



LAW ENFORCEMENT-BASED VICTIM SERVICES IN PENNSYLVANIA: 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 Pennsylvania. 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 - Pennsylvania*.

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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 administered by the Office on Violence Against Women (OVW), U.S. Department of Justice.

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

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

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

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

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

Similar to FOIA, state open records' laws contain numerous exemptions, including for some types of law enforcement records (for example, prohibitions on disclosing identifying

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

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

Key Takeaways

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

Discussion

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

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

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

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

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

ethical standard. If ethical standards appear to conflict with the requirements of law or another professional ethic, providers should take steps to resolve the conflict in a responsible manner.”²³

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

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

Key Takeaways

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

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

Discussion

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

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

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

Federal and state courts have found that prosecution-based victim advocates are considered part of the “prosecution team” for *Brady* purposes.²⁹ Beyond that material to which a

defendant is constitutionally entitled, a prosecutor's obligation to disclose information is governed by statute or procedural rule. A criminal defendant is often entitled to additional discovery materials from the prosecutor pursuant to statutes or rules, though discovery statutes and rules vary widely between jurisdictions.

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

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

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

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

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

statements, treatment plans, safety plans, opinions, conclusions, criticisms). Determine a process for clearly marking documents that are not discoverable to ensure they are not inadvertently disclosed. For example, use a red stamp that says, “Not Discoverable.”

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

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

Key Takeaways

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

Discussion

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

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

Key Takeaways

- Advocates may receive subpoenas to appear before the court or elsewhere to provide a sworn statement and/or to appear with specified documents.
- Victims should be informed immediately if advocates receive a subpoena for the information or documents related to a victim's case.
- There may be grounds to challenge a subpoena issued to a system-based or community-based advocate. These challenges can be made by the prosecutor, the community agency and/or the victims (either with or without the help of an attorney).

Discussion

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

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

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

privilege rights or protections that must be protected and enforced.

SELECT LAWS

SELECT PRIVACY LAWS

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

In Pennsylvania, victims of crime are guaranteed an explicit state constitutional right to privacy. Pa. Const. art. I, § 9.1(a) (guaranteeing victims the right, *inter alia*, “to be treated with fairness and respect for the victim’s . . . privacy”).³⁶ In addition to this express constitutional privacy protection, crime victims in Pennsylvania have constitutional rights—under Article 1, section 9.1 of Pennsylvania’s Constitution—that protect their privacy interests. *See, e.g.*, Pa. Const. art. I, § 9.1(a) (providing that “[t]o secure . . . justice and due process [for victims] throughout the criminal and juvenile justice systems, a victim shall have the” right “to be treated with fairness and respect for the victim’s . . . dignity”).³⁷ In particular, the state constitution also protects victim privacy through safety-related rights. *See, e.g.*, Pa. Const. art. I, § 9.1(a) (affording victims, *inter alia*, the right “to be treated with fairness and respect for the victim’s safety”); *id.* (providing victims the right “to reasonable protection from the accused or any person acting on behalf of the accused”); *id.* (affording victims the right “to have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the accused”).³⁸

Pennsylvania also protects victim privacy in the context of pretrial discovery. *See, e.g.*, Pa. Const. art. I, § 9.1(a) (affording crime victims the right, *inter alia*, “to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused”);³⁹ Pa. R. Crim. P. 573(F) (“Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.”).

