NATIONAL CRIME VICTIM LAW INSTITUTE

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

INTRODUCTION

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

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

USING THIS RESOURCE

This resource is designed to enhance victim services personnel's knowledge and understanding of the law governing crime victims' rights to privacy, confidentiality and privilege in New Jersey. 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 – New Jersey*.

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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 administrated 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 guide 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 New Jersey?

Numerous laws in New Jersey protect victims' privacy rights and interests. For example, victims have broad privacy protection under their constitutional and statutory rights to be treated with fairness and compassion. *See, e.g.*, N.J. Const. art. I, ¶ 22 (guaranteeing victims of crime the rights to "be treated with fairness, compassion and respect by the criminal justice system"); N.J. Stat. Ann. § 52:4B-36(a) (affording victims of crime the rights "[t]o be treated with dignity and compassion by the criminal justice system"); *id.* at § 52:4B-60.2(c)(1) (providing sexual assault victims with the right to be treated with dignity and compassion).

Some privacy protections in New Jersey take the form of safety-related rights. *See, e.g.*, N.J. Stat. Ann. § 2C:14-14(d) (providing that courts must waive any requirement that sexual assault victims applying for a protective order include their residence on their application); *id.* at § 39:4-50.11(f) (affording victims of drunk driving the right to "[a] secure waiting area, after the motor vehicle accident, during investigations, and prior to a court appearance"); *id.* at § 52:4B-36(c) (affording victims of crime the right "[t]o be free from intimidation, harassment or abuse by any person including the defendant or any other person acting in support of or on behalf of the defendant, due to the involvement of the victim or witness in the criminal justice process"); *id.* at § 52:4B-36(j) (affording victims the right "[t]o be provided a secure . . .waiting area during court proceedings"); *id.* at § 52:4B-44(b)(8)–(9) (providing that each county prosecutor's office must provide "[a] waiting or reception area separate from the defendant for use during court proceedings" and "[a]n escort or accompaniment for intimidated victims or witnesses during court appearances"); *id.* § 52:4B-60.2(c)(9) (providing sexual assault victims with the right to "protection from further violence").

Other privacy protections in New Jersey relate to the nondisclosure of victims' identifying and locating information. *See, e.g.*, N.J. Stat. Ann. § 2A:82-46(a) (barring disclosure of the identity of certain victims under the age of 18 in an indictment, complaint or other public record and requiring fictitious names or initials to be used in such documents in place of the victim's name); *id.* at 2A:82-46(b) (providing that any public record that contains a victim's name, address or identity is confidential and unavailable to the public); *id.* at § 2A:82-46(d) (authorizing the imposition of "further restrictions with regard to the disclosure of the name, address, and identity of the victim when [a court] deems it necessary to prevent trauma or stigma to the victim"); *id.* § 2C:14-12(c) (providing that, upon defendant's release from custody, the location of a sex offense victim "shall remain confidential and shall not appear on any documents or records to which the defendant has access"); *id.* at § 2C:25-25(c) (providing that the court in a criminal complaint arising from a domestic violence incident

must "waive any requirement that the victim's location be disclosed to any person"); *id.* at § 2C:25-26(c) (providing that a domestic violence victim's location is to remain confidential and not appear on any documents or records to which defendant has access).

New Jersey further protects victim privacy through courtroom accommodations. For instance, certain victims may provide testimony via closed circuit television upon specific findings by the court. N.J. Stat. Ann. § 2A:84A-32.4.

New Jersey also protects the privacy interests of certain victims through its rape shield law, which prohibits, in sex offense cases, the introduction of evidence regarding a victim's sexual behavior or predisposition, except under limited circumstances. N.J. Stat. Ann. § 2C:14-7(a).

New Jersey further recognizes the importance of victim privacy through legislation related to the operation of family justice centers. In particular, each justice center must be staffed by a privacy officer to oversee the center's privacy policies and procedures regarding the maintenance of confidential victim records and the limited sharing of such records among service providers. N.J. Stat. Ann. § 52:4B-72(b). Family justice centers' privacy policies and procedures must comply with existing federal and state privacy laws regarding the confidentiality of such records. *Id.* at § 52:4B-75(a); *see also id.* at § 52:4B-76 (detailing scope of permissible information sharing by family justice centers).

Additionally, in the context of public records requests, public agencies have a legal duty to protect victims' privacy. Specifically, the legislature declared it public policy that public agencies "ha[ve] a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]" N.J. Stat. Ann. § 47:1A-1. The section "Select Confidentiality Laws" further details how New Jersey protects victims' privacy interests in the context of public records requests.

