



LAW ENFORCEMENT-BASED VICTIM SERVICES IN CALIFORNIA: PRIVACY, PRIVILEGE AND CONFIDENTIALITY

INTRODUCTION

Best practice in victim services is about facilitating victims' ability to exercise meaningful choices. This requires understanding and supporting the exercise of victims' rights, which are found in state constitutions, statutes, rules and policies. For victims' rights to be meaningful, both compliance with and enforcement of these rights is necessary. Compliance is the fulfillment of legal responsibilities to victims and making efforts to reduce willful, negligent or inadvertent failures to fulfill those legal responsibilities; enforcement is the pursuit, by a victim or someone on behalf of a victim, of a judicial or administrative order that either mandates compliance with victims' rights or provides remedies for violations of victims' rights laws.

In addition to understanding victims' rights, best practices in victim services require understanding one's legal and ethical obligations as an advocate with regard to victim privacy, confidentiality and privilege, and the scope of one's services. Informing victims—at the first or earliest possible contact with them—of their rights and the advocate's role, including limitations on that role, is critical to victims' ability to make informed decisions about whether and how to exercise their rights, as well as whether, what and how much to share with any particular service provider. In addition, advocates need to build and maintain relationships throughout the community in order to provide meaningful referrals to victim service providers with complementary roles when a victim needs the referral.

USING THIS RESOURCE

This resource is designed to enhance victim services personnel's knowledge and understanding of the law governing crime victims' rights to privacy, confidentiality and privilege in California. It provides an overview of key concepts and excerpts of key legal citations that can help facilitate victims' meaningful choices regarding these rights. To keep this *Guide* as user-friendly as possible in light of the breadth, complexity and evolving nature of law, the *Guide* does not include all laws. It does not constitute legal advice, nor does it substitute for legal advice. This resource is best used together with its companion resource: *Select Victims' Rights - California*.

This resource was developed by the National Crime Victim Law Institute (NCVLI) under 2020-V3-GX-K001, awarded to the International Association of Chiefs of Police (IACP) by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this draft publication are those of the contributors and do not necessarily represent the official position of the U.S. Department of Justice.

TABLE OF CONTENTS

Introduction.....1

Using This Resource1

Overview3

 System-Based and Community-Based Advocates3

 Privacy, Confidentiality and Privilege4

 HIPAA, FERPA, VOCA, VAWA and FOIA8

 Ethical Code Relevant to Advocates12

Brady v. Maryland13

Giglio v. United States16

 Subpoena Considerations16

Select Laws18

 Privacy.....18

 Confidentiality.....19

 Privilege21

 Definitions.....26

OVERVIEW

What are the key similarities and differences between system-based and community-based advocates?

Key Takeaways

- System-based advocates are typically employed by a law enforcement agency, prosecutor's office, corrections, or another governmental agency.
- Community-based advocates are typically employed by a nonprofit/non-governmental agency.
- The United States Supreme Court and state laws impose on the prosecutor's office—and by extension on other governmental agencies such as law enforcement—legal obligations to disclose information to the accused and their lawyer. These obligations are sometimes called *Brady* Obligations or Discovery Obligations.
- *Brady*/Discovery Obligations generally attach to system-based advocates, and these obligations can override an advocate's ability to keep something confidential. That means anything shared with a system-based advocate may have to be disclosed to law enforcement, prosecutors, and eventually the accused and their lawyer.
- Community-based advocates are generally not directly linked to a government actor, and therefore not subject to *Brady*/Discovery Obligations; this means that they can hold more things confidential, and depending on local law, may also be bound by privilege (which is an even stronger privacy protection than confidentiality).

Discussion

It is imperative that an advocate understands and communicates clearly—at the first encounter or earliest possible contact—whether one is a community-based or system-based advocate, the advocate's legal and ethical obligations with regard to privacy, confidentiality and privilege and the scope of the services that the advocate offers.¹ This information will assist the victim in understanding the role of the advocate and any limitations of that role regarding: (1) the services that the advocate can provide and (2) the privacy protections that exist regarding information shared with the advocate. Further, providing a clear explanation of the advocate's role to the victim will help the victim make informed decisions, build rapport and avoid misunderstandings.

While both system-based and community-based advocates serve victims and operate under a general ethical rule of confidentiality, there are significant differences between them. System-based advocates are typically employed by a law enforcement agency, office of the prosecuting attorney, corrections or another entity within the city, county, state or federal government. Titles for system-based advocates vary; for example, they can be called victim advocates, victim-witness coordinators or victim assistance personnel.² Because system-based advocates are typically a component of a government agency or program, a primary focus of their work is assisting victims in their interactions with the system, and they will

typically be able to provide services to the victims during the pendency of the investigation, prosecution and post-conviction legal aspects of a case. In addition, this placement as part of a government agency or program generally means that system-based advocates are subject to the *Brady* disclosure obligations (*see Brady v. Maryland* Section below for additional information) and generally, their communications with victims are not protected by privilege.

By contrast, community-based advocates are generally not directly linked to any government actor or agency. As such, they are not subject to *Brady*; generally, can assist victims even if a crime has not been reported; can assist before, during and after a criminal case; can provide holistic services aimed at victims' broad needs; and, depending on the jurisdiction's laws and funding source, can maintain privileged communications with victims.³

Because each type of advocate has different duties and protections that they can offer victims, knowledge of and partnerships between them is an integral part of facilitating meaningful victim choice and helping victims access holistic services.

What are privacy, confidentiality and privilege? Why do the differences matter?

Key Takeaways

- Privacy is the broad right that allows one to control the sharing of personal information.
- Many jurisdictions have state constitutional and statutory protections for affording victims the right to privacy, including explicit rights to privacy and the broader stated rights to be treated with fairness, dignity and respect. A federal Constitutional right to privacy also exists.
- Confidentiality is a form of privacy protection; it is the legal and ethical duty to keep private the victim-client's information that was learned in confidence. The duty of confidentiality is found in laws and regulations that govern particular professions (e.g., community-based advocates and licensed mental health professionals) as well as certain types of information (e.g., health and educational records). In addition, certain funding sources (such as VOCA and VAWA) contain confidentiality requirements that govern anyone receiving the funds.
- Courts have the authority to require disclosure of a victim's confidential information when certain conditions are met. Circumstances that may compel disclosure of victims' otherwise confidential information include if the information is shared with a mandatory reporter and in the case of system-based advocates, if the information falls within the state's required disclosures to defendant pursuant to *Brady/Discovery Obligations*.
- Privilege is another privacy protection and is stronger than confidentiality. Privileges are defined by statute and rule and protect communications between victims and certain people, such as doctors, psychotherapists/counselors, attorneys

and in some jurisdictions, victim advocates. Key terms in the law may be defined in a way to limit the privilege. For example, among those jurisdictions that recognize an advocate-victim privilege, the term “advocate” is often narrow (e.g., only sexual assault advocates). Disclosure of privileged communications is prohibited unless the victim consents.

- Because privacy is so critical to victims it is important to understand what level of privacy protection can be afforded to a victim with whom one works and to communicate that BEFORE the victim shares any information.

Discussion

Privacy

“Privacy” is a fundamental right, essential to victim agency, autonomy and dignity, which—among other things—permits boundaries that limit who has access to our communications and information.

Privacy can be understood as the ability to control the sharing of personal information. See *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) (“The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for [themselves] the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behavior and opinions are to be shared with or withheld from others.”). For many crime victims, maintaining privacy in their personal information and communications is vitally important. In fact, maintaining privacy is so important that some victims refrain from accessing critical legal, medical or counseling services without an assurance that treatment professionals will protect their personal information from disclosure. Understanding this and wishing as a matter of public policy to encourage access to services when needed, federal and state legislatures and professional licensing bodies have created frameworks of laws and regulations that help protect the information victims share with professionals from further dissemination. To this end, every jurisdiction has adopted statutory or constitutional victims’ rights; some jurisdictions explicitly protect victims’ rights to privacy, or to be treated with dignity, respect or fairness.⁴ Victims also have a federal Constitutional right to privacy.⁵

In addition to the broad rights to privacy that exist, privacy protections generally come in two forms: “confidentiality” and “privilege.” Professionals who work with victims should understand each concept.

Confidentiality

“Confidentiality” is a legal and ethical duty not to disclose the victim-client’s information learned in confidence.

As part of accessing services, victims frequently share highly sensitive personal information with professionals. A victim’s willingness to share this information may be premised on

the professionals' promise to not disclose it. The promise to hold in confidence the victim's information is governed by the professional's ethical duties, regulatory framework and/or by other various laws. Breaking the promise may carry sanctions. The promise not to disclose information that is shared in confidence—as well as the legal framework that recognizes this promise—are what qualifies this information as “confidential.”

Key aspects of confidential communications are that: (1) they are made with the expectation of privacy; (2) they are not accessible to the general public; (3) there may or may not be legal requirements that the recipient keep the information private; and (4) there may be a professional/ethical obligation to keep the information private.