Pennsylvania further extends privacy protections to victims in connection with public records requests. *See, e.g.*, 65 Pa. Stat. and Cons. Stat. Ann. § 67.708(b)(16)(v) (providing public record exemptions, subject to certain exceptions, for agency records “relating to or resulting in a criminal investigation,” such as “[v]ictim information, including any information that would jeopardize the safety of the victim”); *id.* at § 67.708(b)(5) (providing public record exemptions, subject to certain exceptions, for “[a] record of an individual’s medical, psychiatric or psychological history or disability status, including an evaluation,

consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information"); *id.* at § 67.708(b)(1) (providing public record exemptions, subject to certain exceptions, for "[a] record, the disclosure of which . . . would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual"); *id.* at § 67.708(b)(6)(i)(A) (providing public record exemptions, subject to certain exceptions, for personal identification information such as "[a] record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number"); *id.* at § 67.708(b)(18)(i) (providing public record exemptions, subject to certain exceptions, for "[r]ecords or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings"); *id.* at § 67.708(b)(19) (providing public record exemptions, subject to certain exceptions, for "DNA and RNA records"); *id.* at § 67.708(b)(20) (providing public record exemptions, subject to certain exceptions, for "[a]n autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print").

Pennsylvania extends additional protections to victims of certain offenses. *See, e.g.*, 18 Pa. Stat. and Cons. Stat. Ann. § 3019(a) (providing that "[n]otwithstanding any other provision of law to the contrary, unless the court otherwise orders in a prosecution involving a victim of human trafficking, an officer or employee of the court may not disclose the identity of the victim of human trafficking to the public" and "[a]ny record revealing the name of the victim of human trafficking shall not be open to public inspection"); 42 Pa. Stat. and Cons. Stat. Ann. § 5988(a) (providing that "[n]otwithstanding any other provision of law to the contrary, in a prosecution involving a minor victim of sexual or physical abuse, the name of the minor victim shall not be disclosed by officers or employees of the court to the public, and any records revealing the name of the minor victim shall not be open to public inspection").

Pennsylvania also protects the privacy rights of victims of domestic and sexual violence through its address confidentiality program, 23 Pa. Stat. and Cons. Stat. Ann. §§ 6701 through 6713. This program is included below in the section "Select Confidentiality Laws," which discusses select examples of how Pennsylvania protects victims' privacy interests.

SELECT CONFIDENTIALITY LAWS

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

Pennsylvania law affords victims a range of statutory confidentiality protections related to the nondisclosure of their personal information, including laws that concern law enforcement. *See, e.g.*, 42 Pa. Stat. and Cons. Stat. Ann. § 67A04(a) (“Except as provided in this section, if a law enforcement agency determines that an audio recording or video recording contains potential evidence in a criminal matter, information pertaining to an investigation or a matter in which a criminal charge has been filed, confidential information or victim information and the reasonable redaction of the audio or video recording would not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information, the law enforcement agency shall deny the request in writing. The written denial shall state that reasonable redaction of the audio recording or video recording will not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information.”).

Confidentiality protections also extend to information relating to victim compensation. *See* 18 Pa. Stat. and Cons. Stat. Ann. § 11.709(a) (providing that “[a]ll reports, records or other information obtained or produced by the bureau during the processing or investigation of a [compensation] claim shall be confidential and privileged, shall not be subject to subpoena or discovery, shall be used for no purpose other than the processing of a claim and, except as otherwise provided by law or as provided in this section, shall not be introduced into evidence in any judicial or administrative proceeding”).

Victim confidentiality protections also extend to protection of that information from disclosure to inmates. *See* 61 Pa. Stat. and Cons. Stat. Ann. § 5906 (providing that “[n]otwithstanding any other provision of law, any and all statements or testimony of the victim and of any family member submitted to the department shall be . . . [d]eemed confidential and privileged” and that the “[c]urrent address, telephone numbers and any other personal information of the victim and family members shall be deemed confidential” and not “released to the inmate” or otherwise disclosed without the written consent of the victim).

Pennsylvania has also adopted a case records public access policy to help ensure that confidential information is not included in any document filed with a court. *See* Pa. Public Access Policy § 7.0 (providing a list of information that is deemed confidential and which shall not be included in court documents, including the names of minors and addresses and other contact information relating to victims of abuse).