Information regarding the privacy protections available under New Jersey's Address Confidentiality Program are also discussed in the section "Select Confidentiality Laws."

SELECT CONFIDENTIALITY LAWS

What are key confidentiality rights and/or protections in New Jersey?

Victims in New Jersey have a number of rights and protections that they can assert to prevent disclosure of their confidential information and communications, subject to certain exceptions and waivers.

With respect to government records, victims have a right to confidentiality that extends to victims' records and even victims' requests for various records. *See* N.J. Stat. Ann.

§ 47:1A-1.1 (providing that government records subject to public records' requests shall not include, *inter alia*, the following confidential information: "criminal investigatory records"; "victims' records, except that a victim of a crime shall have access to the victim's own records"; "any written request by a crime victim for a record to which the victim is entitled to access as provided in this section, including, but not limited to, any law enforcement agency report, domestic violence offense report, and temporary or permanent restraining order"; and "information which is to be kept confidential pursuant to court order"); *id.* at § 47:1A-2.2(a) (providing that an inmate's general right of access to public records does not apply to records containing victim's personal identifying or locating information). A victim's name and locating information may be released pursuant to a public records request regarding ongoing criminal investigations, unless it is contrary to existing law or court rule; in considering whether to release information regarding a victim's identity "the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered." *Id.* at § 47:1A-3(b).

New Jersey also protects the confidentiality of the exercise of certain victims' rights. For instance, when a victim comments on a petition for compassionate release, such comments are confidential. N.J. Stat. Ann. § 30:4-123.51e(e)(4). Additionally, when a sexual offense or domestic violence victim exercises their right to take unpaid leave as needed in relation to the offense committed against them, any information provided to an employer must "be retained in the strictest confidentiality, unless the disclosure is voluntarily authorized in writing by the employee or is required by a federal or State law, rule, or regulation." *Id.* at § 34:11C-3(f).

New Jersey extends heightened confidentiality protections to certain categories of victims. For example, sexual assault victims also have a right to confidentiality in records maintained under the Sexual Assault Survivor Protection Act of 2015. N.J. Stat. Ann. § 2C:14-19(a). Additionally, victims of domestic violence have a right to confidentiality in their physical location and to have that information protected from disclosure to defendants who are granted pretrial release. *See id.* at § 2C:25-26(c) (mandating that a victim's location must remain confidential and may not appear on any documents or records to which defendant has access, upon defendant's release from custody). The name, address, location or telephone number of a domestic violence shelter or other facility that provides temporary emergency shelter to victims is also generally protected from disclosure under the victim counselor privilege. *Id.* at § 2A:84A-22.15. Victims of sexual violence have a right to confidentiality when undergoing medical testing regarding sexually transmitted diseases. *See*, e.g., *id.*, § 18A:61E-2(g) (providing that victims of campus sexual assault have the right "to be informed of, and assisted in exercising, any rights to be confidentially or anonymously tested for sexually transmitted diseases or human immunodeficiency virus"); *id.* at § 52:4B-60.2(c)(5) (providing victims of sexual violence the right "[t]o be informed of, and assisted in exercising, the right to be confidentially or anonymously tested for" AIDS, HIV or a related virus).

Child-victims of select offenses have a right to confidentiality in their personally identifying information. More specifically, "[a]ny report, statement, photograph, court document,

indictment, complaint or any other public record which states the name, address and identity of a" child-victim of select offenses is deemed confidential and not available for public inspection or copy. N.J. Stat. Ann. § 2A:82-46(a). If any of the above records are disclosed, initials and fictitious names must be used. *Id.* There is a presumption of confidentiality in these records and other materials containing victims' locating and identifying information. *Id.* § 2A:82-46(b). Disclosure may occur after a hearing where the court finds good cause; victims have a right to notice of such proceedings. *Id.* at § 2A:82-46(c). Notably, however, if a court "deems it necessary to prevent trauma or stigma to" victims, it has the authority to impose additional disclosure restrictions above and beyond those explicitly enumerated. *Id.* at § 2A:82-46(d). Child-victims also have a right to confidentiality in reports of child abuse. *Id.* at § 9:6-8.10a(a).

New Jersey offers additional confidentiality protections to victims of domestic violence, stalking and sexual assault through its address confidentiality program. *See generally*, N.J. Stat. Ann. §§ 47:4-1 through 47:4-6. This program is designed to "enable public agencies to respond to requests for public records without disclosing the location of a victim of domestic violence, stalking, or sexual assault . . . to enable interagency cooperation with the Director of the Division on Women in the Department of Children and Families in providing address confidentiality for victims of domestic violence, stalking, and sexual assault . . ., and to enable public agencies to accept a program participant's use of an address designated by the director as a substitute mailing address. *Id.* at 47:4-2.