Professional confidentiality obligations may be imposed by one's profession, e.g., advocate ethics; social worker ethics; attorney ethics; medical provider ethics; and mental health counselor ethics. In addition, certain laws may have confidentiality provisions that are tied to funding. If an entity receives such funds, then it is bound by confidentiality or risks losing funding. Examples of laws that impose confidentiality requirements include the: (1) Victims of Crime Act (VOCA), 28 C.F.R. § 94.115; (2) Violence Against Women Act (VAWA), 34 U.S.C. § 12291(b)(2)(A)–(B); and (3) Family Violence Prevention and Services Act (FVPSA), 42 U.S.C. § 10406 (c)(5)(B). For example, VAWA (Section 3), VOCA and FVPSA regulations prohibit sharing personally identifying information about victims without informed, written and reasonably time-limited consent. VAWA and VOCA also prohibit disclosure of individual information without written consent. In addition, depending on the types of victim information at issue, other statutes may impose additional restrictions, including the Federal Educational Rights & Privacy Act (FERPA), 20 U.S.C. § 1232g (protections governing the handling of education records); the Health Insurance Portability & Accountability Act (HIPAA), 42 U.S.C. § 1320d et seq. (protections governing the handling of health records); and the Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq. (protections governing electronic communications and transactions records).

When providing services, professionals should discuss with victims the consequences of sharing information before information is shared. These consequences may include the: (1) inability to “take back” a disclosure; (2) lack of control over the information once released; and (3) risk of the accused accessing the information. In addition, even when laws appear to prohibit disclosure, there are often exceptions that require disclosure, for instance in response to court orders or valid subpoenas. These limits should be explained to a victim. For example, a court may make a determination that an accused's interests outweigh the confidentiality protection afforded by a law and order the professional to disclose the victim's private information. Although a victim can be assured that a professional may not ethically disclose her confidential information unless legally required to do so, it is important that a victim understand that courts have the authority to require a professional to break the promise of confidentiality when certain conditions are met. Other circumstances that may compel disclosure of victims' otherwise confidential information include if the information is shared with a mandatory reporter of elder or child abuse and if the information falls within the state's required disclosures to defendant pursuant to the United

States Supreme Court case *Brady v. Maryland*.

Thus, although the basic rule of confidentiality is that a victim's information is not shared outside an agency unless the victim gives permission to do so, it is important to inform victims before they share information whether, when and under what circumstances information may be further disclosed.

Privilege

“Privilege” is a legal right of the victim not to disclose—or to prevent the disclosure of—certain information in connection with court and other proceedings.

Legislatures throughout the country have recognized that the effective practice of some professions requires even stronger legal protection of confidential communications between the professional and client. This recognition has resulted in the passage of laws that prevent courts from forcing these professionals to break the promise of confidentiality no matter how relevant the information is to the issues in the legal proceeding. This additional protection is a “privilege”—a legal right not to disclose certain information, even in the face of a valid subpoena.⁶ Key aspects of privileged communications are that: (1) they are specially protected, often by statute; (2) disclosure without permission of the privilege holder (*i.e.*, the victim) is prohibited; (3) they are protected from disclosure in court or other proceedings; (4) the protections may be waived only by the holder of the privilege (*i.e.*, the victim); and (5) some exceptions may apply. Examples of communications that may be protected by privilege depending on jurisdiction include: (1) spousal; (2) attorney-client; (3) clergy-penitent; (4) psychotherapist/counselor-patient; (5) doctor-patient; and (6) advocate-victim. Jurisdictions that recognize a given privilege may narrowly define terms, thereby limiting its applications. For example, among the jurisdictions that recognize an advocate-victim privilege, many define the term “advocate” to exclude those who are system-based (*i.e.*, affiliated with a law-enforcement agency or a prosecutor's office).⁷

Understanding the Differences

Because maintaining a victim's control over whether and how to disclose personal information is so important and because community-based and system-based advocates can offer different levels of protection regarding communications, every professional must know whether their communications with a victim are confidential or privileged, as well as how courts have interpreted the scope of each protection. This information should be shared with victims in advance of information disclosure. To do otherwise may provide victim-clients with a false sense of security regarding their privacy and inflict further harm if their personal information is unexpectedly disclosed.

What are HIPAA, FERPA, VOCA, VAWA and FOIA, and why are these relevant to my work as an advocate?⁸**Key Takeaways**

- Federal and many state laws protect certain types of information from disclosure. These laws generally cover medical, therapy and other behavioral health records, educational records and certain advocacy records.
- HIPAA—the Health Insurance Portability and Accountability Act—requires the protection and confidential handling of protected health information (PHI). This is important because although it permits release of PHI in response to a valid court order, no such release may be made in response to a subpoena or other request except under very specific circumstances.
- FERPA—the Family Educational Rights and Privacy Act—protects the privacy of student education records, as well as any personally identifiable information in those records. Although the Department of Education provides that law enforcement records are not education records, personally identifiable information collected from education records and shared with law enforcement remain protected from disclosure.
- Victim assistance programs that receive funding under either VOCA (the Victims of Crime Act of 1984) or VAWA (the Violence Against Women Act) are mandated to protect crime victims' confidentiality and privacy subject to limited exceptions, such as mandatory reporting or statutory or court mandates. Even if disclosure of individual client information is required by statute or court order, recipients of VOCA or VAWA funding must provide notice to victims affected by any required disclosure of their information, and take steps to protect the privacy and safety of the victims.
- Open records' laws—also commonly referred to as public records' laws or sunshine laws—permit any person to request government documents and, if the government refuses to turn them over, to file a lawsuit to compel disclosure. Every state and the federal government have such laws (the federal law is known as FOIA, the Freedom of Information Act), which carry a presumption of disclosure. That means that all government records are presumed open for public inspection unless an exemption applies. Many exemptions from disclosure exist, including for some types of law enforcement records. All advocates should understand their jurisdiction's open records' laws, especially as they relate to exemptions that may apply to law enforcement and other victim-related records.

Discussion

HIPAA: Federal law—as well as state law in many jurisdictions—provides crime victims with different forms of protections from disclosure of their personal and confidential information. This includes protections against the disclosure of medical and/or therapy and other behavioral health records without the victim's consent. HIPAA—codified at 42

U.S.C. § 1320d et seq. and 45 C.F.R. § 164.500 et seq.—is the acronym for the Health Insurance Portability and Accountability Act, a federal law passed in 1996. HIPAA does a variety of things, but most relevantly, it requires the protection and confidential handling of protected health information (PHI). This is important because although it permits release of PHI in response to a valid court order, no such release may be made in response to a subpoena or other request unless one of the following circumstances is met:

1. The entity must receive “satisfactory assurance” from “the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request[.]” 45 C.F.R. § 164.512(e)(1)(ii)(A).
-or-
2. The entity must receive “satisfactory assurance” from the “party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order” that meets certain requirements, detailed in subsection (iv), 45 C.F.R. § 164.512(e)(1)(ii)(B).

Advocates may wish to inform victims that they may proactively contact their medical providers, informing them that the victims are asserting privilege and other legal protections in their records, and requesting that these providers: (1) give them prompt notice of any request for the victims’ medical records; (2) refuse to disclose the records pursuant to any such request without first receiving a valid court order; and (3) ensure that no medical records are released without first permitting the victims to file a challenge to their release. Advocates who work for or with community-based organizations—including organizations that provide general mental health services as well as those that serve domestic violence or sexual assault victims—should advise victims about the possibility of asserting HIPAA protections if facing a request for their records.

FERPA: The Family Educational Rights and Privacy Act (FERPA)—codified at 20 U.S.C. § 1232g—is a federal law that protects the privacy of student education records, and the [personally identifiable information] contained therein, maintained by educational agencies or institutions or by a party acting for the agencies or institutions.”⁹ FERPA applies to those agencies and institutions that receive funding under any U.S. Department of Education program.¹⁰ “Private schools at the elementary and secondary levels generally do not receive funds from the Department [of Education] and are, therefore, not subject to FERPA, but may be subject to other data privacy laws such as HIPAA.”¹¹

Protections afforded by FERPA include the right of parents or eligible students to provide a signed and dated, written consent that clearly identifies which education records or personally identifiable information may be disclosed by the educational agency or institution; the person who may receive such records or information; and the purpose for the disclosure prior to disclosure of an education record or personally identifiable information, except in limited circumstances such as health or safety emergencies.¹²

Notably, while the Department of Education provides that law enforcement records are not

education records, “personally identifiable information [collected] from education records, which the school shares with the law enforcement unit, do not lose their protected status as education records just because they are shared with the law enforcement unit.”¹³ Thus, law enforcement has a duty to understand and comply with FERPA when drafting police reports, supplemental reports and, generally, sharing or relaying information.

It is important that advocates have an understanding of FERPA as well as other federal laws, state laws and local policies that address student privacy in education records as eligible students or parents may be afforded privacy protections in addition to FERPA. For example, “the education records of students who are children with disabilities are not only protected by FERPA but also by the confidentiality of information provisions in the Individuals with Disabilities Education Act (IDEA).”¹⁴

VOCA and VAWA: The Victims of Crime Act of 1984 (VOCA)—codified at 34 U.S.C. §§ 20101 to 20111—established the Crime Victims Fund (the Fund), which is managed by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The Fund is financed by, *inter alia*, fines and penalties from persons convicted of crimes against the United States as opposed to by tax dollars.¹⁵ The Fund supports victim assistance programs that offer direct victim services and crime victim compensation.¹⁶ Examples of direct services are crisis intervention, emergency shelters or transportation, counseling and criminal justice advocacy; and crime victim compensation programs that cover expenses incurred as a result of the crime.¹⁷

The Violence Against Women Act (VAWA)—enacted in 1994 and reauthorized in 2000, 2005 and 2013—created an array of federal protections for victims of crimes, including domestic violence, sexual assault and stalking. Additionally, VAWA provided funding for services and programs to combat violent crimes against women. VAWA funds are administered by the Office on Violence Against Women (OVW), U.S. Department of Justice.

