

Crime Victims' Rights Enforcement & Remedies

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Federal and state laws provide victims of crime rights in the criminal justice system.¹ Those rights might include the right to receive reasonable and timely notice of proceedings, the right to be present at proceedings, the right to be heard at proceedings, the right to reasonable protection, the right to be treated with fairness, dignity and respect for the victim's privacy, and the right to restitution. The number and extent of victims' rights vary, depending on the jurisdiction.

When the prosecution, defense, the court or the system generally fails to honor victims' rights, victims may wonder whether "victims' rights" are real. Victims' rights enforcement refers to the use of the courts—through litigation—to make rights a reality by securing compliance with victims' rights laws either proactively (when the violation is imminent) or reactively (when the violation has taken place). This Resource is designed to answer some frequently asked questions about rights enforcement, focusing on remedying violations that have already taken place.

1 Examples of Rights Enforcement Remedies



Violation

A victim's rights to advance notice of a sentencing hearing and to be present at that hearing were violated when the prosecutor's office failed to give notice of the hearing.



Remedy

The appellate court ordered the trial court to vacate the sentence and conduct a resentencing hearing.²



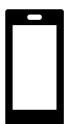
Violation

A victim's right to full restitution was violated when the trial court accepted plea agreements in which the amount of restitution the defendants must pay was capped at an arbitrary maximum of \$500,000.



Remedy

The appellate court vacated the cap.³



Violation

A victim's right to privacy was violated when the trial court ordered the victim to turn over their cell phone to the defense after the victim had already provided the police with relevant portions of the phone's contents.



Remedy

The appellate court prohibited the trial court from enforcing its order.⁴

2 Common Misconceptions



Our law is unenforceable because it doesn't include a provision that says remedies are available for violations of victims' rights.



Courts have power to award remedies for violations of individual rights even when the law is silent about the availability of remedies to enforce the rights.⁵ For example, the Fourth Amendment of the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."⁶

The Constitution is silent about enforcement and remedies. Yet upon finding violations of an individual's Fourth Amendment rights, the U.S. Supreme Court has repeatedly fashioned a remedy to redress harms caused by the violation and/or to deter future violations. Those remedies include: (1) allowing the wronged individual to sue the rights violator for money damages⁷; and (2) adopting the exclusionary rule, whereby evidence law enforcement obtains in violation of the Fourth Amendment cannot be used against the individual.⁸

Our law is unenforceable because it says the failure to afford victims their rights cannot support a cause of action against the state, any state employee of the state or any officer of the court.

A prohibition against a cause of action against rights violators means a victim cannot file a civil lawsuit for monetary damages. Without more, such a provision does not prohibit a victim from filing motions and petitions that seek other relief from the court, such as an order to redo a hearing or an order to stop the prosecution and defense from taking an action that violates the victim's rights in a criminal case.⁹

Our law is unenforceable with respect to specific rights. For example, victims' rights to notice of and be present at plea hearings include a clause that says victims cannot request a delay or voidance of the plea based on the prosecutor's failure to give notice.

A provision that explicitly bars one form of remedy does not mean the law is not enforceable because other types of remedy may be available.¹⁰ For example, the law referenced here does not prohibit a court from awarding other remedies that may redress the harm, including an order sanctioning the prosecutor for failure to comply with the notice requirement and requiring the prosecutor to issue a public apology to the victim. The law also does not prohibit a court from ordering that no future hearings may be scheduled without confirmation that the prosecutor has consulted with the victim and the proposed dates/times will work with the victim's schedule.

Our law is unenforceable because it says a victim cannot participate as a party in the criminal case and has no standing to appeal.