In addition to these victim-specific confidentiality protections, providers of assistance at family justice centers in New Jersey must comply with any confidentiality protections concerning their specific professions. N.J. Stat. Ann. § 52:4B-75(b). As detailed further in the section "Select Privilege Laws," New Jersey protects the confidentiality of communications between victims and various service providers. *See, e.g., id.* at § 2A:84A-22.15 (victim counselor-victim confidentiality); *id.* at § 45:14B-28 (psychologist-patient confidentiality); *id.* at § 45:15BB-13 (social worker-client confidentiality).

SELECT PRIVILEGE LAWS

What are key privileges in New Jersey?

Victims in New Jersey have a number of privileges that they can assert to prevent disclosure of confidential communications, subject to certain exceptions and waivers. *See, e.g.*, N.J. Stat. Ann. § 2A:84A-22.15 (victim counselor-victim privilege)); N.J. R. Evid. 517 (same); N.J. Stat. Ann. § 2A:84A-20 (lawyer-client privilege); N.J. R. Evid. 504 (same); N.J. R. Evid. 505 (psychologist-patient privilege); N.J. R. Evid. 506 (physician-patient privilege); N.J. R. Evid. 518 (social worker-client privilege); N.J. R. Evid. 534 (mental health service provider-patient privilege); *see also* N.J. Stat. Ann. § 2A:84A-22.13 (detailing the legislative findings and declarations underlying the victim counselor's privilege).

New Jersey recognizes a comprehensive victim counselor privilege, one which reflects "the public policy of this State to extend a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of these communications maintained by the counselor." N.J. Stat. Ann. § 2A:84A-22.13. Importantly, the victim counselor privilege does not extend to communications between victims and county victim-witness coordinators, where such communications are subject to disclosure to a defendant under state or federal constitutional provisions. *Id.* at § 2A:84A-22.16. Also of note is the express provision under the mental health service provider-patient privilege that the confidential communications between victims of violent crime and mental health service providers must be evaluated under the provisions of the victim counselor privilege, not under the mental health service provider-patient privilege. N.J. R. Evid. 534(d)(1).

There are exceptions to these privileges, such as for the mandatory reporting of child abuse or neglect. *See, e.g.*, N.J. Stat. Ann. § 52:4B-75(b) (providing that any privilege available to a victim services provider working through a family justice center does not apply where the provider has a legal obligation to report or disclose specific information or incidents); N.J. R. Evid. 534(f) (stating that the mental health service provider-patient privilege does not apply when disclosure is compelled under state law, such as in instances where reports of child or elder abuse are mandated).

Privilege may be waived through meaningful consent by the victim. *See, e.g.*, N.J. Stat. Ann. § 45:15BB-13(e) (client may waive social worker-client privilege); N.J. R. Evid. 534(g) (patient may waive mental health service provider-patient privilege).

For reference, the key privileges referenced in this section appear below.

Victim Counselor-Victim Privilege	N.J. Stat. Ann. § 2A:84A-22.15. Subject to Rule 37 of the Rules of Evidence,[1] a victim counselor has a privilege not to be examined as a witness in any civil or criminal proceeding with regard to any confidential communication. The privilege shall be claimed by the counselor unless otherwise instructed by prior written consent of the victim. When a victim is incapacitated or deceased consent to disclosure may be given by the guardian, executor, or administrator except when the guardian, executor, or administrator is the defendant or has a relationship with the victim such that the guardian, executor, or administrator has an interest in the outcome of the proceeding. The privilege may be knowingly waived by a juvenile. In any instance where the juvenile is, in the opinion of the judge, incapable of knowing consent, the parent or guardian of the juvenile may waive the privilege on behalf of the juvenile, provided that the parent or guardian is not the defendant and does

	not have a relationship with the defendant such that he has an interest in the outcome of the proceeding. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a domestic violence shelter or any other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding. [1] See, now, N.J.R.E. 530.
	N.J. R. Evid. 517(a), (c)–(d). (a) N.J.S.A. 2A:84A-22.13 provides: The Legislature finds and declares that: a. The emotional and psychological injuries that are inflicted on victims of violence are often more serious than the physical injuries suffered; b. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families; c. In the counseling process, victims of violence openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile; d. Counseling of violence and victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and e. Confidentiality should be accorded all victims of violence who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists. Therefore, it is the public policy of this State to extend a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of these communications maintained by the counselor. . . . (c) N.J.S.A. 2A:84A-22.15 provides: Subject to Rule 37 [Rule 530] of the Rules of Evidence, a victim counselor has a privilege not to be examined as a witness in any civil or criminal proceeding with regard to any confidential communication. The privilege shall be claimed by the counselor unless otherwise instructed by prior written consent of the victim. When a victim is incapacitated or deceased consent to disclosure