Agencies that receive VOCA or VAWA funding are mandated to protect crime victims’ confidentiality and privacy subject to limited exceptions, such as mandatory reporting or statutory or court mandates. Specifically, state administering agencies and subrecipients of VOCA funding, are mandated “to the extent permitted by law, [to] reasonably protect the confidentiality and privacy of [victims] receiving services . . . and shall not disclose, reveal, or release, except . . . [in limited circumstances:] (1) [a]ny personally identifying information or individual information collected in connection with VOCA-funded services requested, utilized, or denied, regardless of whether such information has been encoded, encrypted, hashed, or otherwise protected; or (2) [i]ndividual client information, without the informed, written, reasonably time-limited consent of the person about whom information is sought” 28 C.F.R. § 94.115(a)(1)–(2). Agencies that receive VAWA funding are subject to nearly identical duties to protect crime victims’ confidentiality and privacy subject to limited exceptions. *See* 34 U.S.C. § 12291(b)(2).

Even if disclosure of individual client information is required by statute or court order, state

administering agencies and sub-recipients' privacy and confidentiality obligations owed to crime victims do not disappear. State administering agencies and subrecipients of VOCA funds "shall make reasonable attempts to provide notice to victims affected by the disclosure of the information, and take reasonable steps necessary to protect the privacy and safety of the persons affected by the release of the information." 28 C.F.R. § 94.115(b). VAWA imposes similar requirements on recipients of funding. *See* 34 U.S.C. § 12291(b)(2)(C) ("If release of information . . . is compelled by statutory or court mandate[,] . . . grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the disclosure of information[] and . . . shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information."). VOCA also mandates that none of the protections afforded to victims be circumvented. For example, a crime victim may neither be required to release personally identifying information in exchange for services nor be required to provide personally identifying information for recording or reporting purposes. 28 C.F.R. § 94.115(d).

It is important that advocates are aware if their positions and/or offices are subject to VOCA's and VAWA's mandates regarding victims' confidentiality and privacy protections and if so, understand how these mandates interact with disclosure obligations.

FOIA: Open records' laws—also commonly referred to as public records' laws or sunshine laws—permit any person to request government documents and, if the government refuses to turn them over, to file a lawsuit to compel disclosure. Every state and the federal government have such laws, which carry a presumption of disclosure, meaning that all government records are presumed open for public inspection unless an exemption applies.

The federal open records' law, known as the Freedom of Information Act (FOIA or the "Act"), 5 U.S.C. §552, was enacted in 1966. Similar to its state counterparts, FOIA provides for the legally enforceable right of any person to obtain access to federal agency records subject to the Act, except to the extent that any portions of such records are protected from public disclosure by one of the nine exemptions. Three such exemptions, Exemptions 6, 7(C) and 7(F) protect different types of personal information in federal records from disclosure. Exemption 6 "protects information about individuals in 'personnel and medical files and similar files' when the disclosure of such information 'would constitute a clearly unwarranted invasion of personal privacy.'"¹⁸ Exemption 7(C) "is limited to information compiled for law enforcement purposes, and protects personal information when disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" Under both exemptions, "the concept of privacy not only encompasses that which is inherently private, but also includes an 'individual's control of information concerning [his/her/their] person.'"¹⁹ Exemption 7(F), which also applies to law enforcement records, exempts records that contain information that "could reasonably be expected to endanger the life or physical safety of any individual."

Similar to FOIA, state open records' laws contain numerous exemptions, including for some types of law enforcement records (for example, prohibitions on disclosing identifying information of victims' and witnesses' generally or of child-victims and/or victims of

certain crimes). Advocates should have an understanding of their jurisdiction’s open records’ laws, especially as they relate to exemptions from disclosure that may be afforded to law enforcement and other victim-related records within their office’s possession. Jurisdiction-specific victims’ rights laws—including rights to privacy and protection—also provide grounds for challenging public records’ requests for victims’ private information.

Are there ethical standards relevant to my work as an advocate?

Key Takeaways

- Advocates should know what ethical standards apply to their work with victims.
- Law enforcement agencies should develop a code of ethics specific to victim services personnel or, at a minimum, expand the scope of existing codes of ethics to include them.

Discussion

Yes, there are ethical standards—or “principles of conduct”—that guides victim advocates in their work.²⁰ Although there is no formal regulatory board that oversees victim assistance programs, the *Model Standards for Serving Victims & Survivors of Crime (Model Standards)* was created by the National Victim Assistance Standards Consortium with guidance from experts across the nation “to promote the competency and ethical integrity of victim service providers, in order to enhance their capacity to provide high-quality, consistent responses to crime victims and to meet the demands facing the field today.”²¹

The *Model Standards* cover three areas: (1) Program Standards for Serving Victims & Survivors of Crime; (2) Competency Standards for Serving Victims & Survivors of Crime; and (3) Ethical Standards for Serving Victims & Survivors of Crime.

The third area—Ethical Standards for Serving Victims & Survivors of Crime—contains “ethical expectations” of victim service providers that are “based on core values” in the field and are intended to serve as guidelines for providers in the course of their work. The Ethical Standards are comprised of five sections:

- (1) Scope of Services;
- (2) Coordinating within the Community;
- (3) Direct Services;
- (4) Privacy, Confidentiality, Data Security and Assistive Technology; and
- (5) Administration and Evaluation.²²

Notably, “[p]rofessionals who are trained in another field (*e.g.*, psychology, social work) but are engaging in victim services will [also] abide by their own professional codes of ethics. If th[ose] ethical standards establish a higher standard of conduct than is required by law or another professional ethic, victim assistance providers should meet the higher ethical standard. If ethical standards appear to conflict with the requirements of law or another professional ethic, providers should take steps to resolve the conflict in a

responsible manner.”²³

Many law enforcement agencies have established their own code of ethics. Often, these codes of ethics are developed to guide the behavior of sworn personnel and may not encompass the role of victim services. Agencies are encouraged to develop a code of ethics specific to victim services personnel or, at a minimum, expand the scope of existing codes of ethics to include them.²⁴

What is the difference between discovery and production and how does this relate to the Supreme Court’s decision in *Brady v. Maryland*?

Key Takeaways

- In a criminal case, the term “discovery” refers to the exchange of information between parties to the case—the prosecutor and defendant. The term “production” refers to the defendant’s more limited right to obtain information from nonparties, such as victims. Sometimes the term “discovery” is used to describe the parties’ requests for information and records from nonparties, but this is an imprecise use of the word as it confuses the two ideas.
- In *Brady v. Maryland* the United States Supreme Court announced a rule, and state laws have adopted it also, that impose on the prosecutor’s office—and by extension on other governmental agencies such as law enforcement—legal obligations to disclose information to the accused and their lawyer even if they do not ask for it. These obligations are sometimes called *Brady* Obligations or Discovery Obligations.
- Pursuant to these obligations, the prosecutor is only constitutionally required to disclose information that is exculpatory and material to the issue of guilt, and which is within the custody or control of the prosecutor.
- Beyond that material to which a defendant is constitutionally entitled under *Brady*, state statute or procedural rule may entitle a criminal defendant to additional discovery materials.
- If records are not properly in the possession or control of the prosecutor, a defendant can only try to obtain them through their more limited right of production by seeking a subpoena pursuant to the jurisdiction’s statutes and rules governing production of documents from a nonparty.
- Federal and state courts have found that prosecution-based victim advocates are part of the “prosecution team” for *Brady* purposes. Therefore, *Brady*/Discovery Obligations generally attach to system-based advocates, and these obligations can override an advocate’s ability to keep something confidential. That means anything shared with a system-based advocate may have to be disclosed to the accused and their lawyer.
- Victims should be informed at the outset that disclosure requirements—imposed by *Brady* as well as a jurisdiction’s statutes and rules governing discovery—may impact victim privacy.

Discussion

The Supreme Court case Brady v. Maryland, as well as jurisdiction-specific statutes and court rules, impose discovery and disclosure obligations on the prosecution and defendant—not on the victim.

In criminal cases, victim privacy is routinely at risk by parties seeking personal records, such as counseling, mental health, medical, employment, educational and child protective services records. The law governing when these records must be disclosed to a defendant is complex, touching on a number of factors, including whether the records are within the government's control; whether they are protected by a privilege; whether any applicable privilege is absolute or qualified; whether a victim has waived any privilege in full or in part; the scope of the jurisdiction's constitutional or statutory rights and/or protections for victims; and the jurisdiction's statutes and rules governing discovery and production. If the records sought are properly in the possession or control of the prosecutor, a defendant may be entitled to them, pursuant to constitutional, statutory or rule-based rights to discovery. If, however, the records are not in the possession (or properly in the possession) of the prosecutor, a defendant must subpoena those records pursuant to the jurisdiction's statutes and rules governing production of documents from a nonparty. Although courts and practitioners sometimes refer to defendant's receipt of materials from both the prosecutor and nonparties as "discovery," this imprecise use of the term confuses a defendant's right to discovery from the prosecutor with a defendant's right to production from a nonparty.

