



LAW ENFORCEMENT-BASED VICTIM SERVICES IN ILLINOIS: 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 those 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 Illinois. 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 - Illinois*.

This resource was developed by the National Crime Victim Law Institute (NCVLI) under 2018-V3-GX-K049 and 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 resource 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 Resource	1
Overview	3
System-Based and Community-Based Advocates	3
Privacy, Confidentiality and Privilege	4
HIPAA, FERPA, VOCA, VAWA and FOIA	8
Ethical Code Relevant to Advocates	12
<i>Brady v. Maryland</i>	13
<i>Giglio v. United States</i>	16
Subpoena Considerations	16
Select Laws	18
Privacy.....	18
Confidentiality.....	20
Privilege	22
Definitions.....	29

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 Illinois?

Illinois expressly guarantees crime victims the right to privacy in its constitution and code. Ill. Const. art. 1, § 8.1(a)(1); 725 Ill. Comp. Stat. Ann. 120/4(a)(1). These bodies of law also offer victims privacy protections through various safety guarantees, such as the right “to be free from harassment, intimidation, and abuse throughout the criminal justice process.” Ill. Const. art. 1, § 8.1(a)(1); 725 Ill. Comp. Stat. Ann. 120/4(a)(1). *See also* Ill. Const. art. 1, § 8.1(a)(8) (victims’ right to reasonable protection from the accused); 725 Ill. Comp. Stat. Ann. 120/4(a)(7) (same); 725 Ill. Comp. Stat. Ann. 120/4.5(b)(6) (obligation of Office of the State Attorney to provide secure waiting area during court proceedings that does not require victims to be in close proximity to defendants, their families or friends).

More narrowly, Illinois gives victims a constitutional and statutory “right to notice and to a hearing before a court ruling on a request for access to any of the victim’s records, information, or communications which are privileged or confidential by law.” Ill. Const. art. 1, § 8.1(a)(2); 725 Ill. Comp. Stat. Ann. 120/4(a)(1.5). When a defendant seeks to subpoena a victim’s confidential or privileged records, the defendant must request court approval before the subpoena can be issued. 725 Ill. Comp. Stat. Ann. 120/4.5(c-5)(9). The request for such approval must take the form of a written motion and provide “an offer of proof regarding the relevance, admissibility and materiality of the records.” *Id.* Upon finding, by a preponderance of the evidence, “that: (A) the records are not protected by an absolute privilege and (B) the records contain relevant, admissible, and material evidence that is not available through other witnesses or evidence, the court shall issue a subpoena requiring a sealed copy of the records be delivered to the court to be reviewed *in camera*.” *Id.* If, after the *in camera* review, “the court determines that due process requires disclosure of any portion of the records, the court shall provide copies of what it intends to disclose to the prosecuting attorney and the victim. The prosecuting attorney and the victim shall have 30 days to seek appellate review before the records are disclosed to the defendant. The disclosure of copies of any portion of the records to the prosecuting attorney does not make the records subject to discovery.” *Id.*

Illinois extends heightened privacy protections to certain categories of victims, such as victims of sex crimes. For instance, the state protects victim privacy through its rape shield law, under which a sex crime victim’s sexual history cannot be admitted into evidence, except under limited circumstances. 725 Ill. Comp. Stat. Ann. 5/115-7.

Child-victims of sexual offenses also have heightened privacy rights under Illinois law. Specifically, the Privacy of Child Victims of Criminal Sexual Offenses Act bars law enforcement and court records from revealing the identity of such victims to anyone other