	may be given by the guardian, executor, or administrator except when the guardian, executor, or administrator is the defendant or has a relationship with the victim such that the guardian, executor, or administrator has an interest in the outcome of the proceeding. The privilege may be knowingly waived by a juvenile. In any instance where the juvenile is, in the opinion of the judge, incapable of knowing consent, the parent or guardian of the juvenile may waive the privilege on behalf of the juvenile, provided that the parent or guardian is not the defendant and does not have a relationship with the defendant such that he has an interest in the outcome of the proceeding. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a domestic violence shelter or any other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding. (d) N.J.S.A. 2A:84A-22.16 provides: Nothing in this act shall be deemed to prevent the disclosure to a defendant in a criminal action of statements or information given by a victim to a county victim-witness coordinator, where the disclosure of the statements or information is required by the constitution of this State or of the United States.
Lawyer-Client Privilege	N.J. Stat. Ann. 28:84A-20(1)-(2). Rule 26.[1] (1) General rule. Subject to Rule 37[2] and except as otherwise provided by paragraph 2 of this rule communications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if the client is

	incapacitated or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns, or trustees in dissolution. (2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter. . . . [1] See, now, N.J.R.E. 504. [2] See, now, N.J.R.E. 530.
	N.J. R. Evid. 504(1)–(2). (1) General rule. Subject to Rule 37 [Rule 530] and except as otherwise provided by paragraph 2 of this rule communications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if the client is incapacitated or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns, or trustees in dissolution. (2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in

	aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter. . . .
Psychologist-Patient Privilege	N.J. R. Evid. 505. N.J.S.A. 45:14B-28 provides: The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and nothing in this act shall be construed to require any such privileged communications to be disclosed by any such person. There is no privilege under this section for any communication: (a) upon an issue of the client's condition in an action to commit the client or otherwise place the client under the control of another or others because of alleged incapacity, or in an action in which the client seeks to establish his competence or in an action to recover damages on account of conduct of the client which constitutes a crime; or (b) upon an issue as to the validity of a document as a will of the client; or (c) upon an issue between parties claiming by testate or intestate succession from a deceased client.
Physician-Patient Privilege	N.J. R. Evid. 506(b)–(g). (b) N.J.S.A. 2A:84A-22.2 provides: Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be

	necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him. (c) N.J.S.A. 2A:84A-22.3 provides: There is no privilege under this act as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of his alleged incapacity, or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient. (d) N.J.S.A. 2A:84A-22.4 provides: There is no privilege under this act in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured. (e) N.J.S.A. 2A:84A-22.5 provides: There is no privilege under this act as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed. (f) N.J.S.A. 2A:84A-22.6 provides: No person has a privilege under this act if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to

	plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort. (g) N.J.S.A. 2A:84A-22.7 provides: A privilege under this act as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.
Social Worker-Client Privilege	N.J. R. Evid. Rule 518. N.J.S.A. 45:15BB-13 provides: A social worker licensed or certified pursuant to the provisions of this act shall not be required to disclose any confidential information that the social worker may have acquired from a client or patient while performing social work services for that client or patient unless: a. Disclosure is required by other State law; b. Failure to disclose the information presents a clear and present danger to the health or safety of an individual; c. The social worker is a party defendant to a civil, criminal or disciplinary action arising from the social work services provided, in which case a waiver of the privilege accorded by this section shall be limited to that action; d. The patient or client is a defendant in a criminal proceeding and the use of the privilege would violate the defendant's right to a compulsory process or the right to present testimony and witnesses on that person's behalf; or e. A patient or client agrees to waive the privilege accorded by this section, and, in circumstances where more than one person in a family is receiving social work services, each such member agrees to the waiver. Absent a waiver from each family member, a social worker shall not disclose any information received from any family member.

