

NAMING SEXUAL ASSAULT COMPLAINANTS IN THE MEDIA: ETHICAL CONSIDERATIONS FOR JOURNALISTS

A discussion paper from the Ethics Advisory Committee of The Canadian Association of Journalists

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Introduction

Historically, sexual assault complainants were rarely, if ever, identified by the news media in Canada. More recently, however, we have witnessed an apparent increase in the number of complainants who have chosen to be identified in the media, particularly in high-profile cases such as that of former CBC broadcaster [Jian Ghomeshi](#), who was charged with multiple counts of sexual assault in 2014, and former anesthesiologist [George Doodnaught](#), who was convicted in 2014 of sexually assaulting patients during surgery.

Journalists may encounter sexual assault complainants who are considering “going public”; such situations give rise to a number of specific ethical considerations, which will be explored in this paper. One of those issues is the question of consent—specifically, whether the complainant has freely given consent with a full appreciation of the range of outcomes that may flow from her* choice. While the discussion of consent in this paper is specific to the question of identifying sexual assault complainants, any journalist faced with this issue may also wish to review the [CAJ Ethics Committee’s 2014 report](#), which looks more broadly at consent transactions between journalists and non-expert subjects.

* The pronouns we have adopted to refer to sexual assault complainants reflect the fact that sexual assault is, to a large extent, a gendered crime, one that is predominately committed by men against women. That being said, we know that men are also victims of sexual assault. Finally, we are aware that people who identify as trans, queer, two-spirited or in any other way as gender non-conforming face an increased risk of sexual violence. The words “she” and “her” are used throughout this document not to diminish the broad range of genders that may be victims of sexual assault; rather, we have done so simply to make this paper accessible and easy to read.

Background

This report addresses the ethics—not the law—of naming sexual assault complainants who wish to be publicly identified. That being said, in order to fully appreciate the ethical issue, a journalist must also understand the relevant legal considerations that may inform and affect the ethical decision-making process.

[Section 486.4\(1\)](#) of the *Criminal Code* is the source of the ban on the identity of a sexual assault complainant. The ban is mandatory if requested by the Crown, and remains in place regardless of the outcome of any criminal proceeding (i.e. even if a person charged with sexual assault is ultimately acquitted, the ban remains), and even lives on after the death of the complainant. Perhaps the most common misunderstanding about the ban is when it comes into effect—the fact that an assault has taken place, or that a complainant has reported an assault to the police, is not what gives rise to the ban—the ban under 486.1 ordinarily does not come into effect until an individual appears in court to be formally charged with a crime. What this means is, barring exceptional circumstances, there is no legal impediment to publicly identifying unless or until A. someone is charged with sexually assaulting her and B. The Crown then requests a ban.

The ban imposed at the request of the Crown should be imposed **only** after consulting with the complainant—or at least that’s the way it’s supposed to work. There is, however, significant anecdotal evidence to suggest this isn’t always the case—that some prosecutors seek the ban as a matter of course, or that they don’t fully explain the implications of the ban to the complainant. In some cases, a complainant is told only that the ban will stop *the media* from publicly naming her, rather than explaining that the ban may have implications for the complainant herself—that she may not be able to speak publicly about her own lived experience, and that she doesn’t necessarily have control over whether to rescind the ban.

From a purely legal perspective, most media lawyers believe that the ban is permanent unless varied or lifted by a court. Some media organizations, however, have adopted a practical perspective that it’s ok to identify without getting a court order if the victim wants to be identified and consents. One reason for this is that media organizations believe it is highly unlikely the Crown will prosecute in these circumstances. While relying solely on the complainant’s consent is common practice, some news organizations now take a more conservative approach after the CBC was [convicted of breaching a publication ban](#) on the identity of a complainant who had asked to be publicly identified in a CBC news report. That being said, the CBC case is the only time in which a news organization has ever been charged for identifying a complainant to wanted to be identified.

The prevalence of social media in our lives adds another dimension to the issue. As sexual assault complainants self-identify on [social media](#) with apparent increasing frequency, many of those who seek to self-identify independently (i.e. not in an interview with a journalist) do so without seeking a court’s approval, while others opt to [formally request that the ban be lifted](#).

The lack of clarity around the legal question was best summed up by a sexual assault complainant known only as Jane Doe, who [successfully sued Toronto Police](#) for failing to warn women about a serial rapist active in a Toronto neighbourhood. Doe later researched the ban and its implications for a chapter in the book, [On the Identity Trail: Anonymity, Identity and Privacy in a Networked Society](#), and [concluded](#) that

...no one really understands the publication ban specific to sexual assault, not the lawyers, judges, antiviolence advocates nor the media, and certainly not the women to whom—or against whom—the publication ban is applied.