than “a judge, state’s attorney, assistant state’s attorney, psychologist, psychiatrist, social worker, doctor, parent, parole agent, aftercare specialist, probation officer, defendant or defendant’s attorney in any criminal proceeding or investigation related thereto.” 725 Ill. Comp. Stat. Ann. 190/3. For the child-victim’s protection and upon a showing of good cause, a court may “prohibit any person or agency present in court from further disclosing the child’s identity.” *Id.* Should a school district employee commit or be alleged to have committed a criminal sexual offense, information regarding the investigation must be given to the school superintendent, who is “restricted from specifically revealing the name of the victim without written consent of the victim or victim’s parent or guardian.” *Id.* Under the Act, a court may only prohibit disclosure of the identity of a child-victim of a sexual offense “after giving notice and a hearing to all affected parties. In determining whether to prohibit disclosure of the minor’s identity the court shall consider: (a) the best interest of the child; and (b) whether such nondisclosure would further a compelling State interest.” *Id.* Illinois also protects the privacy of child sex offense victims at trial by authorizing courts to “exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media.” 725 Ill. Comp. Stat. Ann. 5/115-11.

Illinois also protects the safety-related privacy concerns of specific categories of victims. For example, certain crime victims, who seek to legally change their names in order to protect themselves from further harm, are exempt from the publication requirement that typically attaches to name change petitions. Specifically, a court may enter an order waiving the publication requirement if, *inter alia*, the petitioner is 18 years of age or older and concurrently files a statement attesting that they are a person protected under certain laws, such as the state’s domestic violence act. 735 Ill. Comp. Stat. Ann. 5/21-103(c-1). Additionally, “[i]f the petitioner files a statement attesting that disclosure of the petitioner’s address would put the petitioner or any member of the petitioner’s family or household at risk or reveal the confidential address of a shelter for domestic violence victims, that address may be omitted from all documents filed with the court, and the petitioner may designate an alternative address for service.” 735 Ill. Comp. Stat. Ann. 5/21-103(c-2). Domestic abuse advocates, rape crisis advocates, and victim advocates may assist in the preparation of a name change under the statute. 735 Ill. Comp. Stat. Ann. 5/21-103(c-3).

The state also protects the privacy-related safety-interests of domestic violence victims by guaranteeing these victims the right to request the immediate issuance of a new license plate. 625 Ill. Comp. Stat. Ann. 5/3-806.6. Under the Illinois Domestic Violence Act, 750 Ill. Comp. Stat. Ann. 60/101-401, when a domestic violence victim petitions for an order of protection, the victim’s address or the address of a domestic violence shelter where the victim is staying may be omitted from all court filings. 750 Ill. Comp. Stat. Ann. 60/203(b). Instead, the victim must “designate an alternative address at which respondent may serve notice of any motions.” *Id.* Where the order of protection seeks to protect a child enrolled in any daycare facility or school, the petitioner may provide the name of such an institution. 750 Ill. Comp. Stat. Ann. 60/203(c). Where “disclosure of this information would risk abuse to petitioner or to the child protected under the order, this information may be omitted from all documents filed with the court.” *Id.* Victims of domestic violence may also protect

their privacy and safety by participating in the state's address confidentiality program, 750 Ill. Comp. Stat. Ann. 61/1 through 61/45, 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 Illinois?

Illinois offers a number of confidentiality rights and protections to crime victims. Under the Bill of Rights for Victims and Witnesses of Violent Crime Act, victims are responsible for notifying "law enforcement authorities and the prosecuting attorney of any change of contact information, including but not limited to, changes of address and contact information, including but not limited to changes of address, telephone number, and email address." 725 Ill. Comp. Stat. Ann. 120/7(d). Failure to notify the prosecutor "of any change in contact information constitutes waiver of a right." *Id.* Law enforcement and the prosecutor must maintain the confidentiality of the victim's contact information. *Id.*

Additionally, victims who choose to use the statewide notification system to receive notice of an offender's release, escape or other changes in custody status may do so without compromising the confidentiality of their contact information. *See* 725 Ill. Comp. Stat. Ann. 120/8.5(h) ("The Attorney General shall not release the names, addresses, phone numbers, personal identification numbers, or email addresses of any person registered to receive notifications to any other person except State or local officials using the notification system to satisfy the official's obligation to provide the information.").