In a criminal prosecution, the term "discovery" refers to the exchange of information between parties to the case—the prosecutor and defendant. *See, e.g., Fed R. Crim. P. 16* (entitled "Discovery and Inspection," the rule explicitly and exclusively governs discovery between the government and defendant). It does not govern defendant's ability to obtain information directly from a crime victim or other nonparty. With regard to discovery from the prosecutor, a criminal defendant has no general federal constitutional right to discovery.²⁵ The prosecutor, instead, is only constitutionally required to disclose information that is exculpatory and material to the issue of guilt, *see Brady v. Maryland*, 373 U.S. 83, 87–88 (1963), and which is within the custody or control of the prosecutor.²⁶ The *Brady* rule imposes an affirmative "duty to disclose such evidence . . . even [when] there has been no request [for the evidence] by the accused, . . . and . . . the duty encompasses impeachment evidence as well as exculpatory evidence."²⁷ The prosecutor's *Brady* obligation extends to all exculpatory material and impeachment evidence and to "others acting on the government's behalf in th[e] case."²⁸

Federal and state courts have found that prosecution-based victim advocates are considered part of the "prosecution team" for *Brady* purposes.²⁹ Beyond that material to which a defendant is constitutionally entitled, a prosecutor's obligation to disclose information is governed by statute or procedural rule. A criminal defendant is often entitled to additional discovery materials from the prosecutor pursuant to statutes or rules, though discovery statutes and rules vary widely between jurisdictions.

Victims should be informed that disclosure requirements—imposed by Brady as well as a jurisdiction’s statutes and rules governing discovery—may impact victim privacy.

Prosecutors are required by law to disclose exculpatory statements to the defense. Because system-based advocates are generally considered agents of the prosecutors, and prosecutors are deemed to know what advocates know, such advocates are generally required to disclose to the prosecutors the exculpatory statements made by victims to advocates.³⁰ Examples of exculpatory statements might include:

- “I lied to the police.”
- “I hit him first and he was defending himself.”
- “The crime didn’t happen.”
- “The defendant is not really the person who assaulted me.”
- *Any other statement from a victim that directly implicates a victim’s truthfulness regarding the crime.*
- *Any other statement from the victim that provides information that could be helpful to a defendant’s case.*

Important steps that victim advocates may take to help ensure that their office has appropriate policies and procedures in place to protect victims in light of required disclosures to prosecutors’ offices include:

- Ensure that every person clearly understands the prosecutor’s interpretation and expectations regarding discovery and exculpatory evidence with regard to victim advocates.
- Work with the prosecutors’ offices to create a policy/practice that addresses the limits of system-based advocate confidentiality.
- Inform victims prior to sharing of information if the victim advocate is bound by the rules that govern prosecutors.
- Develop a short, simple explanation to use with victims to communicate your responsibilities (*e.g.*, don’t use the word “exculpatory”).
- Consider including a simple statement in the initial contact letter or notice explaining limitations.
- Determine how and when advocates will remind victims of the limits of confidentiality throughout the process.
- Identify what documentation an advocate might come into contact with and whether the prosecutors’ office considers it discoverable. For example: (1) victim compensation forms; (2) victim impact statements; (3) restitution documentation; and (4) U-Visa application documentation.
- Create policies regarding the types of documentation that an advocate may not need from the victim in order to provide effective victim advocacy (*e.g.*, victim statements, treatment plans, safety plans, opinions, conclusions, criticisms). Determine a process for clearly marking documents that are not discoverable to ensure they are not inadvertently disclosed. For example, use a red stamp that says, “Not Discoverable.”

- Inform the victim at the time they make a disclosure that constitutes exculpatory evidence—or soon as a statement is deemed exculpatory—that it is going to be disclosed.
- When possible, avoid receiving a victim impact statement in writing prior to sentencing.
- Develop relationships with complementary victim advocates and communicate about your obligations and boundaries regarding exculpatory evidence. This will allow everyone to help set realistic expectations with victims regarding privacy.
- Establish how exculpatory information will be communicated to the prosecutor’s office.

What is *Giglio*, and why is it relevant to my work as an advocate?

Key Takeaways

- The United States Supreme Court (in *Giglio v. United States*) clarified the affirmative responsibility of the prosecutor’s office to disclose to the defendant any information in its possession that is material to their guilt or innocence. This means that the prosecution does not wait for a defendant to ask for material but must disclose it even without them asking.

Discussion

Giglio v. United States, 405 U.S. 150 (1972), is a case that was heard before the United States Supreme Court.³¹ The impact of the Court’s decision in *Giglio* intersects with advocates’ work as it makes it imperative that advocates understand: (1) what “material evidence” is (see *Brady v. Maryland* section for additional information); (2) how the advocate’s role is or is not related to the prosecutor’s office along with any corresponding professional, ethical obligations; (3) ways to avoid re-victimization by preventing violations that would cause a victim to undergo a second trial for the same crime; (4) the types of procedures and regulations that need to be implemented for advocates to ensure—in the face of prosecutor or advocate turnover—that all relevant and appropriate information is provided to the prosecutor handling the case; and (5) whether state or other local laws impose additional obligations that build on those prescribed by *Giglio*.

What are key considerations for system-based advocates who receive a subpoena?³²

Key Takeaways

- Advocates may receive subpoenas to appear before the court or elsewhere to provide a sworn statement and/or to appear with specified documents.
- Victims should be informed immediately if advocates receive a subpoena for the information or documents related to a victim’s case.

- There may be grounds to challenge a subpoena issued to a system-based or community-based advocate. These challenges can be made by the prosecutor, the community agency and/or the victims (either with or without the help of an attorney).

Discussion

In addition to providing prompt notice of receipt of a subpoena to the victim—whose rights and interests are implicated—a key consideration for system-based advocates, their superiors and the attorneys with whom they work is determining the type of subpoena received.³³ Subpoenas that system-based advocates often encounter are subpoenas demanding either: (a) a person’s presence before a court or to a location other than a court for a sworn statement; or (b) a person’s presence along with specified documentation, records or other tangible items.³⁴

When system-based advocates receive the latter (which is called a subpoena duces tecum) there are a number of factors that should be considered, such as whether the documentation, record or item sought (a) is discoverable; or (b) constitutes *Brady* material, as defined by federal, state and local law. If an item, for example, is neither discoverable nor *Brady* material, an advocate, by law, may not be required to disclose the item. The same may be true if the item falls within an exception to discovery and does not constitute *Brady* material.³⁵ For additional information on *Brady* material, see the *Brady v. Maryland* section pertaining to disclosure obligations. Notably, this analysis is relevant to other types of subpoenas as well. For example, if a person is subpoenaed to testify and it is anticipated that defense counsel will attempt to elicit testimony that he/she/they are not legally entitled to, a prosecutor may file a motion in advance—such as a motion in limine or a motion for a protective order—requesting that the scope of the testimony be narrowly tailored or otherwise limited in accordance with the jurisdiction’s laws. For advocates employed by prosecutor’s offices, this analysis must be completed in cooperation with the prosecuting attorney.

Other key considerations for system-based advocates, their superiors and the attorneys they work with include determining: whether the requester has a right to issue a subpoena, and, more specifically, a right to issue a subpoena for the person’s attendance and/or items sought; whether the subpoena is unspecified, vague or overbroad to warrant an objection that the subpoena is facially invalid or procedurally flawed; whether court mechanisms are available to oppose the subpoena; whether such mechanisms are time sensitive and require immediate action; whether the victim received ample notice and adequate information; what the victim’s position is; and whether the law affords the victim privacy, confidentiality or privilege rights or protections that must be protected and enforced.

SELECT LAWS

SELECT PRIVACY LAWS

What are key privacy rights and/or protections in California?

California’s Constitution and statutory code guarantee crime victims a number of privacy rights and interests. Under Article 1, Section 28 of the California Constitution—also known as Marsy’s Law—crime victims have an express right to privacy. Cal. Const. art. 1, § 28(b)(1) (guaranteeing victims the right “[t]o be treated with fairness and respect for his or her privacy and dignity”). Marsy’s Law also affords victims a constitutional right to the nondisclosure of confidential information and records “to the defendant, the defendant’s attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim’s family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.” Cal. Const. art. 1, § 28(b)(4). Under Marsy’s Law, victims can also protect their privacy by exercising their right to refuse an interview, deposition or discovery request by the defendant, defense counsel or anyone else working on the defendant’s behalf. *Id.* at § 28(b)(5).

In addition to these constitutional rights, various California statutes protect victim privacy rights and interests throughout the criminal justice process. For instance, law enforcement is expressly barred from disclosing a victim’s telephone number or address to an arrested person or potential defendant in a criminal case. Cal. Penal Code § 841.5(a). Additionally, when a defense attorney receives a victim’s personal identifying information through mandatory disclosures from the prosecution, state law bars the attorney from disclosing this information—except for the victim’s name—to the defendant or the defendant’s family, “unless specifically permitted to do so by the court after a hearing and upon a showing of good cause.” *Id.* at § 1054.2(a)(1). If the defendant is representing himself, the court is required to “endeavor to protect the personal identifying information of a victim . . . by providing for contact only through a private investigator licensed by the Department of Consumer Affairs and appointed by the court or by imposing other reasonable restrictions, absent a showing of good cause as determined by the court.” *Id.* at § 1054.2(b).

California extends heightened privacy protections to certain categories of victims. For instance, upon request, a sexual assault victim may be identified in all records and during all proceedings by “Jane Doe or John Doe” if doing so “is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or defense.” Cal. Penal Code § 293.5. Sexual assault victims also have the right to request that their address and telephone number be excluded from evidence. Cal. Evid. Code § 352.1. The court may grant such a request upon finding that “the probative value of the evidence is outweighed by the creation of substantial danger to the victim.” *Id.*

In cases where the victim is under the age of 16 or is mentally disabled and the crime involved is a sex crime, domestic violence or child abuse, the prosecutor may request closing the courtroom to the public during the victim’s testimony. Cal. Penal Code § 859.1; *id.* at § 868.7. The state’s law also protects victim privacy through rape shield laws, under which a victim’s sexual history cannot be admitted into evidence, except under limited circumstances. Cal. Evid. Code § 782; *id.* at § 1103.