Mental Health Service Provider-Patient Privilege	N.J. R. Evid. Rule 534(b)–(g). (b) General Rule of Privilege. A patient has a privilege to refuse to disclose in a proceeding, and to prevent any other person from disclosing confidential communications, as defined in subsection (a)(1). (c) Who May Claim the Privilege. The privilege under this rule may be claimed by the patient, the patient's guardian or conservator, the personal representative of a deceased patient, or if authorized by the patient, a member or members of the patient's family. The person who was the mental-health service provider at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the patient or deceased patient. The mental-health service provider shall claim the privilege unless otherwise instructed by the patient or, as applicable, members of the patient's family, the patient's guardian or conservator, or the personal representative of a deceased patient. (d) Violent Crime Victim; Other Communications. (1) Violent Crime Victim. Any confidential communication between any of the mental health service providers listed in this rule and a victim of violent crime, as defined in N.J.S.A. 2A:84A-22.14c, shall be evaluated under the provisions of the "Victim Counselor Privilege" contained in N.J.R.E. 517, and not under the provisions set forth herein. Nothing in this act shall be construed to dilute or alter the scope of the Victim Counselor Privilege. (2) Other Communications. Nothing in this rule shall be construed to limit or otherwise affect any privileges that may apply to communications outside the scope of confidential communications as defined in subsection (a)(1) above. (e) Exceptions. There is no privilege under this rule for a communication: (1) Relevant to an issue of the patient's condition in a proceeding to commit the patient or otherwise place the patient under the control of another or others because of alleged incapacity; (2) Relevant to an issue in a proceeding in which the patient seeks to establish his competence, or in a criminal matter where the defendant's competence to stand trial is put at issue;

	(3) Relevant to an issue in a proceeding to recover damages on account of conduct of the patient which constitutes a crime; (4) Upon an issue as to the validity of a will of the patient; (5) Relevant to an issue in a proceeding between parties claiming by testate or intestate succession from a deceased patient; (6) Made in the course of any investigation or examination, whether ordered by the court or compelled pursuant to Court Rule, of the physical, mental, or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise, and provided that a copy of the order is served upon the patient prior to the communication, indicating among other things that such communications may not be privileged in subsequent commitment proceedings; (7) Relevant to an issue in a proceeding in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured; (8) If the court finds that any person, while a holder of the privilege, has caused the mental-health service provider to testify in any proceeding to any matter of which the mental-health service provider gained knowledge through the communication; (9) In the course of mental health services sought or obtained in aid of the commission of a crime or fraud, provided that this exception is subject to the protections found in N.J.R.E. 501 and N.J.R.E. 509 and is not intended to modify or limit them; (10) Relevant to an issue in a proceeding against the mental-health service provider, arising from the mental-health services provided, in which case the waiver shall be limited to that proceeding. (11) Relevant to a proceeding concerning an application to purchase, own, sell, transfer, possess or carry a firearm, including but not limited to applications pursuant to N.J.S.A. 2C:58-3, or 2C:58-4, or a proceeding concerning the return of a firearm pursuant to N.J.S.A. 2C:25-21(d)(3). (f) Disclosure Pursuant to Statutory Duty to Report to a Public Official or Office. Nothing in this rule shall prevent a court from compelling disclosure of a statement by a mental-health service provider, patient or other third party to a public official when such statement is made in compliance with a statutory duty to report to a public official, or information required to be recorded in a public office that was in fact recorded in a public office, including but not

	limited to reports of child or elder abuse or neglect or the abuse or neglect of disabled or incompetent persons, unless the statute requiring the report of record specifically provides that the statement or information shall not be disclosed. (g) Disclosure Where Waiver or Where Exercise of Privilege Would Violate a Constitutional Right. Nothing in this rule shall prevent a court from compelling disclosure where: (1) the patient has expressly or implicitly waived the privilege or authorized disclosure; or (2) exercise of the privilege would violate a constitutional right.

DEFINITIONS

Key definitions appear below.	
Victims' Rights Amendment Definition of "Victim"	N.J. Const. art. I, ¶ 22. "[V]ictim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.
Crime Victim's Bill of Rights Definition of "Victim"	N.J. Stat. Ann. § 52:4B-37. As used in this act, "victim" means a person who suffers personal, physical or psychological injury or death or incurs loss of or injury to personal or real property as a result of a crime committed by an adult or an act of delinquency that would constitute a crime if committed by an adult, committed against that person. "Victim" also includes the spouse, parent, legal guardian, grandparent, child, sibling, domestic partner or civil union partner of the decedent in the case of a criminal homicide or act of juvenile delinquency that would constitute a criminal homicide if committed by an adult.