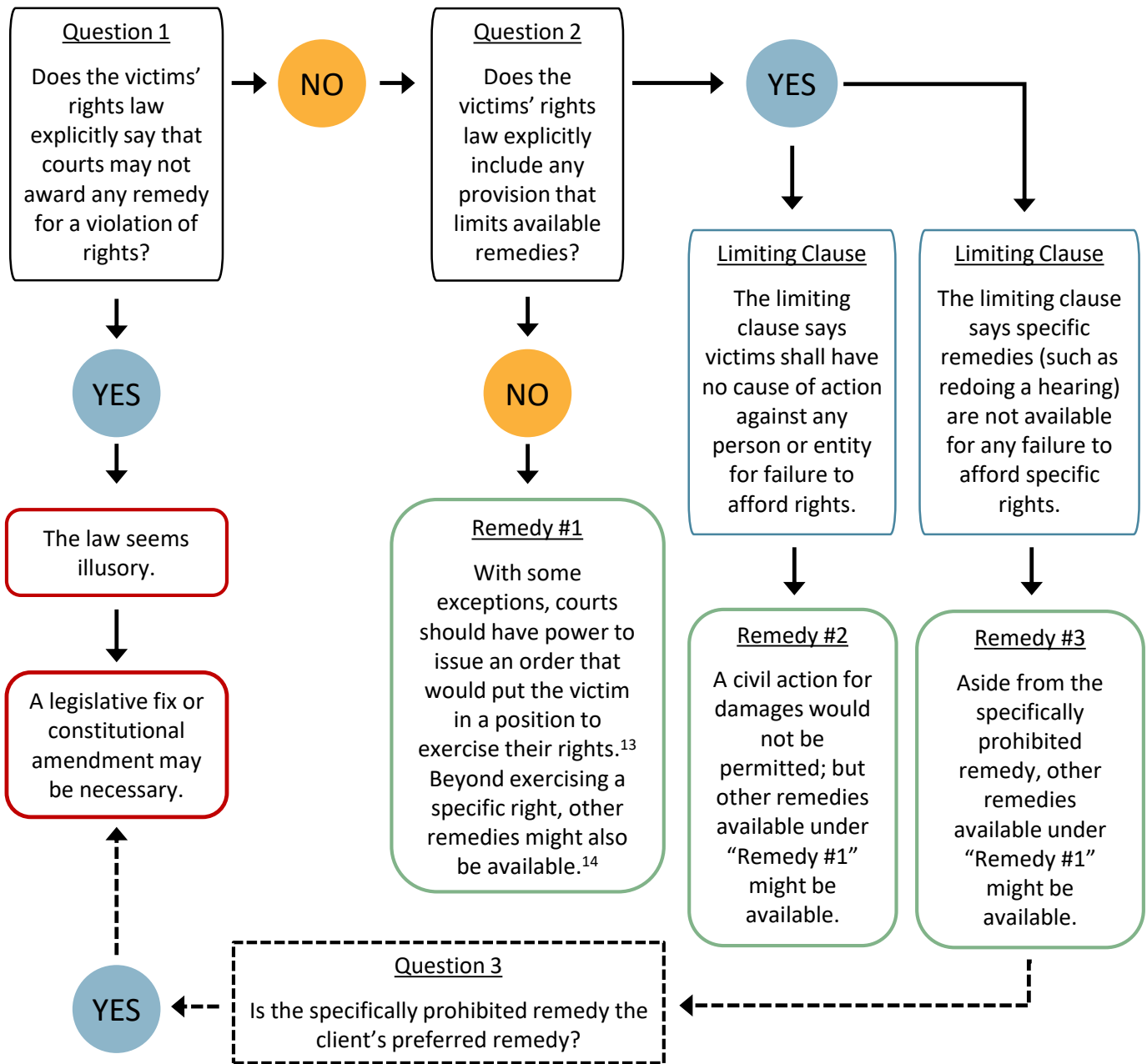
A clause that says the victim is not a party in the criminal case and cannot "appeal," without more, does not mean the victim cannot seek enforcement of their rights. Non-parties are routinely allowed to ask a court to enforce their rights.¹¹ Appellate review might be available via another avenue that's not technically an "appeal," such as a petition for a writ of mandamus or prohibition.¹²

Remedies for rights violations are fact and jurisdiction specific and cannot be comprehensively addressed in a brief guide. This Resource identifies some key factors to consider when analyzing available remedies. For help analyzing potentially available remedies in a particular case, request technical assistance from NCVLI.



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3 Steps to Analyzing Available Remedies



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¹ This Resource addresses crime victims' rights enforcement and remedies in the civilian justice system. Rights enforcement and remedies in the military justice system are outside the scope of this Resource.