To protect the safety and privacy of victims of domestic violence, stalking, rape or sexual battery, California provides these individuals with the right to apply for substitute license plates. Cal. Veh. Code § 4467. These victims also have the right to shortened, confidential legal procedures to change their names. Cal. Civ. Proc. Code § 1277(b). Additionally, they may participate in the state’s address confidentiality program, Safe at Home, Cal. Gov’t Code §§ 6205-6211, which is discussed more fully in the following section, “Select Confidentiality Laws.”

The section “Select Confidentiality Laws” also includes information about victims’ privacy protections when someone attempts to access their personal information through a public records request.

SELECT CONFIDENTIALITY LAWS

What are key confidentiality rights and/or protections in California?

California guarantees all crime victims a constitutional right to maintain the confidentiality of their information and records from the defendant and anyone working on the defendant’s behalf. Cal. Const. art. 1, § 28(b)(4). Specifically, Marsy’s Law guarantees victims the right “[t]o prevent the disclosure of confidential information or records to the defendant, the defendant’s attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim’s family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.” *Id.*

As detailed in the following section, “Select Privilege Laws,” California law protects the confidentiality of communications between victims and certain providers of counseling and other support services, as well as the confidentiality of records related to the provision of these services. *See, e.g.*, Cal. Evid. Code § 1035.8 (confidential communications between sexual assault counselors and victims); *id.* at § 1037.5 (confidential communications between domestic violence counselors and victims); *id.* at § 1038 (confidential communications between human trafficking caseworkers and victims); *id.* at § 1014 (confidential communications between psychotherapists and victims). The confidential communications and records that fall within these privileges may only be disclosed in limited circumstances and through a court order. The process for determining whether disclosure is legally warranted is detailed in the following section.

The state extends heightened confidentiality protections to information about certain categories of victims. For instance, victims of sexual assault have the right to request that their names and addresses not be disclosed to anyone “except the prosecutor, parole officers of the Department of Corrections and Rehabilitation, hearing officers of the parole authority, probation officers of county probation departments, or other persons or public agencies where authorized or required by law.” Cal. Penal Code § 293(c), (d). In fact, law enforcement must directly inform these victims that if they do not request otherwise, their names will “become a matter of public record.” *Id.* at § 293(a). Likewise, victims of human trafficking have the right to request that a law enforcement agency not disclose their names, addresses and images to anyone other than certain individuals authorized by law to access the information. *Id.* at § 293(e).

Additionally, as noted above, law enforcement is expressly barred from disclosing a victim’s telephone number or address directly to an arrested person or potential defendant. Cal. Penal Code 841.5(a); *see also id.* at § 964 (each county must establish a procedure to protect victims’ confidential personal information contained in police reports, arrest reports or investigative reports submitted to the court).

California also protects victim confidentiality in the context of public records requests. For example, victims of sexual assault, child abuse, stalking and other specified crimes may ask that their names be withheld in response to disclosure requests under the California Public Records Act. Cal. Gov’t Code § 6254(f)(2)(A); *see also* Cal. Penal Code § 293(d) (sexual assault victims’ right to confidentiality of name and address). Human trafficking victims may also request that their names and images—as well as those of their immediate family—are not disclosed in response to such requests. Cal. Gov’t Code § 6254(f)(2)(B); *see also* Cal. Penal Code § 293(e) (human trafficking victims’ right to confidentiality of name, address and image).

California explicitly exempts from disclosure pursuant to a public records request victim records that are otherwise protected by federal or state law. Cal. Gov’t Code § 6254(k). Such records include crime victims’ “confidential information or records” that are protected by Marsy’s Law. *Id.* at § 6276.01. The public records exception also expressly applies to confidential communications between domestic violence counselors and victims, *id.* at § 6276.14, confidential communications between sexual assault counselors and victims, *id.* at § 6276.40, and requests for assistance to the California Crime Victim Compensation Board, *id.* at 6254.17.

Finally, California’s Safe at Home Program—an address confidentiality program for victims of domestic violence, sexual assault, human trafficking, stalking and elder or dependent abuse—protects victim confidentiality by offering these victims a free post office box to use for receiving mail, opening a bank account, completing a confidential name change, filling out government documents, registering to vote, obtaining a driver’s license, enrolling a child in school and other purposes. The program is designed “to enable state and local agencies to respond to requests for public records without disclosing the changed

name or location of [these victims], to enable interagency cooperation with the Secretary of State in providing name and address confidentiality for [these victims], and to enable state and local agencies to accept a program participant's use of an address designated by the Secretary of State as a substitute mailing address." Cal. Gov't Code § 6205. California state, county and city government agencies must accept this substitute address in lieu of a residential or other mailing address. *Id.* at § 6207. Further details about the program can be found here: <https://www.sos.ca.gov/registries/safe-home/>. *See also* Cal. Gov't Code §§ 6205–6211.

SELECT PRIVILEGE LAWS

What are key privileges in California?

Victims in California have a number of privileges that they can assert to prevent disclosure of their private communications with certain victim advocates, counselors, caseworkers, psychotherapists and others. *See, e.g.*, Cal. Evid. Code § 1035.8 (sexual assault counselor-victim privilege); *id.* at § 1037.5 (domestic violence counselor-victim privilege); *id.* at § 1038 (human trafficking caseworker-victim privilege); *id.* at § 1010.5 (educational psychologist-patient privilege); *id.* at § 1014 (psychotherapist-patient privilege). Marsy's Law expands upon these privileges and gives them constitutional weight. Under the law, victims have a constitutional right "[t]o prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant . . . which are [] privileged or confidential by law." Cal. Const. art. 1, § 28(b)(4). Although there is no physician-patient evidentiary privilege in criminal proceedings in California, Cal. Evid. Code § 998, Marsy's Law guarantees crime victims the right "[t]o prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, . . . which disclose confidential communications made in the course of medical or counseling treatment." Cal. Const. art. 1, § 28(b)(4). Additionally, health information privacy laws and ethical duties of confidentiality may protect victim-patient privacy interests in some contexts. Ultimately, California's evidentiary privileges protect the confidential communications between victims and certain professionals from being disclosed to anyone in the course of the criminal justice process; Marsy's Law guards against disclosure to the defendant, defense counsel and others working on the defendant's behalf.

Recognizing that victims are not always aware of the limitations on the confidentiality of their communications with individuals providing counseling and other support services, California mandates that certain professionals expressly inform victims of any such limitations. *See, e.g.*, Cal. Evid. Code § 1037.8 (domestic violence counselors must provide victims with information regarding the limitations on the confidentiality of their communications); *id.* at § 1038(c) (human trafficking caseworkers must inform victims of limitations on the confidentiality of their communications).

Under California law, if a privilege is claimed on the ground that the information sought to be disclosed is a communication made in confidence in the course of one of these protected relationships, “the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.” Cal. Evid. Code § 917(a). Such communications do not lose their privileged status “for the sole reason that [they are] communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.” *Id.* at § 917(b).

When disclosure of a confidential communication protected by one of these privileges is sought from a victim, the victim may assert the privilege to protect against disclosure. When disclosure is sought from the professional in the privileged relationship with the victim, that professional must assert the privilege to protect against disclosure. *See, e.g.*, Cal. Evid. Code § 1036 (sexual assault counselor who received or made privileged communication must “claim the privilege if he or she is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1035.8”); *id.* at § 1037.6 (domestic violence counselor who received or made privileged communication must “claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege under subdivision (c) of Section 1037.5”); *id.* at § 1038(b) (human trafficking caseworker who received or made privileged communication must “claim the privilege whenever the caseworker is present when the communication is sought to be disclosed and the caseworker is authorized to claim the privilege under this section”); *id.* at § 1015 (psychotherapist who received or made privileged communication must “claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014”).

Importantly, these privileges do not interfere with a professional’s mandatory child abuse reporting obligations or duties to report a crime. *See, e.g.*, Cal. Evid. Code § 1037.3 (domestic violence counselor-victim privilege does not limit mandatory child abuse reporting obligations); *id.* at § 1038.3 (human trafficking caseworker-victim privilege does not limit mandatory child abuse reporting obligations). Additionally, the psychotherapist-patient privilege does not apply where the patient is under sixteen years of age and “[t]he psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.” *Id.* at § 1027.