Victims have the right to request a copy of the presentence report. 725 Ill. Comp. Stat. Ann. 120/4.5(c-5)(13)(A). Before providing the victim with a copy of the report, the State's Attorney must redact certain information, including "the name, address, phone number, and other personal information about any other victim." 725 Ill. Comp. Stat. Ann. 120/4.5(c-5)(13)(A)(iii). The State's Attorney may, nonetheless, orally disclose such redacted information "if there is a reasonable likelihood that the information will be stated in court at the sentencing." 725 Ill. Comp. Stat. Ann. 120/4.5(c-5)(13)(C).

When a victim provides the Prisoner Review Board with a statement in preparation for a parole hearing, the content of the statement is "confidential and privileged . . . except if that statement was an oral statement made by the victim at a hearing open to the public." 725 Ill. Comp. Stat. Ann. 120/4.5(d)(4); 725 Ill. Comp. Stat. Ann. 120/6(b-5); 730 Ill. Comp. Stat. Ann. 5/3-3-4(h); 730 Ill. Comp. Stat. Ann. 5/5-4.5-115(f). Statements submitted to the Board in preparation of mandatory release or clemency hearings are also expressly

confidential and privileged under Illinois law, except for those given in open court. 725 Ill. Comp. Stat. Ann. 120/4.5(d)(4-1), 725 Ill. Comp. Stat. Ann. 120/4.5(d)(4-2); 725 Ill. Comp. Stat. Ann. 120/6(b-5). Additionally, the Board is barred from “releas[ing] the names or addresses of any person on its victim registry to any other person except the victim, a law enforcement agency, or other victim notification system.” 730 Ill. Comp. Stat. Ann. 5/3-3-4(h); 730 Ill. Comp. Stat. Ann. 105/10(b-5).

Under the Victims’ Economic Security and Safety Act (VESSA), 820 Ill. Comp. Stat. Ann. 180/1 through 180/999, victims of domestic violence, sexual offenses and gendered violence have the right to take unpaid leave from work for reasons related to the crime committed against them, such as to seek medical attention, to obtain services from a victim services organization and to participate in criminal justice proceedings. 820 Ill. Comp. Stat. Ann. 180/20(a). The statute also provides victims, under certain circumstances, with the right to maintain health benefits, even if the victim fails to return from leave. 820 Ill. Comp. Stat. Ann. 180/20(e)(1)–(2). Employers must maintain the confidentiality of any employee information and records related to the exercise of their rights under VESSA. 820 Ill. Comp. Stat. Ann. 180/20(d); 820 ILCS 180/20(e)(2)(D).

As detailed in the following section, “Select Privilege Laws,” Illinois 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.*, 735 Ill. Comp. Stat. Ann. 5/8-802.1 (rape crisis personnel-victim privilege); 735 Ill. Comp. Stat. Ann. 5/8-802.2 (counselor-victim privilege); 750 Ill. Comp. Stat. Ann. 60/227 (domestic violence counselor-victim privilege); 735 Ill. Comp. Stat. Ann. 5/8-802 (physician-patient privilege).

Illinois also protects victim confidentiality in the context of public records requests. Under its Freedom of Information Act, the state exempts from inspection and copying victim records that are otherwise protected from disclosure by federal or state law. 5 Ill. Comp. Stat. Ann. 140/7(1)(a). The statute also contains an exemption for “[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order,” 5 Ill. Comp. Stat. Ann. 140/7(1)(b), as well as for “[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information,” 5 Ill. Comp. Stat. Ann. 140/7(1)(c). For the purposes of the latter exemption, “[u]nwarranted invasion of personal privacy” means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject’s right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.” 5 Ill. Comp. Stat. Ann. 140/7(1)(c). The Illinois Freedom of Information Act also exempts from disclosure “[r]ecords requested by a person in a county jail or committed to the Department of Corrections or Department of Human Services Division of Mental Health, containing personal information pertaining to the person’s victim or the victim’s family, including, but not limited to, a victim’s home address, home telephone number, work or school address,