This report does not offer any guidance on the question of whether a complainant's informed consent is sufficient to identify her, or whether the complainant herself should first seek to have a ban formally rescinded. This is a purely legal question and, given the uncertainty about the ambit of the ban and whether court approval is required to have it rescinded, it is a question that should be addressed by a newsroom's senior leadership and/or a lawyer with media defence expertise.

Informed consent from sexual assault complainants

The aforementioned [2014 report](#) by the CAJ's Ethics Committee notes that the question of consent, particularly when dealing with vulnerable individuals, has become infinitely more complex in an era of social media and digital archives. Not so long ago, “yesterday's news” was tough to find—once the broadcast was over or the newspaper tossed in the trash (this was also the pre-recycling era, after all), it was hard for people to access past stories without making significant effort. Today, however, news reports from years or even decades ago are easily searchable and immediately available. This has implications for the concept of informed consent. For this reason, any journalist who discusses with a complainant the question of whether she wishes to be publicly identified does not discharge their ethical obligation *unless* they clearly explain the following:

- Once the complainant chooses to be identified in one news report, it is entirely possible—and, in high-profile cases, quite likely—that other media will subsequently name her as well. The complainant will have no control over other journalists' or news outlets' choice to identify her.
- A journalist's obligation is to tell the entire story, not just the complainant's perspective. Telling all sides of the story may mean the report will include details that are inconsistent with the complainant's account of a crime. For example, just before Jian Ghomeshi was charged with multiple counts of sexual assault, he made an attempt at damage control by using social media to declare that all his sexual activities were consensual and that he was the target of “false allegations pursued by a jilted ex girlfriend,” a detail that was widely reported in subsequent news reports.
- Neither the complainant nor the journalist will have any control over comments related to the story generally, or about the complainant specifically, that are posted on social media. Even as an increasing number of news organizations close comments on contentious stories—or even do away with comments completely—there is no way to prevent commenters on Facebook, Reddit or other social sites from commenting, and

those comments can be [vile](#). Some print media organizations have identified complainants in their print editions but deleted the identifying information from their digital platforms. However, once a complainant has been named in print it is very difficult to prevent the identity from migrating to the digital sphere through social media.

- Given the way search engines work, a complainant should have a clear understanding that, even years after a story is published, it may still be the first thing that appears in an internet search of the complainant's name. For that reason, she should think about how she feels about being identified as a complainant not just now, but years or even decades from now when, for example, a potential employer may Google her, or her children may be old enough to search the internet, or she gets involved in a serious relationship but may not want to discuss her past. (Later in this report, we will briefly consider ways in which news organizations may mitigate this “longtail” aspect of being identified online.)
- Finally, as we have seen in the Ghomeshi trial, any complainant who chooses to speak to the media should understand that, if she is later a witness in a sexual assault trial, she may be rigorously cross-examined on the comments she made in news reports. This is true of any complainant who speaks to the media, regardless of whether she chooses to be identified.

It's in a journalist's best interests to have a record of the consent conversation, ideally in writing, and as detailed as possible. A written consent document is beneficial from a legal perspective in that it could serve as relevant evidence in the unlikely event the news organization was charged with breaching a ban. There is also a compelling ethical reason to create a detailed consent document—it can help both the journalist and the complainant focus on precisely what is being agreed to; it can also ensure that there has been a full consideration of the ways in which any potential harm to the complainant can be mitigated. (We will elaborate on these options later in this paper, under the heading “Alternatives to an ‘all-or-nothing’ approach.”) Finally—despite the pressures of the news cycle, and regardless of how comfortable the complainant is with her decision—we advise journalists to give a complainant a day or two to sit with her decision before actually revealing her identity; taking that time up front will almost certainly reduce the likelihood of “source remorse” (and the possibility of an [unpublishing](#) request) later.

Creating a written document that details the nature of the consent may be a practical impossibility if time is short (i.e. the journalist is working on a same-day story). In that case, the journalist should make an audio or video recording of his/her explanation of consent; that recording should include the complainant's assertion that she understands the range of risks she may face.

In sorting through the issues related to consent, a journalist should be aware of the fact that consent is not valid unless it is freely given, without any element of coercion or obligation. A journalist should appreciate the potential power imbalance that may exist between them and the complainant. The journalist may have knowledge about the criminal justice system that is not evident to the complainant; the journalist may also have reported the story in a way that the complainant perceived as being favourable to her, a perspective that may create a sense of obligation. Given this apparent imbalance, the journalist should encourage the victim to bring

one or more support people—such as a parent, sibling, friend, partner or lawyer—to any meeting in which the question of identity is discussed. The news organization, on the other hand, should be represented by one or two reporters in such a meeting, in order to not overwhelm the complainant.