A court may compel disclosure of privileged communications in certain situations, after balancing the interests at stake. The sexual assault counselor-victim privilege, the domestic violence counselor-victim privilege and the human trafficking caseworker-victim privilege each provide an express procedure for courts to follow in response to a request for the disclosure of a victim’s protected records; case law governs when and how courts handle requests for information covered by the psychotherapist-patient privilege.³⁶

For instance, a “[c]ourt may compel disclosure of information received by the sexual assault counselor which constitutes relevant evidence of the facts and circumstances involving an alleged sexual assault about which the victim is complaining and which is the subject of a criminal proceeding if the court determines that the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled. The court may also compel disclosure in proceedings related to child abuse if the court determines the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled.” Cal. Evid. Code § 1035.4. When determining whether to allow for the disclosure of privileged communications between a sexual assault counselor and victim, a court “may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present.” *Id.* If, after this *in camera* review, the court “determines that the information is privileged and must not be disclosed, neither he or she nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.” *Id.* Where the court finds that certain information should be disclosed, it must order the disclosure and inform the defendant. *Id.* “If the court finds there is a reasonable likelihood that particular information is subject to disclosure pursuant to the balancing test provided in this section, the following procedure shall be followed: (1) The court shall inform the defendant of the nature of the information which may be subject to disclosure. (2) The court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the sexual assault counselor regarding the information which the court has determined may be subject to disclosure. (3) At the conclusion of the hearing, the court shall rule which items of information, if any, shall be disclosed. The court may make an order stating what evidence may be introduced by the defendant and the nature of questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.” *Id.*

Likewise, a court may compel disclosure of privileged communications between a domestic violence counselor and a victim upon finding that the evidence is relevant and that “the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services.” Cal. Evid. Code § 1037.2(b). Under the Evidence Code, a court may compel disclosure of such privileged information “if the victim is either dead or not the complaining witness in a criminal action against the perpetrator” and “in proceedings related to child abuse if the court determines that the probative value of the evidence outweighs the effect of the disclosure on the victim, the counseling relationship, and the counseling services.” *Id.* As with the sexual assault counselor-victim privilege, when ruling on a claim of privilege, a court may require an *in camera* review of the sought information. *Id.* at § 1037.2(c). If, after balancing the probative value of the information against the effects of disclosure, the court finds that “there is a reasonable likelihood” any of the information is subject to disclosure, it must inform the defendant of the nature of the information that may be disclosed, hold a hearing, and then issue an order stating which disclosures, if any, may be made. *Id.* at § 1037.2(d).

In the context of the human trafficking caseworker-victim privilege, disclosure of confidential information received by the caseworker may be compelled, where the information “constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim and that is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services.” Cal. Evid. Code § 1038.1(a).

For reference, the four main privileges discussed in this section appear below.

<p>Sexual Assault Counselor-Victim Privilege</p>	<p>Cal. Evid. Code 1035.8.</p> <p>A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault counselor if the privilege is claimed by any of the following: (a) The holder of the privilege; (b) A person who is authorized to claim the privilege by the holder of the privilege; or (c) The person who was the sexual assault counselor at the time of the confidential communication, but that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.</p>
<p>Domestic Violence Counselor-Victim Privilege</p>	<p>Cal. Evid. Code 1037.5.</p> <p>A victim of domestic violence, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a domestic violence counselor in any proceeding specified in Section 901 if the privilege is claimed by any of the following persons: (a) The holder of the privilege. (b) A person who is authorized to claim the privilege by the holder of the privilege. (c) The person who was the domestic violence counselor at the time of the confidential communication. However, that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.</p>

<p>Human Trafficking Caseworker-Victim Privilege</p>	<p>Cal. Evid. Code § 1038.</p> <p>(a) A trafficking victim, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication, whether made orally, in writing, or otherwise conveyed, between the victim and a human trafficking caseworker if the privilege is claimed by any of the following persons:</p> <p>(1) The holder of the privilege.</p> <p>(2) A person who is authorized to claim the privilege by the holder of the privilege.</p> <p>(3) The person who was the human trafficking caseworker at the time of the confidential communication or is presently the human trafficking caseworker for the victim. However, that person may not claim the privilege if there is no holder of the privilege in existence or if the person is otherwise instructed by the court or by another person authorized to permit disclosure.</p>
<p>Psychotherapist-Patient Privilege</p>	<p>Cal. Evid. Code § 1014.</p> <p>Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by: (a) The holder of the privilege. (b) A person who is authorized to claim the privilege by the holder of the privilege. (c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code, a marriage and family therapist corporation as defined in Article 6 (commencing with Section 4987.5) of Chapter 13 of Division 2 of the Business and Professions Code, a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 4998) of Chapter 14 of Division 2 of the Business and Professions Code, or a professional clinical counselor corporation as defined in Article 7 (commencing with Section 4999.123) of Chapter 16 of Division 2 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between those patients and</p>

	<p>psychotherapists employed by those corporations to render services to those patients. The word “persons” as used in this subdivision includes partnerships, corporations, limited liability companies, associations, and other groups and entities.</p>
--	--

SELECT DEFINITIONS

<p>Key definitions appear below.</p>	
<p>Constitutional Definition of “Victim”</p>	<p>Cal. Const. art. 1, § 28(e).</p> <p>As used in [California Constitution, article 1, § 28], a “victim” is 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 victim who is deceased, a minor, or physically or psychologically incapacitated. The term “victim” does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.</p>
<p>Rights of Victims and Witnesses of Crime Act Definitions</p>	<p>Cal. Penal Code § 679.01.</p> <p>(a) “Crime” means an act committed in this state which, if committed by a competent adult, would constitute a misdemeanor or felony.</p> <p>(b) “Victim” means a person against whom a crime has been committed.</p> <p>(c) “Witness” means any person who has been or is expected to testify for the prosecution, or who, by reason of having relevant information, is subject to call or likely to be called as a witness for the prosecution, whether or not any action or proceeding has yet been commenced.</p>
<p>Sexual Assault Counselor-Victim Privilege Definitions</p>	<p>Confidential Communications (Cal. Evid. Code § 1035.4).</p> <p>As used in this article, “confidential communication between the sexual assault counselor and the victim” means information</p>

transmitted between the victim and the sexual assault counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the sexual assault counselor is consulted. The term includes all information regarding the facts and circumstances involving the alleged sexual assault and also includes all information regarding the victim's prior or subsequent sexual conduct, and opinions regarding the victim's sexual conduct or reputation in sexual matters.

Holder of the Privilege (Cal. Evid. Code § 1035.6).

As used in this article, "holder of the privilege" means:

- (a) The victim when such person has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator.
- (c) The personal representative of the victim if the victim is dead.

Sexual Assault (Cal. Evid. Code § 1036.2).

As used in this article, "sexual assault" includes all of the following:

- (a) Rape, as defined in Section 261 of the Penal Code.
- (b) Unlawful sexual intercourse, as defined in Section 261.5 of the Penal Code.
- (c) Rape in concert with force and violence, as defined in Section 264.1 of the Penal Code.
- (d) Sodomy, as defined in Section 286 of the Penal Code, except a violation of subdivision (e) of that section.
- (e) A violation of Section 288 of the Penal Code.
- (f) Oral copulation, as defined in Section 287 of, or former Section 288a of, the Penal Code, except a violation of subdivision (e) of those sections.
- (g) Sexual penetration, as defined in Section 289 of the Penal Code.
- (h) Annoying or molesting a child under 18 years of age, as defined in Section 647a of the Penal Code.
- (i) Any attempt to commit any of the acts listed in this section.

Sexual Assault Counselor (Cal. Evid. Code § 1035.2).

As used in this article, "sexual assault counselor" means any of the following:

- (a) A person who is engaged in any office, hospital, institution, or center commonly known as a rape crisis center, whose primary purpose is the rendering of advice or assistance to victims of sexual

	<p>assault and who has received a certificate evidencing completion of a training program in the counseling of sexual assault victims issued by a counseling center that meets the criteria for the award of a grant established pursuant to Section 13837 of the Penal Code and who meets one of the following requirements:</p> <p>(1) Is a psychotherapist as defined in Section 1010; has a master’s degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape crisis counseling.</p> <p>(2) Has 40 hours of training as described below and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas:</p> <p>(A) Law.</p> <p>(B) Medicine.</p> <p>(C) Societal attitudes.</p> <p>(D) Crisis intervention and counseling techniques.</p> <p>(E) Role playing.</p> <p>(F) Referral services.</p> <p>(G) Sexuality.</p> <p>(b) A person who is engaged in a program on the campus of a public or private institution of higher education, whose primary purpose is the rendering of advice or assistance to victims of sexual assault and who has received a certificate evidencing completion of a training program in the counseling of sexual assault victims issued by a counseling center that meets the criteria for the award of a grant established pursuant to Section 13837 of the Penal Code and who meets one of the following requirements:</p> <p>(1) Is a psychotherapist as defined in Section 1010; has a master’s degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape crisis counseling.</p> <p>(2) Has 40 hours of training as described below and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas:</p> <p>(A) Law.</p> <p>(B) Medicine.</p> <p>(C) Societal attitudes.</p> <p>(D) Crisis intervention and counseling techniques.</p> <p>(E) Role playing.</p> <p>(F) Referral services.</p> <p>(G) Sexuality.</p> <p>(c) A person who is employed by any organization providing the programs specified in Section 13835.2 of the Penal Code, whether financially compensated or not, for the purpose of counseling and assisting sexual assault victims, and who meets one of the following</p>
--	--

	<p>requirements:</p> <p>(1) Is a psychotherapist as defined in Section 1010; has a master’s degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape assault counseling.</p> <p>(2) Has the minimum training for sexual assault counseling required by guidelines established by the employing agency pursuant to subdivision (c) of Section 13835.10 of the Penal Code, and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas:</p> <p>(A) Law.</p> <p>(B) Victimology.</p> <p>(C) Counseling.</p> <p>(D) Client and system advocacy.</p> <p>(E) Referral services.</p> <p>Victim (Cal. Evid. Code § 1035).</p> <p>As used in this article, “victim” means a person who consults a sexual assault counselor for the purpose of securing advice or assistance concerning a mental, physical, or emotional condition caused by a sexual assault.</p>
<p>Domestic Violence Counselor-Victim Privilege Definitions.</p>	<p>Confidential Communication (Cal. Evid. Code § 1037.2(a)).</p> <p>(a) As used in this article, “confidential communication” means any information, including, but not limited to, written or oral communication, transmitted between the victim and the counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the domestic violence counselor is consulted. The term includes all information regarding the facts and circumstances involving all incidences of domestic violence, as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser.</p> <p>Domestic Violence (Cal. Evid. Code § 1037.7).</p> <p>As used in this article, “domestic violence” means “domestic violence” as defined in Section 6211 of the Family Code.</p>