work telephone number, social security number, or any other identifying information, except as may be relevant to a requester’s current or potential case or claim.” 5 Ill. Comp. Stat. Ann. 140/7(1)(e-9). Other victim-related information that is expressly exempt from disclosure in response to a public records request includes: victim records related to an application for crime victim compensation, 740 Ill. Comp. Stat. Ann. 45/4.2; victim statements provided to the Prisoner Review Board, 730 Ill. Comp. Stat. Ann. 105/10(b); and victim contact information kept by the Department of Corrections for the purposes of notifying victims about the custody status of civilly committed sexually violent offenders, 725 Ill. Comp. Stat. Ann. 207/75(d).

Finally, Illinois’s address confidentiality program for victims of domestic violence protects victim confidentiality by offering these victims a substitute mailing address to use for receiving mail, filling out government documents, registering to vote, and other purposes. *See generally* 750 Ill. Comp. Stat. Ann. 61/15 (address confidentiality program application and certification).³⁶ The program is designed “to enable State and local agencies to respond to requests for public records without disclosing the location of a victim of domestic violence, to enable interagency cooperation with the Attorney General in providing address confidentiality for victims of domestic violence, and to enable State and local agencies to accept a program participant’s use of an address designated by the Attorney General as a substitute mailing address.” 750 Ill. Comp. Stat. Ann. 61/5. Illinois state, county and city government agencies must accept this substitute address in lieu of a residential or other mailing address. 750 Ill. Comp. Stat. Ann. 61/25.

SELECT PRIVILEGE LAWS

What are key privileges in Illinois?

Victims in Illinois have a number of privileges that they can assert to prevent disclosure of their communications with certain professionals, including rape crisis counselors, social workers, and other service providers. *See, e.g.*, 735 Ill. Comp. Stat. Ann. 5/8-802.1 (rape crisis counselor-victim privilege); 735 Ill. Comp. Stat. Ann. 5/8-802.2 (counselor-victim privilege); 750 Ill. Comp. Stat. Ann. 60/227 (domestic violence counselor-victim privilege); 735 Ill. Comp. Stat. Ann. 5/8-802 (physician-patient privilege).

The rape crisis counselor-victim privilege recognizes that “[b]ecause of the fear and stigma that often results from [sex] crimes, many victims hesitate to seek help even where it is available at no cost to them. As a result they not only fail to receive needed medical care and emergency counseling, but may lack the psychological support necessary to report the crime and aid police in preventing future crimes.” 735 Ill. Comp. Stat. Ann. 5/8-802.1(a). Illinois’ rape crisis counselor-victim privilege is absolute; a rape crisis counselor may not “disclose any confidential communication or be examined as a witness in any civil or criminal proceeding as to any confidential communication without the written consent of the victim or a representative of the victim.” 735 Ill. Comp. Stat. Ann. 5/8-802.1(d); *see*

also 735 Ill. Comp. Stat. Ann. 5/8-802.1(f) (rape crisis counselor who knowingly discloses confidential communications commits a class C misdemeanor). The statute governing the privilege creates one exception, where “failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person.” 735 Ill. Comp. Stat. Ann. 5/8-802.1(e).

The counselor-victim privilege exists to protect the communications between counselors and victims of violent crimes. As stated in the statute, this privilege stems from the fact that “[b]ecause of the fear and trauma that often result from violent crimes, many victims hesitate to seek help even where it is available and may therefore lack the psychological support necessary to report the crime and aid police in preventing future crimes.” 735 Ill. Comp. Stat. Ann. 5/8-802.2(a). The privilege protects statements that violent crime victims make “during the course of therapy or consultation to any counselor, employee or volunteer of a victim aid organization.” 735 Ill. Comp. Stat. Ann. 5/8-802.2(c). The victim aid organization and its employees are barred from disclosing any such statements or contents thereof “unless the maker of the statement consents in writing or unless otherwise directed pursuant to this Section.” *Id.* Where, “in any judicial proceeding, a party alleges that such statements are necessary to the determination of any issue before the court and written consent to disclosure has not been given, the party may ask the court to consider the relevance and admissibility of the statements. In such a case, the court shall hold a hearing in camera on the relevance of the statements. If the court finds them relevant and admissible to the issue, the court shall order the statements to be disclosed.” *Id.*