Drunk Driving Victim's Bill of Rights Definitions	N.J. Stat. Ann. § 39:4-50.10. As used in this act, "victim" means, unless otherwise indicated, a person who suffers personal physical or psychological injury or death or incurs loss of or injury to personal or real property as a result of a motor vehicle accident involving another person's driving while under the influence of drugs or alcohol. In the event of a death, "victim" means the surviving spouse, a child or the next of kin.
Address Confidentiality Program Definitions	N.J. Stat. Ann. § 47:4-3. As used in this act: "Address" means a residential street address, school address, or work address of a qualified person, as specified on the qualified person's application to be a program participant under this act. "Division" means the Division on Women in the Department of Children and Families. "Director" means the Director of the Division on Women in the Department of Children and Families. "Domestic violence" means an act defined in section 3 of P.L.1991, c. 261 (C.2C:25-19), if the act has been reported to a law enforcement agency or court. "Qualified person" means a reproductive health service patient or provider, a victim of domestic violence, sexual assault, or stalking, or a family member of any such person. "Program participant" means a qualified person certified by the director as eligible to participate in the Address Confidentiality Program established by this act. "Reproductive health service provider" means a hospital, clinic, physician's office, or other facility that provides reproductive health services, including an employee, a volunteer, or a contractor of the provider. "Reproductive health services" means medical, surgical, counseling, or referral services relating to the human reproductive

	system, including services relating to pregnancy or the termination of a pregnancy. "Sexual assault" means an act of sexual assault as defined in N.J.S.2C:14-2, if the act has been reported to a law enforcement agency or court. "Stalking" means an act defined in section 1 of P.L.1992, c. 209 (C.2C:12-10), if the act has been reported to a law enforcement agency or court.
Victim Counselor-Victim Privilege Definitions	N.J.S.A. 2A:84A-22.14 provides: As used in this act: a. "Act of violence" means the commission or attempt to commit any of the offenses set forth in subsection b. of section 11 of P.L.1971, c. 317 (C.52:4B-11). b. "Confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from an act of violence. It includes any advice, report or working paper given or made in the course of the consultation and all information received by the victim counselor in the course of that relationship. c. "Victim" means a person who consults a counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused by an act of violence. d. "Victim counseling center" means any office, institution, or center offering assistance to victims and their families through crisis intervention, medical and legal accompaniment and follow-up counseling. e. "Victim counselor" means a person engaged in any office, institution or center defined as a victim counseling center by this act, who has undergone 40 hours of training and is under the control of a direct services supervisor of the center and who has a primary function of rendering advice, counseling or assisting

	victims of acts of violence. "Victim counselor" includes a rape care advocate as defined in section 4 of P.L.2001, c. 81 (C.52:4B-52).
	Rule 517(b). N.J.S.A. 2A:84A-22.14 provides: As used in this act: a. "Act of violence" means the commission or attempt to commit any of the offenses set forth in subsection b. of section 11 of P.L. 1971, c. 317 (C. 52:4B-11). b. "Confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from an act of violence. It includes any advice, report or working paper given or made in the course of the consultation and all information received by the victim counselor in the course of that relationship. c. "Victim" means a person who consults a counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused by an act of violence. d. "Victim counseling center" means any office, institution, or center offering assistance to victims and their families through crisis intervention, medical and legal accompaniment and follow-up counseling. e. "Victim counselor" means a person engaged in any office, institution or center defined as a victim counseling center by this act, who has undergone 40 hours of training and is under the control of a direct services supervisor of the center and who has a primary function of rendering advice, counseling or assisting victims of acts of violence. "Victim counselor" includes a rape care advocate as defined in Section 4 of P.L.2001, c.81 (C.52:4B-52).

Lawyer-Client Privilege Definitions	N.J. Stat. Ann. § 2A:84A-20(3). Definitions. As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes a person who is incapacitated whose guardian so consults the lawyer or the lawyer's representative on behalf of the person who is incapacitated, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of the relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.
	N.J. R. Evid. 504(3). As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes a person who is incapacitated whose guardian so consults the lawyer or the lawyer's representative on behalf of the person who is incapacitated, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of the relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

Patient-Physician Privilege Definitions	N.J. R. Evid. Rule 506(a). N.J.S.A. 2A:84A-22.1 provides: As used in this act, (a) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of the patient's physical or mental condition, consults a physician, or submits to an examination by a physician; (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the State or jurisdiction in which the consultation or examination takes place; (c) "holder of the privilege" means the patient while alive and not under the guardianship of the guardian of the person of a patient who is incapacitated, or the personal representative of a deceased patient; (d) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.
Mental Health Service Provider-Patient Privilege Definitions	N.J. R. Evid. Rule 534(a). In this rule: (1) "Confidential communications" means such information transmitted between a mental-health service provider and patient in the course of treatment of, or related to, that individual's condition of mental or emotional health, including information obtained by an examination of the patient, that is transmitted in confidence, and is not intended to be disclosed to third persons, other than: (i) those present to further the interest of the patient in the diagnosis or treatment; (ii) those reasonably necessary for the transmission of the information, including the entity through which the mental-health service provider practices: and (iii) persons who are participating in the diagnosis or treatment of the patient under the direction of a mental-health service provider, including authorized members of the patient's family, the patient's