	<p>Domestic Violence (Cal. Fam. Code § 6211). “Domestic violence” is abuse perpetrated against any of the following persons:</p> <ul style="list-style-type: none"> (a) A spouse or former spouse. (b) A cohabitant or former cohabitant, as defined in Section 6209. (c) A person with whom the respondent is having or has had a dating or engagement relationship. (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12). (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected. (f) Any other person related by consanguinity or affinity within the second degree. <p>Domestic Violence Counselor (Cal. Evid. Code § 1037.1).</p> <p>(a)(1) As used in this article, “domestic violence counselor” means a person who is employed by a domestic violence victim service organization, as defined in this article, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of domestic violence and who has at least 40 hours of training as specified in paragraph (2).</p> <p>(2) The 40 hours of training shall be supervised by an individual who qualifies as a counselor under paragraph (1), and who has at least one year of experience counseling domestic violence victims for the domestic violence victim service organization. The training shall include, but need not be limited to, the following areas: history of domestic violence, civil and criminal law as it relates to domestic violence, the domestic violence victim-counselor privilege and other laws that protect the confidentiality of victim records and information, societal attitudes towards domestic violence, peer counseling techniques, housing, public assistance and other financial resources available to meet the financial needs of domestic violence victims, and referral services available to domestic violence victims.</p> <p>(3) A domestic violence counselor who has been employed by the domestic violence victim service organization for a period of less than six months shall be supervised by a domestic violence counselor who has at least one year of experience counseling domestic violence victims for the domestic violence victim service organization.</p> <p>(b) As used in this article, “domestic violence victim service organization” means either of the following:</p>
--	---

	<p>(1) A nongovernmental organization or entity that provides shelter, programs, or services to victims of domestic violence and their children, including, but not limited to, either of the following: (A) Domestic violence shelter-based programs, as described in Section 18294 of the Welfare and Institutions Code. (B) Other programs with the primary mission to provide services to victims of domestic violence whether or not that program exists in an agency that provides additional services.</p> <p>(2) Programs on the campus of a public or private institution of higher education with the primary mission to provide support or advocacy services to victims of domestic violence.</p> <p>Holder of Privilege (Cal. Evid. Code § 1037.4). As used in this article, “holder of the privilege” means: (a) The victim when he or she has no guardian or conservator. (b) A guardian or conservator of the victim when the victim has a guardian or conservator, unless the guardian or conservator is accused of perpetrating domestic violence against the victim.</p> <p>Victim (Cal. Evid. Code § 1037). As used in this article, “victim” means any person who suffers domestic violence, as defined in Section 1037.7.</p>
<p>Human Trafficking Caseworker-Victim Privilege Definitions</p>	<p>Confidential Communication (Cal. Evid. Code § 1038.2(a)). “Confidential communication” means all information, including but not limited to written and oral communication, transmitted between the victim and the human trafficking caseworker in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the human trafficking caseworker is consulted and made with the victim’s knowledge and consent. “Confidential communication” includes all information regarding the facts and circumstances relating to all incidences of human trafficking, as well as all information about the children of the victim and the relationship of the victim to the human trafficker.</p> <p>Holder of the Privilege (Cal. Evid. Code § 1038.2(b)). “Holder of the privilege” means: (1) The victim if the victim has no guardian or conservator. (2) A guardian or conservator of the victim if the victim has a guardian or conservator.</p>

	<p>(3) The personal representative of the victim if the victim is deceased.</p> <p>Human Trafficking Caseworker (Cal. Evid. Code § 1038.2(c)). “Human trafficking caseworker” means a person working for a human trafficking victim service organization, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of human trafficking, who meets the requirements of paragraph (1) or (2) and who also meets the requirements of paragraph (3), if applicable:</p> <p>(1) Has an advanced degree or license, such as a master’s degree in counseling, social work, or a related field and at least one year of experience in a caseworker role working directly with victims of human trafficking.</p> <p>(2) Has at least 40 hours of training as specified in this paragraph and is supervised by an individual who qualifies as a human trafficking caseworker under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but need not be limited to, the following areas:</p> <p>(A) History of human trafficking. (B) Civil and criminal law relating to human trafficking. (C) Systems of oppression. (D) Peer counseling techniques. (E) Resources available to victims of human trafficking. (F) Crisis intervention and counseling techniques. (G) Role playing. (H) Intersections of human trafficking and other crimes. (I) Client and system advocacy. (J) Referral services. (K) Connecting to local, regional, and national human trafficking coalitions. (L) Explaining privileged communications.</p> <p>(3) If the caseworker has been employed by a human trafficking service organization for a period of less than six months, that caseworker is supervised by another human trafficking caseworker who has at least one year of experience working with human trafficking victims.</p> <p>Human Trafficking Victim Service Organization (Cal. Evid. Code § 1038.2(d)). “Human trafficking victim service organization” means a nongovernmental organization or entity that provides shelter, program, or other support services to victims of human trafficking and their children and that does all of the following:</p> <p>(1) Employs staff that meet the requirements of a human trafficking</p>
--	---

	<p>caseworker as set forth in this section.</p> <p>(2) Operates a telephone hotline, advertised to the public, for survivor crisis calls.</p> <p>(3) Offers psychological support and peer counseling provided in accordance with this section.</p> <p>(4) Makes staff available during normal business hours to assist victims of human trafficking who need shelter, programs, or other support services.</p> <p>Victim (Cal. Evid. Code § 1038.2(e)). “Victim” means a person who consults a human trafficking caseworker for the purpose of securing advice or assistance concerning a mental, physical, emotional, or other condition related to their experience as a victim of human trafficking.</p>
<p>Psychotherapist-Patient Privilege Definitions</p>	<p>Confidential Communication (Cal. Evid. Code § 1012). As used in this article, “confidential communication between patient and psychotherapist” means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.</p> <p>Holder of the Privilege (Cal. Evid. Code § 1013). As used in this article, “holder of the privilege” means:</p> <p>(a) The patient when he has no guardian or conservator.</p> <p>(b) A guardian or conservator of the patient when the patient has a guardian or conservator.</p> <p>(c) The personal representative of the patient if the patient is dead.</p> <p>“Patient” (Cal. Evid. Code § 1011). As used in this article, “patient” means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.</p> <p>Psychotherapist (Cal. Evid. Code § 1010).</p>

	<p>As used in this article, “psychotherapist” means a person who is, or is reasonably believed by the patient to be:</p> <p>(a) A person authorized to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of their time to the practice of psychiatry.</p> <p>(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.</p> <p>(c) A person licensed as a clinical social worker under Chapter 14 (commencing with Section 4991) of Division 2 of the Business and Professions Code, when they are engaged in applied psychotherapy of a nonmedical nature.</p> <p>(d) A person who is serving as a school psychologist and holds a credential authorizing that service issued by the state.</p> <p>(e) A person licensed as a marriage and family therapist under Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.</p> <p>(f) A person registered as a registered psychological associate who is under the supervision of a licensed psychologist as required by Section 2913 of the Business and Professions Code, or a person registered as an associate marriage and family therapist who is under the supervision of a licensed marriage and family therapist, a licensed clinical social worker, a licensed professional clinical counselor, a licensed psychologist, or a licensed physician and surgeon certified in psychiatry, as specified in Section 4980.44 of the Business and Professions Code.</p> <p>(g) A person registered as an associate clinical social worker who is under supervision as specified in Section 4996.23 of the Business and Professions Code.</p> <p>(h) A psychological intern as defined in Section 2911 of the Business and Professions Code who is under the primary supervision of a licensed psychologist.</p> <p>(i) A trainee, as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code, who is fulfilling their supervised practicum required by subparagraph (B) of paragraph (1) of subdivision (d) of Section 4980.36 of, or subdivision (c) of Section 4980.37 of, the Business and Professions Code and is supervised by a licensed psychologist, a board certified psychiatrist, a licensed clinical social worker, a licensed marriage and family therapist, or a licensed professional clinical counselor.</p> <p>(j) A person licensed as a registered nurse pursuant to Chapter 6 (commencing with Section 2700) of Division 2 of the Business and Professions Code, who possesses a master’s degree in psychiatric-mental health nursing and is listed as a psychiatric-mental health nurse by the Board of Registered Nursing.</p>
--	---

	<p>(k) An advanced practice registered nurse who is certified as a clinical nurse specialist pursuant to Article 9 (commencing with Section 2838) of Chapter 6 of Division 2 of the Business and Professions Code and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing.</p> <p>(l) A person rendering mental health treatment or counseling services as authorized pursuant to Section 6924 of the Family Code.</p> <p>(m) A person licensed as a professional clinical counselor under Chapter 16 (commencing with Section 4999.10) of Division 2 of the Business and Professions Code.</p> <p>(n) A person registered as an associate professional clinical counselor who is under the supervision of a licensed professional clinical counselor, a licensed marriage and family therapist, a licensed clinical social worker, a licensed psychologist, or a licensed physician and surgeon certified in psychiatry, as specified in Sections 4999.42 to 4999.48, inclusive, of the Business and Professions Code.</p> <p>(o) A clinical counselor trainee, as defined in subdivision (g) of Section 4999.12 of the Business and Professions Code, who is fulfilling their supervised practicum required by paragraph (3) of subdivision (c) of Section 4999.32 of, or paragraph (3) of subdivision (c) of Section 4999.33 of, the Business and Professions Code, and is supervised by a licensed psychologist, a board-certified psychiatrist, a licensed clinical social worker, a licensed marriage and family therapist, or a licensed professional clinical counselor.</p>
--	---

¹ See *Office for Victims of Crime, Ethical Standards, Section I: Scope of Services*, https://www.ovc.gov/model-standards/ethical_standards_1.html.