² *State v. Barrett*, 255 P.3d 472, 481–82 (Or. 2011) (finding the victim's state constitutional rights to advance notice of sentencing and to be present at sentencing were violated, and concluding the victim's "proposed remedy—vacating defendant's sentence and conducting a resentencing hearing—was permissible, in that it was not barred by the Double Jeopardy Clause"). Courts have ordered a do-over of criminal proceedings as a remedy to put victims back in a position where they could exercise their rights in other cases. See, e.g., *Antoine v. State*, 226 A.3d 1170, 1175 (Md. Ct. Spec. App. 2020) (finding the trial court violated the victim's statutory right to present a victim impact statement at sentencing when it approved a plea agreement that bound the court to a specific sentence without first giving the victim an opportunity to be heard; and concluding that the appropriate remedy is "to vacate the sentence and the trial court's final approval of the plea agreement, and require the court to receive and consider victim impact evidence before deciding whether to give final approval of the plea agreement"); *State v. Ball*, 416 P.3d 301, 303 (Or. 2018) (finding the trial court violated the victim's state constitutional right to be heard at sentencing when it terminated the victim's oral victim impact statement before the victim was finished speaking; and concluding that the appropriate remedy is to vacate defendant's sentence and hold a new sentencing hearing); *Cleveland v. Rudolph*, No. 111128, 2022 WL 2527205, at*2-4 (Ohio Ct. App. July 7, 2022) (unpublished) (finding the victim's state constitutional rights to notice and an opportunity to be heard at all public proceedings were violated when the victim was not given notice of the sentencing hearing; finding the denial of the victim's rights to notice and an opportunity to be heard at sentencing violated the victim's state constitutional right to full and timely restitution because the victim was not afforded the opportunity to present evidence in support of his restitution claim; and granting the requested remedy of a remand to the trial court for resentencing); see also *Kenna v. U.S. Dist. Ct. for C.D.Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006) (finding crime victims' right to be heard under the federal Crime Victims' Rights Act (CVRA) includes the right to speak at all sentencing hearings; concluding the trial court erred by denying the victim an opportunity to speak at co-defendant's sentencing; directing the trial court on remand to determine the proper remedy; and cautioning that the trial court on remand "must . . . be cognizant that the only way to give effect to [the victim's] right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing").

³ *E.H. v. Slayton in & for Cnty. of Coconino*, 468 P.3d 1209, 1214, 1217 (Ariz. 2020) (finding plea agreements that capped the restitution at an arbitrary amount without the victim's consent violated the victim's right to full restitution; vacating the restitution cap; and directing the trial court to give defendants an opportunity to withdraw from their plea agreements in light of the removal of the restitution cap). Courts have enforced victims' right to restitution under other circumstances. See, e.g., *State v. Davis*, 907 N.W.2d 220, 228 (Minn. Ct. App. 2018) (finding the trial court's decision to deny all restitution to the homicide victim's surviving spouse due to defendant's inability to pay, even where the statute allows it to consider a defendant's ability to pay when ordering restitution, violated the victim's statutory right to restitution; reversing the restitution order; and directing the trial court on remand to reconsider the amount of restitution); *United States v. Cienfuegos*, 462 F.3d 1160, 1168 (9th Cir. 2006) (finding a homicide victim's right to full restitution under the Mandatory Victims Restitution Act includes right to restitution for future lost income; reversing the trial court's order denying restitution for future lost income; and remanding for further proceedings to determine the victim's future lost income).

⁴ *In re B.H.*, 946 N.W.2d 860, 870-71 (Minn. 2020) (concluding the trial court erred in denying the victim's motion to quash defendant's subpoena seeking the contents of the victim's cell phone; finding the fact that the victim had voluntarily turned over some of her cell phone data to the police did not

mean the victim “waive[d] her right to privacy in all other data contained on all applications on her phone for other time periods”; and enforcing the victim’s right to privacy by granting the victim’s request for a writ that prohibited the trial court from enforcing its order requiring the victim to turn over her cell phone). Courts have enforced victims’ privacy-related rights under other circumstances. See, e.g., *In re Hope Coal.*, 977 N.W.2d 651, 659, 662-63 (Minn. 2022) (concluding the statutory sexual assault counselor-victim privilege prohibits the counselor from disclosing the victim’s confidential records to the trial court for *in camera* review without the victim’s consent; finding the “compelling interest in protecting a victim’s privacy through . . . [this] privilege . . . is not outweighed by [defendant’s] constitutional rights”; and enforcing the victim’s right to privacy by granting the counseling organization’s request for a writ that prohibited the trial court from enforcing its order requiring disclosure).

⁵ See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392 (1971) (stating that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief” (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946))); see also *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) (stating that “[o]nce a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies”); *Hoke Cnty. Bd. of Educ. v. State*, 879 S.E.2d 193, 234 (N.C. 2022) (stating that case law “affirm[s] this Court’s broad equitable powers to remedy the violation of rights in a wide variety of substantive and procedural contexts”).

⁶ U.S. Const. amend. IV.

⁷ See *Bivens*, 403 U.S. at 396-97 (recognizing a cause of action for damages against federal officers for the violation of an individual’s rights under the Fourth Amendment when the amendment does not explicitly “provide for its enforcement by an award of money damages for the consequences of its violation” and Congress has not expressly stated that money damages may not be recovered).