	guardian, the patient's conservator, and/or the patient's personal representative. (2) "Diagnosis or treatment" shall include consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment. (3) "Mental-health service provider" means a person authorized or reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition, and is specifically intended to include: (i) Psychologists, consistent with the definition under N.J.R.E. 505 and N.J.S.A. 45:14B-2(a), "licensed practicing psychologist," and N.J.S.A 45:14B-6(a)(1), (b), (c), (d), (e), (f), and (g), governing persons engaged in authorized activities of certain unlicensed practicing psychologists; (ii) Physicians, including psychiatrists, consistent with the definition under N.J.R.E. 506 and N.J.S.A. 2A:84A-22.1(b); (iii) Marriage and family therapists, consistent with the definition under N.J.R.E. 510 and N.J.S.A. 45:8B-2(a), "licensed marriage and family therapist," and N.J.S.A. 45:8B-6, governing unlicensed persons who may engage in specified activities related to, consisting of marriage and family therapy; (iv) Social workers, consistent with the definition under N.J.R.E. 518 and N.J.S.A. 45:15BB-3, and including social work interns and certified school social worker as defined in N.J.S.A. 45:15BB-5(b) and (c); (v) Alcohol and drug counselors, consistent with the definitions under N.J.S.A. 45:2D-3 and N.J.A.C. 13:34C-4.5 (licensed and certified Alcohol and drug counselors); (vi) Nurses, consistent with the definition under N.J.S.A. 45:11-23; (vii) Professional counselors, associate counselors or rehabilitation counselors consistent with the definition under N.J.S.A. 45:8B-40, -41, -41.1 8, and persons authorized to provide counseling pursuant to N.J.S.A. 45:8B-48(b), (c), (d); (viii) Psychoanalysts, consistent with the definition under N.J.S.A. 45:14BB-3; (ix) Midwives, consistent with the definition under N.J.S.A. 45:10-1 (x) Physician assistants, consistent with the definition under N.J.S.A. 45:9-27.15; and (ix)1 Pharmacists, consistent with the definition under N.J.S.A. 45:14-41.

	(4) "Patient" means an individual, who undergoes diagnosis or treatment with or by a mental-health service provider for the purpose of diagnosis or treatment related to that patient's condition of mental or emotional health, including addiction to legal or illegal substances, whether referred to as client, person in therapy, or some other equivalent term in the context of the relationship.

[1] *See Office for Victims of Crime, Ethical Standards, Section I: Scope of Services*, https://www.ovc.gov/model-standards/ethical_standards_1.html.
[2] Additional examples of system-based advocate titles include: district attorney's office/state attorney's office advocates or victim-witness coordinators; law enforcement advocates; FBI victim specialists; U.S. attorney's office victim-witness coordinators; board of parole and post-prison supervision advocates; and post-conviction advocates.
[3] Examples of community-based advocates include: crisis hotline or helpline staff; rape crisis center staff; domestic violence shelter staff; campus advocates; and homicide support program staff.
[4] *See* Nat'l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), June 2011, at 3 n.30 (listing victims' constitutional and statutory rights to privacy and to dignity, respect or fairness).
[5] *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (recognizing that the United States Constitution provides a right of personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) ("[A] right to personal privacy . . . does exist under the Constitution.").
[6] There are different levels of privileges: absolute, absolute diluted and qualified. When an absolute privilege attaches, only a victim has the right to authorize disclosure of that information and the court can never order the information to be disclosed without the victim's consent. Absolute privileges are rare, however, because privileges are seen to run contrary to the truth finding function of courts.
[7] *See, e.g.*, Ala. R. Evid. 503A(a)(7) ("'Victim counselor' means any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or prosecutor's office and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence."); Alaska Stat. Ann. § 18.66.250(5)(B) ("'[V]ictim counseling center' means a private organization, an organization operated by or contracted by a branch of the armed forces of the United States, or a local government agency that . . . is not affiliated with a law enforcement agency or a prosecutor's office[.]"); Haw. Rev. Stat. Ann. § 626-1, Rule 505.5(a)(6) ("A 'victim counseling program' is any activity of a domestic violence victims' program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor's office, or the department of human services."); Ind. Code Ann. § 35-37-6-5(2) ("'[V]ictim service provider' means a person . . . that is not affiliated with a law enforcement agency[.]"); Neb. Rev. Stat. Ann. § 29-4302(1) ("Advocate means any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor's office whose primary purpose is assisting domestic violence and sexual assault victims[.]"); N.M. Stat. Ann. § 31-25-2(E) ("'[V]ictim counselor' means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney[.]").
[8] Terms that inform the intersection of victim services and HIPAA, FERPA, FOIA, VAWA or VOCA are "informed consent" and "waiver." "Informed consent" is defined as "1. [a] person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. For the legal profession, informed consent is defined in Model Rule of Professional Conduct 1.0(e)[;] [or] 2. [a] patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical field community would give to a patient regarding the risks involved in the proposed treatment or procedure." *Informed consent*, Black's Law Dictionary (8th ed. 2004). "Waiver" is