² Additional examples of system-based advocate titles include: district attorney's office/state attorney's office advocates or victim-witness coordinators; law enforcement advocates; FBI victim specialists; U.S. attorney's office victim-witness coordinators; board of parole and post-prison supervision advocates; and post-conviction advocates.

³ Examples of community-based advocates include: crisis hotline or helpline staff; rape crisis center staff; domestic violence shelter staff; campus advocates; and homicide support program staff.

⁴ See Nat'l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), June 2011, at 3 n.30 (listing victims' constitutional and statutory rights to privacy and to dignity, respect or fairness).

⁵ See, e.g., *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (recognizing that the United States Constitution provides a right of personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) ("[A] right to personal privacy . . . does exist under the Constitution.").

⁶ There are different levels of privileges: absolute, absolute diluted and qualified. When an absolute privilege attaches, only a victim has the right to authorize disclosure of that information and the court can never order the information to be disclosed without the victim's consent. Absolute privileges are rare, however, because privileges are seen to run contrary to the truth finding function of courts.

⁷ See, e.g., Ala. R. Evid. 503A(a)(7) (“‘Victim counselor’ means any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or prosecutor’s office and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence.”); Alaska Stat. Ann. § 18.66.250(5)(B) (“‘[V]ictim counseling center’ means a private organization, an organization operated by or contracted by a branch of the armed forces of the United States, or a local government agency that . . . is not affiliated with a law enforcement agency or a prosecutor’s office[.]”); Haw. Rev. Stat. Ann. § 626-1, Rule 505.5(a)(6) (“A ‘victim counseling program’ is any activity of a domestic violence victims’ program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor’s office, or the department of human services.”); Ind. Code Ann. § 35-37-6-5(2) (“‘[V]ictim service provider’ means a person . . . that is not affiliated with a law enforcement agency[.]”); Neb. Rev. Stat. Ann. § 29-4302(1) (“Advocate means any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor’s office whose primary purpose is assisting domestic violence and sexual assault victims[.]”); N.M. Stat. Ann. § 31-25-2(E) (“‘[V]ictim counselor’ means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney[.]”).

⁸ Terms that inform the intersection of victim services and HIPAA, FERPA, FOIA, VAWA or VOCA are “informed consent” and “waiver.” “Informed consent” is defined as “1. [a] person’s agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. For the legal profession, informed consent is defined in Model Rule of Professional Conduct 1.0(e); [or] 2. [a] patient’s knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical field community would give to a patient regarding the risks involved in the proposed treatment or procedure.” *Informed consent*, Black’s Law Dictionary (8th ed. 2004). “Waiver” is defined as “[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage” *Waiver*, Black’s Law Dictionary (8th ed. 2004).

⁹ *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)*, https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Are law enforcement records considered education records?*, <https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records>.

¹⁴ *Id.*

¹⁵ *Office for Victims of Crime, Crime Victims Fund*, <https://www.ovc.gov/pubs/crimevictimsfundfs/intro.html#VictimAssist>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Department of Justice Guide to the Freedom of Information Act, at 1, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf>.

¹⁹ *Id.*

²⁰ *Ethic*, Merriam-webster.com, <https://www.merriam-webster.com/dictionary/ethics> (last visited July 31, 2019).

²¹ *Office for Victims of Crime, Purpose & Scope of The Standards*, https://www.ovc.gov/model-standards/purpose_and_scope.html.

²² *Id.* Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For “Scope of Services,” the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_1.html. For “Coordinating within the Community,” the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_2.html. For “Direct Services,” the ethical standards and their corresponding

commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_3.html. For “Privacy, Confidentiality, Data Security and Assistive Technology,” the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_4.html. For “Administration and Evaluation,” the ethical standard and the corresponding commentary can be located at https://www.ovc.gov/model-standards/ethical_standards_5.html.

²³ *Office for Victims of Crime, Ethical Standards for Serving Victims & Survivors of Crime*, https://www.ovc.gov/model-standards/ethical_standards.html.

²⁴ For a sample law enforcement-based victim services code of ethics drafted by the International Association of Chiefs of Police, see *Law Enforcement-Based Victim Services – Template Package I: Getting Started*, https://www.theiacp.org/sites/default/files/LEV/Publications/Template%20Package%20I_04.2021.pdf.

²⁵ See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

²⁶ See *United States v. Agurs*, 427 U.S. 97, 106–07 (1976).

²⁷ *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

²⁸ *Id.*

²⁹ See, e.g., *Eakes v. Sexton*, 592 F. App’x 422, 429 (6th Cir. 2014) (finding that “contrary to the district court’s conclusion that the [state] prosecutor was not responsible for failing to disclose the Victim-Advocate report because the Advocate was located ‘in a separate part of the District Attorney’s office,’ the prosecutor is in fact responsible for disclosing all *Brady* information in the possession of that office, such as the Victim-Advocate report, even if the prosecutor was unaware of the evidence prior to trial”); *Commonwealth v. Liang*, 747 N.E.2d 112, 114 (Mass. 2001) (concluding that “the notes of [prosecution-based] advocates are subject to the same discovery rules as the notes of prosecutors[,]” and “[t]o the extent that the notes contain material, exculpatory information . . . or relevant ‘statements’ of a victim or witness . . . the Commonwealth must disclose such information or statements to the defendant, in accordance with due process and the rules of criminal procedure”).

³⁰ Notably, for advocates/entities that receive VOCA funding, because this disclosure is “compelled by statutory or court mandate,” it does not pursuant to statute, require a signed, written release from the victim. Nevertheless, if disclosure is required, VOCA requires that advocates make reasonable attempts to notify the victim affected by the disclosure and take whatever steps are necessary to protect their privacy and safety.

³¹ Defendant John Giglio was tried, convicted and sentenced for forgery related crimes. While Giglio’s case was pending appeal, his attorney filed a motion for a new trial, claiming that there was newly discovered evidence that the key Government witness—“the only witness linking [Giglio] with the crime”—had been promised that he would not be prosecuted in exchange for his testimony. The defense attorney’s motion was initially denied, but certiorari review was granted “to determine whether the evidence [that was] not disclosed . . . require[d] a new trial under the due process criteria of” cases, including *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which “held that suppression of material evidence justifies a new trial” whether the prosecutor intended to withhold information or not. “An affidavit filed by the Government as part of its opposition to a new trial confirm[ed] [Giglio’s] claim that a promise was made to [the key Government witness]” by the former Assistant United States Attorney “that [the witness] would not be prosecuted if he cooperated with the Government.” This promise of leniency was made by the formerly assigned Assistant United States Attorney who did not handle the trial; and the Assistant United States Attorney who handled the trial was unaware of the promise. The Supreme Court held that nondisclosure of material evidence “is the responsibility of the prosecutor”—whether nondisclosure was intentional or not—and that such action is directly attributable to the Government. Addressing the topic of “turnover,” principally, the Court explained that “[t]o the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to [e]nsure communication of all relevant information on each case to every lawyer who deals with it.” Giglio’s conviction was reversed, and the case was remanded to the lower court.

³² This section addresses subpoenas directed to system-based advocates. For information concerning community-based advocates and subpoenas, please contact NCVLI for technical assistance.

³³ Terminology for subpoenas varies from jurisdiction-to-jurisdiction. Common examples of subpoenas include: “subpoenas”; “subpoenas duces tecum”; “deposition subpoenas”; and “subpoenas ad testificandum.” See *Subpoena*, Black’s Law Dictionary (8th ed. 2004).

³⁴ See *Subpoena*, Black’s Law Dictionary (8th ed. 2004) (defining “subpoena” as “[a] writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply”); *subpoena duces tecum*, Black’s Law Dictionary (8th ed. 2004) (defining “subpoena duces tecum” as “[a] subpoena ordering the witness to appear and to bring specified documents, records, or things”); *deposition subpoena*, Black’s Law Dictionary (8th ed. 2004)

(defining “deposition subpoena” as “1. [a] subpoena issued to summon a person to make a sworn statement in a time and place other than a trial[;] [and] 2. [i]n some jurisdictions, [this is referred to as] a subpoena duces tecum”).

³⁵ Attorney work product “is generally exempt from discovery or other compelled disclosure.” *Work product*, Black’s Law Dictionary (8th ed. 2004).

³⁶ Discussion of this case law falls outside the scope of this document. For information concerning requests for the disclosure of information covered by the psychotherapist-patient privilege, please contact NCVLI for technical assistance.

This resource was developed by the National Crime Victim Law Institute (NCVLI) under 2020-V3-GX-K001, awarded to the International Association of Chiefs of Police (IACP) by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this draft publication are those of the contributors and do not necessarily represent the official position of the U.S. Department of Justice.