Under the domestic violence counselor-victim privilege, a domestic violence advocate or counselor may not “disclose any confidential communication or be examined as a witness in any civil or criminal case or proceeding or in any legislative or administrative proceeding without the written consent of the domestic violence victim except (1) in accordance with the provisions of the Abused and Neglected Child Reporting Act [footnote omitted] or (2) in cases where failure to disclose is likely to result in an imminent risk of serious bodily harm or death of the victim or another person.” 750 Ill. Comp. Stat. Ann. 60/227(b); *see also* 750 Ill. Comp. Stat. Ann. 60/227(c) (domestic violence advocate or counselor who knowingly discloses any confidential communication commits a Class A misdemeanor).

None of these privileges apply in situations involving abused or neglected children, where the professional is subject to the Abused and Neglected Child Reporting Act. 325 Ill. Comp. Stat. Ann. 5/4(g). Indeed, both the domestic violence counselor-victim privilege and the physician-patient privilege expressly carve out exceptions for disclosure in situations that trigger the Act’s reporting requirements. 750 Ill. Comp. Stat. Ann. 60/227(b)(1); 735 Ill. Comp. Stat. Ann. 5/8-802(7).

In certain contexts, victims may need to use privileged records to effectuate other rights. For instance, victims of domestic abuse and sexual violence have certain housing rights and evidence of such abuse and violence may act as an affirmative defense in actions brought against them by a landlord or be necessary when requesting a change of locks. 765 Ill. Comp. Stat. Ann. 750/15; 765 Ill. Comp. Stat. Ann. 750/20. Furnishing such evidence does

“not waive any confidentiality or privilege that may exist between the victim of domestic or sexual violence and a third party.” 765 Ill. Comp. Stat. Ann. 750/27(d).

For reference, the text of the privileges discussed in this section appears below.

<p>Rape Crisis Counselor-Victim Privilege</p>	<p>735 Ill. Comp. Stat. Ann. 5/8-802.1.</p> <p>(a) Purpose. This Section is intended to protect victims of rape from public disclosure of statements they make in confidence to counselors of organizations established to help them. On or after July 1, 1984, “rape” means an act of forced sexual penetration or sexual conduct, as defined in Section 11-0.1 of the Criminal Code of 2012,¹ including acts prohibited under Sections 11-1.20 through 11-1.60 or 12-13 through 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012.² Because of the fear and stigma that often results from those crimes, many victims hesitate to seek help even where it is available at no cost to them. As a result they not only fail to receive needed medical care and emergency counseling, but may lack the psychological support necessary to report the crime and aid police in preventing future crimes.</p> <p>...</p> <p>(c) Waiver of privilege.</p> <p>(1) The confidential nature of the communication is not waived by: the presence of a third person who further expresses the interests of the victim at the time of the communication; group counseling; or disclosure to a third person with the consent of the victim when reasonably necessary to accomplish the purpose for which the counselor is consulted.</p> <p>(2) The confidential nature of counseling records is not waived when: the victim inspects the records; or in the case of a minor child less than 12 years of age, a parent or guardian whose interests are not adverse to the minor inspects the records; or in the case of a minor victim 12 years or older, a parent or guardian whose interests are not adverse to the minor inspects the records with the victim’s consent, or in the case of an adult who has a guardian of his or her person, the guardian inspects the records with the victim’s consent.</p> <p>(3) When a victim is deceased, the executor or administrator of the victim’s estate may waive the privilege established by this Section, unless the executor or administrator has an interest adverse to the victim.</p>
---	--

(4) A minor victim 12 years of age or older may knowingly waive the privilege established in this Section. When a minor is, in the opinion of the Court, incapable of knowingly waiving the privilege, the parent or guardian of the minor may waive the privilege on behalf of the minor, unless the parent or guardian has been charged with a violent crime against the victim or otherwise has any interest adverse to that of the minor with respect to the waiver of the privilege.