A journalist should not try to convince or otherwise pressure a complainant to reveal her identity, nor should they offer any inducement to speak.

Verification and sexual assault complainants:

An ethical journalist should treat a sexual assault complainant with the highest degree of sensitivity, given the nature of the trauma itself and the challenges that come from being the subject of media scrutiny.

But being sensitive does not release a journalist from the responsibility of fact-checking and verifying a complainant's story. Verification is necessary to ensure accuracy, which the CAJ's Ethics Guidelines describe as "the moral imperative of journalists."

Discharging this duty, however, may put a compassionate journalist in an uncomfortable situation. In such circumstances, unless the rationale for verification in journalism is clearly explained to the complainant, it may leave her with a sense that she is not believed *because* she is a sexual assault complainant. This, of course, is not the case. An ethical journalist will test and verify a complainant's story for the same reason the journalist will fact-check a politician's comments or seek multiple eyewitnesses to an event—because, as Kovach and Rosenstiel wrote, journalism's "essence is a discipline of verification."

While uncomfortable, the verification process is necessary. Those who accept a story without question may have the best of intentions, but the outcome can be devastating for all concerned, as was evidenced by the fallout from a 2014 story published in *Rolling Stone* entitled "A Rape on Campus." The investigative piece recounted a University of Virginia student's alleged gang rape at a campus fraternity house. Given the explosive nature of the story, it was subject to intense scrutiny; under that harsh glare, the story unraveled as it became clear that events could not have transpired as they were purported to in the article.

There may be a lower standard of independent verification if the complainant is someone whose attacker has already been convicted of the crime. In such cases, we can rely on the rigour of the criminal justice process to have already effectively verified a complainant's assault. However, when allegations have not been tested in court, or when the accused has been acquitted after a trial, a journalist must take reasonable steps consistent with journalists' best practises.

In the *Rolling Stone* aftermath, the magazine asked the dean of the Columbia School of Journalism, Pulitzer Prize-winning reporter Steve Coll, to investigate the reporting, editing and fact-checking of the impugned story. His exhaustive 12,000 word [report](#) is instructive in many

regards, particularly his observations about the challenge inherent in balancing compassion and sensitivity with the demands of verification:

Over the years, trauma counselors and survivor support groups have helped journalists understand the shame attached to rape and the powerlessness and self-blame that can overwhelm victims, particularly young ones. Because questioning a victim's account can be traumatic, counselors have cautioned journalists to allow survivors some control over their own stories. This is good advice. Yet it does survivors no good if reporters documenting their cases avoid rigorous practices of verification. That may only subject the victim to greater scrutiny and skepticism.

Problems arise when the terms of the compact between survivor and journalist are not spelled out. Kristen Lombardi, who spent a year and a half reporting the Center for Public Integrity's [series on campus sexual assault](#), said she made it explicit to the women she interviewed that the reporting process required her to obtain documents, collect evidence and talk to as many people involved in the case as possible, including the accused. She prefaced her interviews by assuring the women that she believed in them but that it was in their best interest to make sure there were no questions about the veracity of their accounts.

One excellent resource that can help journalists to, in Coll's words, "allow survivors some control over their own stories" is [Use the Right Words: Media Reporting on Sexual Violence in Canada](#), a 2015 publication of the Toronto-based feminist organization [femifesto](#).

Alternatives to an "all-or-nothing" approach

News organizations are finding innovative ways to balance the journalistic imperative of telling the truth as accurately and fully as possible (which includes identifying those whose opinions and experiences we report on) with the humane interest in not exposing a complainant to slurs or ensuring that anyone who searches her online at any point in the future will be able to easily identify her as a sexual assault complainant.

Among the options an organization may take to lessen negative consequences for a named sexual assault complainant are:

- closing comments on the story;
- not sharing the story through social media channels;
- using a photo or video of the sexual assault complainant, which satisfies the "identification" imperative, but not using the complainant's name;
- not archiving the story, or editing the archived story to excise the complainant's name.

It should be noted that choosing to edit an archived story to protect a complainant's identity raises an additional ethical consideration. Any news organization that alters the digital record

should, in the interests of transparency, clearly note the nature of the change, and the reason for that change, on the webpage where the story is found.

The options listed above are intended to offer complainants a greater degree of protection in the digital sphere; however it is important to stress that while these suggestions *may* reduce the risk of exposure of identity, or online abuse and harassment, they are by no means a panacea nor a guarantee of privacy and safety.