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The Department of Justice’s sloppy and careless release of the Jeffrey Epstein files led to an unforgivable debacle: the outing of the identities of multiple child victims of sex crimes who, for years until that point, had intentionally stayed anonymous. DOJ personnel saying after-the-fact that “we made mistakes” can never repair the damage done. Prosecutors removing documents after-the-fact from public websites is of little help in an age when websites are scraped instantaneously for content that is then circulated on the Internet. Once a child victim’s identity is out there, it’s out there—dealing potentially severe blows to victims’ mental and physical wellbeing, and ending their trust in the government.

This article aims to help federal prosecutors get it right. While the Epstein debacle is a glaring example of the failure to safeguard the identities of child victims, it is not an isolated one-off. Due to insufficient training, even well-meaning prosecutors—who care deeply about victims and work zealously to get child predators off the street—are vulnerable to making mistakes when it comes to shielding child victim identities. Typically, the *newest* and least experienced federal prosecutors handle child

pornography and sexual exploitation cases; meanwhile, most child victims and their families *do not* have their own lawyers or know their rights, and instead rely on prosecutors to protect them. Hence this succinct tutorial and checklist aimed at prosecutors.

What Prosecutors Need to Know about Existing Federal Requirements and Tools to Shield Child Victim Identities

Federal law—Title 18 U.S.C. § 3509(d)—already sets forth requirements for protecting the privacy of child victims. These legal obligations extend not only to prosecutors but also to defendants, defense lawyers, and court personnel. As a practical matter, however, the prosecutor is the person best suited to ensure these requirements are followed throughout the criminal proceeding, in consultation with child victims and their families. The law provides:

1. Confidentiality. In any criminal proceeding involving a child, all Department of Justice employees, defendants, defense attorneys, court employees, and jurors, are prohibited from disclosing outside of the proceeding any documents that include “the name or any other information” concerning the child. Inclusion of the term “**or any other information**” is critical: it

means the nondisclosure requirement extends well beyond a child’s name and covers literally “any other information” that could result in that child being identified such as: hair color, skin color, age, social media handle, birthmark, street address, and so forth. 18 U.S.C. § 3509(d)(1).

2. Redaction/Sealing. The law mandates that all court filings that disclose the name of “or any other information” concerning a child victim or witness “*shall be filed under seal without necessity of obtaining a court order.*” Thus, publicly filed charging instruments and all written submissions—whether by the prosecution or defense—must automatically omit or redact identifying information of child victims. 18 U.S.C. § 3509(d)(2).

3. Protective Orders. The prosecutor—and indeed “any person”—can seek a court protective order establishing other measures to protect child privacy. And should a child have to testify at trial, the law allows for testimony in a sealed courtroom and alternatives to live in-court testimony. 18 U.S.C. §§ 3509(b), (d) (3).

Prosecutors should not merely know these requirements and tools but embrace them and pay special

attention to preventing inadvertent disclosures in these four vulnerable circumstances:

First, government charging

instruments. Criminal complaints in particular run the risk of compromising child victim identity by including data points about the victims other than their names. Given the exigencies of arresting child predators, such cases are often charged based upon detailed, sworn complaints that are drafted quickly. Absent extra care, it is easy to forget to scrub out references—such as to the victim’s relationship to the defendant, hair color, exact age, grade, and other descriptors—that, alone or together could reveal the child’s identity. Prosecutors must be alert when quoting electronic messages, texts, and emails in charging instruments, as they often embed revealing characteristics. When in doubt if information would be identifying, prosecutors should consult the child victim’s family, omit the information from the charging instrument, or redact those portions from the publicly filed charging instrument. And when not in an emergency situation, prosecutors should consider charging by “non-speaking” indictment in lieu of a complaint.

Second, bail/detention arguments.

It is often necessary to get into the facts when arguing for bail and detention. Detention letters should be filed under seal or with redactions. In advance of a bail argument, the prosecutor should

confer with defense counsel to ensure the victim’s identity is protected; this is likely the first time the prosecutor is speaking to defense counsel about the case and defense counsel quite possibly has not even thought about Section 3509(d)’s requirements. There should be an explicit agreement up front about necessary procedures to protect child victim identities. And if it becomes necessary to get into identifying information during the argument, the prosecutor should ask to go to side bar and seal those portions of the transcript.

Third, party submissions, especially at sentencing.

Defendants and their lawyers have less motivation than the prosecutor to be vigilant about shielding child victim identities. Accordingly, prosecutors should seek protective orders at the start of the case providing that all submissions and attached exhibits must be filed initially under seal—to give the government and victims the opportunity to identify any needed privacy redactions prior to public filing. Protective orders should also prohibit the sharing with media of any document or discovery that could identify child victims or witnesses. Moreover, prosecutors should remind defense counsel in advance of all in-court hearings of their obligations to prevent inadvertent exposures in court. (Note: For trials, prosecutors will need to consider motions to seal the courtroom or have the

child testify under a pseudonym). When a defendant is convicted, sentencing proceedings warrant special care—sentencing submissions and arguments are laden with facts and judges may ask questions. Some victims and their families may *choose* to publicly be heard while others may insist on strict anonymity. Prosecutor vigilance against slip-ups is therefore critical.

Fourth, court clerk’s offices. Court personnel are human and make mistakes, but prosecutors should go the extra mile to prevent human error in the case of child victims. To prevent the accidental posting of sealed or unredacted documents on the court’s website, prosecutors should talk to the clerks, walk documents over personally for filing, and impress upon court personnel the importance of protecting child victim identities.

And now for the checklist—to help federal prosecutors do right by child victims and avoid the serious harms of inadvertent and unlawful release of a child victim’s identifying information.

One-Page Checklist for Prosecutors in Cases with Child Victims

Pre-Charge

- Read 18 U.S.C. § 3509(d). Obtain the child victim's/family's views related to privacy, including any special concerns about harm to the child if the child's identity were disclosed.

Charging Instruments

- Have you evaluated whether the draft charging instrument contains any child identifying information, including:
 - Name/nickname
 - Exact age (consider alleging "under 14" instead of "age 12")
 - Grade (consider alleging "elementary school" instead of "second grade")
 - Relationship to defendant
 - Social media handles
 - School name
 - Street or town name
 - Distinguishing physical characteristics (height, build, freckles, birthmarks, hair color, skin color, other)
 - Content from which the child might be identified (check language of all quoted messages/emails)
- Ask: Is it necessary for those identifying characteristics to be included in the charging instrument? If not, remove them. If yes, redact before publicly filing. (And since the unredacted original charging instrument will need to be filed under seal and provided to the defendant, take measures to prevent dissemination of the unredacted version).
- Before filing, consult with the child victim's family to ensure that all child identifying information has been flagged and removed or redacted.
- Consider whether inclusion of graphic descriptions of sexual activity is necessary in the public charging instrument. The more graphic, the greater the possible harm to the child if that child's identity is later disclosed.

In-Court Proceedings and Filings

- Consider seeking a protective order requiring, among other things, that all substantive filings be made initially under seal to give the victims/parties an opportunity to identify necessary redactions for child privacy prior to public filing.
- Remind defense and court before all bail arguments, pretrial and sentencing proceedings of the legal prohibition on revealing child victim identifying information. For trials, consider motions for courtroom closure or to allow testimony under a pseudonym, and alternatives to live testimony.