(5) An adult victim who has a guardian of his or her person may knowingly waive the privilege established in this Section. When the victim is, in the opinion of the court, incapable of knowingly waiving the privilege, the guardian of the adult victim may waive the privilege on behalf of the victim, unless the guardian has been charged with a violent crime against the victim or otherwise has any interest adverse to the victim with respect to the privilege.

(d) Confidentiality. Except as provided in this Act, no rape crisis counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal proceeding as to any confidential communication without the written consent of the victim or a representative of the victim as provided in subparagraph (c).

(e) A rape crisis counselor may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any rape crisis counselor or rape crisis organization participating in good faith in the disclosing of records and communications under this Act shall have immunity from any liability, civil, criminal, or otherwise that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this Section, the good faith of any rape crisis counselor or rape crisis organization who disclosed the confidential communication shall be presumed.

(f) Any rape crisis counselor who knowingly discloses any confidential communication in violation of this Act commits a Class C misdemeanor.

¹ 720 ILCS 5/11-0.1.

² 720 ILCS 5/11-1.20 to 5/11-1.60 or 5/12-13 to 5/12-16.

<p>Counselor-Victim Privilege</p>	<p>735 Ill. Comp. Stat. Ann. 5/8-802.2.</p> <p>(a) Purpose. This Section is intended to protect victims of violent crimes from public disclosure of statements they make in confidence to counselors of organizations established to help them. Because of the fear and trauma that often result from violent crimes, many victims hesitate to seek help even where it is available and may therefore lack the psychological support necessary to report the crime and aid police in preventing future crimes.</p> <p>...</p> <p>(c) Confidentiality. Where any victim of a violent crime makes a statement relating to the crime or its circumstances during the course of therapy or consultation to any counselor, employee or volunteer of a victim aid organization, the statement or contents thereof shall not be disclosed by the organization or any of its personnel unless the maker of the statement consents in writing or unless otherwise directed pursuant to this Section.</p> <p>If in any judicial proceeding, a party alleges that such statements are necessary to the determination of any issue before the court and written consent to disclosure has not been given, the party may ask the court to consider the relevance and admissibility of the statements. In such a case, the court shall hold a hearing in camera on the relevance of the statements. If the court finds them relevant and admissible to the issue, the court shall order the statements to be disclosed.</p>
<p>Domestic Violence Counselor-Victim Privilege</p>	<p>750 Ill. Comp. Stat. Ann. 60/227.</p> <p>...</p> <p>(b) No domestic violence advocate or counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal case or proceeding or in any legislative or administrative proceeding without the written consent of the domestic violence victim except (1) in accordance with the provisions of the Abused and Neglected Child Reporting Act² or (2) in cases where failure to disclose is likely to result in an imminent risk of serious bodily harm or death of the victim or another person.</p>