⁸ See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (concluding in a federal prosecution, evidence seized in an illegal search and seizure cannot be used against the defendant in a criminal case); *Mapp v. Ohio*, 367 U.S. 643, 650-51, 657 (1961) (recognizing that *Weeks* established “the exclusionary rule” for federal cases; and concluding the Fourteenth Amendment requires that the exclusionary rule similarly apply to state cases). The “purpose of the exclusionary rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’” *Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)); accord *id.* at 670 (J. Douglas, concurring) (stating that exclusion of evidence is the most effective “remedy” for a violation of an individual’s Fourth Amendment rights).

⁹ See, e.g., *Commonwealth v. Chastain*, No. MI-2020-961, 2021 WL 6550443, at *11 (Va. Cir. Ct. Jan. 29, 2021) (rejecting defendant’s argument that the state constitutional and statutory crime victims’ rights “do not provide a remedy” for the violation of the victim’s right to notice because the statute prohibits “a cause of action by a victim against a prosecutor”; and finding “the fact that the Act says a victim cannot sue a prosecutor for violating the victim’s rights does not mean that the Court cannot grant a continuance of a trial to ensure that the victim was given notice of the trial date”); cf. *Lu v. Hawaiian Gardens Casino, Inc.*, 236 P.3d 346, 353 (Cal. 2010) (concluding a labor statute that prohibits employers from taking gratuities paid to an employee “does not provide a private cause of action” for damages; and noting that this conclusion “does not necessarily foreclose the availability of other remedies. . . . such as a common law action for conversion”).

¹⁰ See, e.g., *Chastain*, 2021 WL 6550443, at *11.

¹¹ See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559-60 (1980) (addressing—without discussion about but necessarily recognizing third-party standing—a newspaper and its reporters’ petition for a writ of certiorari challenging the trial court’s order denying the reporters’ motion to vacate its order closing the criminal trial to the public; finding the First Amendment implicitly guarantees the public a right to attend criminal trials; and concluding the trial court erred by failing to make any findings to support the closure or consider alternative solutions violated the First Amendment); *In re Houston Chronicle Pub. Co.*, 64 S.W.3d 103, 106-07 (Tex. Ct. App. 2001) (concluding that the Houston Chronicle had standing to challenge—via a petition for a writ of mandamus—a gag order entered in a criminal case even though “it is neither a party nor the direct subject of restraint” on the basis that it alleged an injury caused by the gag order; the injury, arguably, impacted rights protected by the First Amendment; and the court had the ability to grant redress for the injury).

A few jurisdictions have case law that stands for the proposition that a crime victim has no standing to challenge court orders that infringe upon the victim’s rights. See, e.g., *State v. Leingang*, 763 N.W.2d 769, 770 (N.D. 2009) (concluding the victim had no standing to challenge the trial court’s decision granting defendant’s request to withdraw a guilty plea and dismiss the criminal charges pursuant to a deferred sentencing order even where defendant had filed to pay all restitution ordered). Practitioners in those jurisdictions may need to analyze those decisions to assess whether the opinions relied on flawed, incomplete or outdated analysis of standing principles and other case law. Compare *id.* at 774 (citing federal case law for the proposition that “[f]ederal courts have held that a criminal victim generally lacks standing to challenge restitution orders”; and citing Maryland case law for the proposition that a victim has no “standing to appeal lack of notice and opportunity to speak at hearing to reconsider sentence” because of non-party status), with *Paroline v. United States*, 572 U.S. 434 (2014) (addressing—without discussion about but necessarily recognizing victim standing—the merits of the United States Court of Appeals for the Fifth Circuit’s denial of the victim’s petition for a writ of mandamus seeking to reverse the trial court’s order declining to award restitution in a federal criminal case), and *Antoine*, 226 A.3d at 1180 (finding the victim has standing, under Maryland law, to seek enforcement of their right to be heard at sentencing pursuant to statutory law change); cf. *E.H.*, 468 P.3d at 1214 (overruling three decades of case law that stood for the erroneous proposition that restitution caps must be included in plea agreements to protect criminal defendants’ due process rights).