defined as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage . . . ." *Waiver*, Black's Law Dictionary (8th ed. 2004).
[9] *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)*, https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Are law enforcement records considered education records?*, https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records.
[14] *Id.*
[15] *Office for Victims of Crime, Crime Victims Fund*, https://www.ovc.gov/pubs/crimevictimsfundfs/intro.html#VictimAssist.
[16] *Id.*
[17] *Id.*
[18] Department of Justice Guide to the Freedom of Information Act, at 1, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf.
[19] *Id.*
[20] *Ethic*, Merriam-webster.com, https://www.merriam-webster.com/dictionary/ethics (last visited July 31, 2019).
[21] *Office for Victims of Crime, Purpose & Scope of The Standards*, https://www.ovc.gov/model-standards/purpose_and_scope.html.
[22] *Id.* Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For "Scope of Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_1.html. For "Coordinating within the Community," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_2.html. For "Direct Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_3.html. For "Privacy, Confidentiality, Data Security and Assistive Technology," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_4.html. For "Administration and Evaluation," the ethical standard and the corresponding commentary can be located at https://www.ovc.gov/model-standards/ethical_standards_5.html.
[23] *Office for Victims of Crime, Ethical Standards for Serving Victims & Survivors of Crime*, https://www.ovc.gov/model-standards/ethical_standards.html.
[24] For a sample law enforcement-based victim services code of ethics drafted by the International Association of Chiefs of Police, see Law Enforcement-Based Victim Services – Template Package I: Getting Started, https://www.theiacp.org/sites/default/files/LEV/Publications/Template%20Package%20I_04.2021.pdf.
[25] *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).
[26] *See United States v. Agurs*, 427 U.S. 97, 106–07 (1976).
[27] *Strickler v. Greene*, 527 U.S. 263, 280 (1999).
[28] *Id.*
[29] *See, e.g., Eakes v. Sexton*, 592 F. App'x 422, 429 (6th Cir. 2014) (finding that "contrary to the district court's conclusion that the [state] prosecutor was not responsible for failing to disclose the Victim-Advocate report because the Advocate was located 'in a separate part of the District Attorney's office,' the prosecutor is in fact responsible for disclosing all *Brady* information in the possession of that office, such as the Victim-Advocate report, even if the prosecutor was unaware of the evidence prior to trial"); *Commonwealth v. Liang*, 747 N.E.2d 112, 114 (Mass. 2001) (concluding that "the notes of [prosecution-based] advocates are subject to the same discovery rules as the notes of prosecutors[,]" and "[t]o the extent that the notes contain material, exculpatory information . . . or relevant 'statements' of a victim or witness . . . the Commonwealth must disclose such information or statements to the defendant, in accordance with due process and the rules of criminal procedure").
[30] Notably, for advocates/entities that receive VOCA funding, because this disclosure is "compelled by statutory or court mandate," it does not pursuant to statute, require a signed, written release from the victim. Nevertheless, if disclosure is required, VOCA requires that advocates make reasonable attempts to notify the victim affected by the disclosure and take whatever steps are necessary to protect their privacy and safety.
[31] Defendant John Giglio was tried, convicted and sentenced for forgery related crimes. While Giglio's case was pending appeal, his attorney filed a motion for a new trial, claiming that there was newly discovered evidence that the key Government witness—"the only witness linking [Giglio] with the crime"—had been promised that he would

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

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

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

[34] *See Subpoena*, Black's Law Dictionary (8th ed. 2004) (defining "subpoena" as "[a] writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply"); *subpoena duces tecum*, Black's Law Dictionary (8th ed. 2004) (defining "subpoena duces tecum" as "[a] subpoena ordering the witness to appear and to bring specified documents, records, or things"); *deposition subpoena*, Black's Law Dictionary (8th ed. 2004) (defining "deposition subpoena" as "1. [a] subpoena issued to summon a person to make a sworn statement in a time and place other than a trial[;] [and] 2. [i]n some jurisdictions, [this is referred to as] a subpoena duces tecum").

[35] Attorney work product "is generally exempt from discovery or other compelled disclosure." *Work product*, Black's Law Dictionary (8th ed. 2004).

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