	<p>(c) A domestic violence advocate or counselor who knowingly discloses any confidential communication in violation of this Act commits a Class A misdemeanor.</p> <p>(d) When a domestic violence victim is deceased or has been adjudged incompetent by a court of competent jurisdiction, the guardian of the domestic violence victim or the executor or administrator of the estate of the domestic violence victim may waive the privilege established by this Section, except where the guardian, executor or administrator of the estate has been charged with a violent crime against the domestic violence victim or has had an Order of Protection entered against him or her at the request of or on behalf of the domestic violence victim or otherwise has an interest adverse to that of the domestic violence victim with respect to the waiver of the privilege. In that case, the court shall appoint an attorney for the estate of the domestic violence victim.</p> <p>(e) A minor may knowingly waive the privilege established by this Section. Where a minor is, in the opinion of the court, incapable of knowingly waiving the privilege, the parent or guardian of the minor may waive the privilege on behalf of the minor, except where such parent or guardian has been charged with a violent crime against the minor or has had an Order of Protection entered against him or her on request of or on behalf of the minor or otherwise has any interest adverse to that of the minor with respect to the waiver of the privilege. In that case, the court shall appoint an attorney for the minor child who shall be compensated in accordance with Section 506 of the Illinois Marriage and Dissolution of Marriage Act.³</p> <p>(f) Nothing in this Section shall be construed to limit in any way any privilege that might otherwise exist under statute or common law.</p> <p>(g) The assertion of any privilege under this Section shall not result in an inference unfavorable to the State’s cause or to the cause of the domestic violence victim.</p> <p>² 325 ILCS 5/1 et seq.</p> <p>³ 750 ILCS 5/506.</p>
<p>Physician-Patient Privilege</p>	<p>735 Ill. Comp. Stat. Ann. 5/8-802.</p> <p>No physician or surgeon shall be permitted to disclose any</p>

information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in case of his or her death or disability, of his or her personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his or her life, health, or physical condition, or as authorized by Section 8-2001.5, (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) (blank), (7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act,¹ (8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment, (9) in prosecutions where written results of blood alcohol tests are admissible pursuant to Section 11-501.4 of the Illinois Vehicle Code,² (10) in prosecutions where written results of blood alcohol tests are admissible under Section 5-11a of the Boat Registration and Safety Act,³ (11) in criminal actions arising from the filing of a report of suspected terrorist offense in compliance with Section 29D-10(p)(7) of the Criminal Code of 2012,⁴ (12) upon the issuance of a subpoena pursuant to Section 38 of the Medical Practice Act of 1987; the issuance of a subpoena pursuant to Section 25.1 of the Illinois Dental Practice Act; the issuance of a subpoena pursuant to Section 22 of the Nursing Home Administrators Licensing and Disciplinary Act; or the issuance of a subpoena pursuant to Section 25.5 of the Workers' Compensation Act, (13) upon the issuance of a grand jury subpoena pursuant to Article 112 of the Code of Criminal Procedure of 1963, or (14) to or through a health information exchange, as that term is defined in Section 2 of the Mental Health and Developmental Disabilities Confidentiality Act, in accordance with State or federal law.


Upon disclosure under item (13) of this Section, in any criminal action where the charge is domestic battery, aggravated domestic battery, or an offense under Article 11 of the Criminal Code of 2012 or where the patient is under the age of 18 years or upon the request of the patient, the State's Attorney shall petition the court for a protective order pursuant to Supreme Court Rule 415.

	<p>In the event of a conflict between the application of this Section and the Mental Health and Developmental Disabilities Confidentiality Act⁵ to a specific situation, the provisions of the Mental Health and Developmental Disabilities Confidentiality Act shall control.</p> <p>¹ 325 ILCS 5/1 et seq.</p> <p>² 625 ILCS 5/11-501.4.</p> <p>³ 625 ILCS 45/5-11a (renumbered as 625 ILCS 45/5-16a).</p> <p>⁴ 720 ILCS 5/29D-10.</p> <p>⁵ 740 ILCS 110/1 et seq.</p>
--	--