Pennsylvania offers specific confidentiality protections to victims of domestic and sexual violence through its address confidentiality program. *See, e.g.*, 23 Pa. Stat. and Cons. Stat. Ann. § 6703(d) (providing that “[a]ll records relating to applicants and program participants are the property of the Office of Victim Advocate” and that these records “shall be kept confidential and shall not be subject to the provisions of the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law, except that records may be released as specifically set forth in this chapter and to a district attorney to the extent

necessary for the prosecution of conduct as set forth in section 6711 (relating to penalties”).

Pennsylvania law also protects the confidentiality of communications between victims and certain medical, mental health and other service providers. *See, e.g.*, 23 Pa. Stat. and Cons. Stat. Ann. § 6116. (domestic violence advocate-victim privilege); 42 Pa. Stat. and Cons. Stat. Ann. § 62A16 (sexual assault counselor-victim privilege); 42 Pa. Stat. and Cons. Stat. Ann. § 5944 (psychiatrist and licensed psychologist-client privilege); 42 Pa. Stat. and Cons. Stat. Ann. § 5945.1(b) (sexual assault counselor-victim privilege); 42 Pa. Stat. and Cons. Stat. Ann. § 5945.3 (a)-(b) (human trafficking victim advocate-victim privilege). These protections are discussed more fully in the section “Select Privilege Laws.”

SELECT PRIVILEGE LAWS

What are key privileges in Pennsylvania?

Victims in Pennsylvania have a number of privileges that they can assert to prevent disclosure of confidential communications, subject to certain exceptions and waivers. *See, e.g.*, 23 Pa. Stat. and Cons. Stat. Ann. § 6116. (domestic violence advocate-victim privilege); 42 Pa. Stat. and Cons. Stat. Ann. § 62A16 (sexual assault counselor-victim privilege); 42 Pa. Stat. and Cons. Stat. Ann. § 5944 (psychiatrist and licensed psychologist-client privilege); 42 Pa. Stat. and Cons. Stat. Ann. § 5945.1(b) (sexual assault counselor-victim privilege); 42 Pa. Stat. and Cons. Stat. Ann. § 5945.3 (a)-(b) (human trafficking victim advocate-victim privilege).

Privilege may be waived through meaningful consent by the victim. *See, e.g.*, 42 Pa. Stat. and Cons. Stat. Ann. § 5944 (requiring written consent); 42 Pa. Stat. and Cons. Stat. Ann. § 5945.1(b) (requiring written consent).

The key privileges referenced in this section appear below.

<p>Domestic Violence Advocate-Victim Privilege</p>	<p>23 Pa. Stat. and Cons. Stat. Ann. § 6116.</p> <p>Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a coparticipant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of the victim. Neither the domestic violence counselor/advocate nor the victim shall waive the</p>
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	<p>privilege of confidential communications by reporting facts of physical or sexual assault under Chapter 63 (relating to child protective services), a Federal or State mandatory reporting statute or a local mandatory reporting ordinance.</p>
<p>Sexual Assault Counselor-Victim Privilege</p>	<p>42 Pa. Stat. and Cons. Stat. Ann. § 62A16.</p> <p>(a) Nature of privilege.—</p> <p>(1) Unless a victim of sexual violence who consults a sexual assault counselor for the purpose of securing advice, counseling or assistance waives the privilege in a signed writing prior to testimony or disclosure, a sexual assault counselor or a coparticipant who is present during sexual assault counseling or advocacy shall not be competent nor permitted to testify, release the records of or to otherwise disclose confidential communications made to or by the counselor by or to the victim. The privilege shall terminate upon the death of the victim.</p> <p>(2) Neither the sexual assault counselor nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual violence under 23 Pa.C.S. Ch. 63 (relating to child protective services), a Federal or State mandatory reporting statute or a local mandatory reporting ordinance.</p> <p>(b) Scope.--The provisions of this section applicable to the victim of sexual violence shall also apply to a person who seeks advice, counseling or assistance from a sexual assault counselor regarding the victim.</p>
<p>Psychiatrist and Licensed Psychologist-Client Privilege</p>	<p>42 Pa. Stat. and Cons. Stat. Ann. § 5944.</p> <p>No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L. 136, No. 52),¹ to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services on behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.</p> <p>1. 42 Pa. Stat. and Cons. Stat. Ann. § 5944.</p>