¹² See, e.g., *In re B.H.*, 946 N.W.2d at 871 (granting the victim’s petition for a writ of prohibition to enforce her right to privacy in her cell phone data). Determining the legal scope of the proper appellate review mechanism for a victim seeking enforcement of their rights in some jurisdictions may depend on a number of factors, including the legal definition of relevant terms such as “appeal” and “petition”; and these determinations may be challenging for both the litigants and the courts when victims’ rights case law is still developing. See, e.g., *State v. Brasher*, 218 N.E.3d 899, 905-07 (Ohio 2022) (addressing whether, under the Ohio Constitution as amended by Marsy’s Law, the victims seeking appellate review to enforce the right to restitution must file a “direct appeal” and comply with the rules for a direct appeal, or whether the victims were permitted to seek relief via an action for a writ of mandamus; discussing a 2020 Ohio Supreme Court case that concluded the victims had a right to “appeal” and therefore were not allowed to seek relief in a writ of prohibition action; discussing a 2021 Ohio Supreme Court case that concluded the victim was permitted to seek relief by filing writ of prohibition action; and concluding the appropriate appellate review mechanism must be determined on a case-by-case basis—“whether a direct appeal or an original action is the appropriate ‘petition’ for a crime victim to file relies on the circumstances of the case, particularly whether an appeal is available as an adequate remedy”).

¹³ Depending on the timing of the request for a court to grant relief or other procedural requirements, a court in some cases might not have the authority to issue an order that could put the victim in a position to exercise their rights. For example, a trial court’s jurisdiction—or power to act—in a case might have expired before a remedy could be ordered. *Compare Hilton v. Superior Ct.*, 168 Cal. Rptr. 3d 309, 316-17 (Cal. Ct. App. 2014) (concluding that the trial court did not have jurisdiction to modify a defendant’s probation to impose additional restitution after defendant’s probationary term had expired), *with People v. Zuniga*, 295 Cal. Rptr. 3d 141, 144-45 (Cal. Ct. App. 2022), *review denied* (Cal. Sept. 14, 2022) (concluding that the trial court retains jurisdiction to order restitution after defendant’s probationary term had expired where the sentencing order had imposed restitution as a condition of probation, deferred setting the amount until the victim’s financial losses could be determined, and directed that defendant “pay restitution [to the victim] . . . in an amount and manner to be determined by the probation officer at a later date”); *see also Brasher*, 218 N.E.3d at 904, 907-08 (finding the victims did not timely assert and seek enforcement of their right to restitution; and affirming the court of appeal’s ruling that the trial court lost jurisdiction to impose jurisdiction after defendant had served his entire term of imprisonment). In addition, there are times that a court may determine that some infringement of a victim’s rights is necessary because defendant’s competing rights outweigh the victim’s rights. *See, e.g., State in Int. of A.B.*, 99 A.3d 782, 792-95 (N.J. 2014) (concluding the trial court did not abuse its discretion in issuing a discovery order that allowed defendant, his attorney and his investigator to inspect and photograph certain areas of the crime scene—which was the victim’s home—for a maximum of 30 minutes; finding the trial court properly weighed the competing interests, including defendant’s constitutional right to a fair trial, the victim and her family’s right to privacy, and the victim’s right to be free from intimidation, harassment and abuse).

¹⁴ Practitioners are encouraged to think creatively and consider remedies that redress the harm from rights violations as well as remedies designed to deter future violations. For example, consider a case where a victim’s rights to advance notice of, to be present at, and to be heard at proceedings involving defendant’s release were violated because no one informed the victim that defendant had filed a motion for pretrial release or that a hearing had been scheduled for a particular date. The victim’s motion for enforcement of their rights may include a request that the court remedy the violation by vacating the release order, scheduling a new hearing on a date/time that is also convenient for the victim, and directing all parties as well as the court clerk to serve the victim on all future filings and scheduling orders.

Consider another example where a victim’s right to privacy in their confidential and privileged records was violated by a defense attorney’s use of unauthorized means to obtain the records. The court may issue an order prohibiting the defense from using those records at trial. *See, e.g., In re Taylor*, 23 Disciplinary Bd. Rep. 151, 154-55 (Or. 2009), https://www.osbar.org/_docs/dbreport/dbr23.pdf (reciting the facts from the underlying criminal case where the trial court granted the victim’s attorney’s motion to suppress the victim’s school and state department of human services records on the ground that they had been improperly disclosed to the defense attorney). In addition, an ethics complaint may be filed against that offending attorney, resulting in a public censure or other sanctions. *See, e.g., id.* at 155-57 (approving a stipulated public reprimand of an attorney for conduct that also violated the professional ethics rules). In some cases, the rights violation may also give rise to a civil rights claim. *See, e.g., Doe v. Cnty. of San Diego*, 445 F. Supp. 3d 957, 972 (S.D. Cal. 2020) (denying a motion to dismiss in part and allowing the victim-plaintiff to proceed with a 42 U.S.C. §1983 civil rights claim against a former sheriff’s deputy and the county on the basis that her constitutional right to privacy was violated by the former sheriff’s deputy’s actions, which included accessing the sheriff’s department investigation files to download photographs of the victim and obtain her name, contact information and school location for personal use).