SELECT DEFINITIONS

<p>Definitions of the terms used in the above-referenced privileges are included below, when available.</p>	
<p>Rape Crisis Counselor-Victim Privilege Definitions</p>	<p>735 Ill. Comp. Stat. Ann. 5/8-802.1(b).</p> <p>As used in this Act:</p> <p>(1) “Rape crisis organization” means any organization or association the major purpose of which is providing information, counseling, and psychological support to victims of any or all of the crimes of aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual assault, sexual relations between siblings, criminal sexual abuse and aggravated criminal sexual abuse.</p> <p>(2) “Rape crisis counselor” means a person who is a psychologist, social worker, employee, or volunteer in any organization or association defined as a rape crisis organization under this Section, who has undergone 40 hours of training and is under the control of a direct services supervisor of a rape crisis organization.</p> <p>(3) “Victim” means a person who is the subject of, or who seeks information, counseling, or advocacy services as a result of an aggravated criminal sexual assault, predatory criminal sexual</p>

	<p>assault of a child, criminal sexual assault, sexual relations within families, criminal sexual abuse, aggravated criminal sexual abuse, sexual exploitation of a child, indecent solicitation of a child, public indecency, exploitation of a child, promoting juvenile prostitution as described in subdivision (a)(4) of Section 11-14.4, or an attempt to commit any of these offenses.</p> <p>(4) “Confidential communication” means any communication between a victim and a rape crisis counselor in the course of providing information, counseling, and advocacy. The term includes all records kept by the counselor or by the organization in the course of providing services to an alleged victim concerning the alleged victim and the services provided.</p>
<p>Counselor-Victim Privilege Definitions</p>	<p>735 Ill. Comp. Stat. Ann. 5/8-802.2(b).</p> <p>As used in this Act, “violent crimes” include, but are not limited to, any felony in which force or threat of force was used against the victim or any misdemeanor which results in death or great bodily harm to the victim.</p>
<p>Domestic Violence Counselor-Victim Privilege Definitions</p>	<p>750 Ill. Comp. Stat. Ann. 60/227(a).</p> <p>As used in this Section:</p> <p>(1) “Domestic violence program” means any unit of local government, organization, or association whose major purpose is to provide one or more of the following: information, crisis intervention, emergency shelter, referral, counseling, advocacy, or emotional support to victims of domestic violence.</p> <p>(2) “Domestic violence advocate or counselor” means any person (A) who has undergone a minimum of forty hours of training in domestic violence advocacy, crisis intervention, and related areas, and (B) who provides services to victims through a domestic violence program either on an employed or volunteer basis.</p> <p>(3) “Confidential communication” means any communication between an alleged victim of domestic violence and a domestic violence advocate or counselor in the course of providing information, counseling, or advocacy. The term includes all records kept by the advocate or counselor or by the domestic violence program in the course of providing services to an alleged victim concerning the alleged victim and the services provided.</p>

	<p>The confidential nature of the communication is not waived by the presence at the time of the communication of any additional persons, including but not limited to an interpreter, to further express the interests of the domestic violence victim or by the advocate’s or counselor’s disclosure to such an additional person with the consent of the victim when reasonably necessary to accomplish the purpose for which the advocate or counselor is consulted.</p> <p>(4) “Domestic violence victim” means any person who consults a domestic violence counselor for the purpose of securing advice, counseling or assistance related to one or more alleged incidents of domestic violence.</p> <p>(5) “Domestic violence” means abuse as defined in this Act.¹</p> <p>¹ Former Ill. Rev. Stat. ¶ 2301-1 et seq. (repealed; see, now, 750 ILCS 60/101 et seq.).</p> <p> 750 Ill. Comp. Stat. Ann. 60/103(3) defines “Domestic violence” as “abuse as defined in paragraph (1)”; 750 Ill. Comp. Stat. Ann. 60/103(1) defines “Abuse” as “physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor child by a parent or person in loco parentis.”</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 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 1: 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 Beginning in 2021, victims of sexual assault and stalking may also enroll in the address confidentiality program. 2019 Ill. Legis. Serv. P.A. 101-270 (H.B. 2818), eff. Jan. 1, 2021.

This resource was developed by the National Crime Victim Law Institute (NCVLI) under 2018-V3-GX-K049 and 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 resource are those of the contributors and do not necessarily represent the official position of the U.S. Department of Justice.