<p>Sexual Assault Counselor-Victim Privilege</p>	<p>42 Pa. Stat. and Cons. Stat. Ann. § 5945.1(b).</p> <p>(1) No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written consent of the victim, disclose the victim’s confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.</p> <p>(2) No coparticipant who is present during counseling may disclose a victim’s confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.</p>
<p>Human Trafficking Victim Advocate-Victim Privilege</p>	<p>42 Pa. Stat. and Cons. Stat. Ann. § 5945.3 (a)-(b).</p> <p>(a) Sexual assault counselors.--An individual qualified as a sexual assault counselor under section 5945.1(a) (relating to confidential communications with sexual assault counselors) may serve as a human trafficking counselor under this section.</p> <p>(b) Privilege.--</p> <p>(1) This subsection applies to all of the following:</p> <ul style="list-style-type: none"> (i) A human trafficking caseworker. (ii) An interpreter. <p>(2) An individual designated in paragraph (1) may not disclose a confidential communication without the written consent of the victim of human trafficking who made the confidential communication.</p>

DEFINITIONS

<p>Key definitions appear below.</p>	
<p>Constitutional Definition of “Victim”.</p>	<p>Pa. Const. art. I, § 9.1(c).</p> <p>As used in this section and as further defined by the General Assembly, the term “victim” includes any person against whom the criminal offense or delinquent act is committed or who is directly harmed by the commission of the offense or act. The term “victim” does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.</p> <p><i>Note:</i> Article I, Section 9.1 of the Pennsylvania Constitution was subject to voter approval at the November 5, 2019 Municipal Election. Before the election, litigation prevented the counting or certifying of ballots until the resolution of a legal challenge to this provision. In January of 2021, the proposed amendment that would have added this section to Pennsylvania's constitution was found to be unconstitutional and the votes cast were declared invalid. <i>See League of Women Voters of Pennsylvania v. Boockvar</i>, No. 578 M.D. 2019, 2021 WL 62268 (Pa. Commw. Ct. Jan. 7, 2021) (per curiam) (unpublished). As of October 2021, that decision is being reviewed by the Pennsylvania Supreme Court and the validity of this provision will remain unclear until the Pennsylvania Supreme Court issues its decision. Legislative efforts are also underway to incorporate the rights included in this section into Pennsylvania’s statutes.</p>
<p>Statutory Crime Victims Act Definitions of “Direct Victim” and “Victim”.</p>	<p>18 Pa. Stat. Ann. § 11.103.</p> <p>“Direct victim.” An individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act. The term shall not include the alleged offender. The term includes a resident of this Commonwealth against whom an act has been committed or attempted which otherwise would constitute a crime as defined in this act but for its occurrence in a location other than this Commonwealth and for</p>

	<p>which the individual would otherwise be compensated by the crime victim compensation program of the location where the act occurred but for the ineligibility of such program under the provisions of the Victims of Crime Act of 1984 (Public Law 98-473, 42 U.S.C. § 10601 et seq.).</p> <p>“Victim.” The term means the following: (1) A direct victim. (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender. (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child’s family: Chapter 25 (relating to criminal homicide). Section 2702 (relating to aggravated assault). Section 3121 (relating to rape). (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiancé, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.</p>
<p>Select Protection from Abuse/Domestic Violence Advocate-Victim Privilege Definitions.</p>	<p>23 Pa. Stat. and Cons. Stat. Ann. § 6102(a).</p> <p>General rule.--The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:</p> <p>...</p> <p>“Confidential communications.” All information, whether written or spoken, transmitted between a victim and a domestic violence counselor or advocate in the course of the relationship. The term includes information received or given by the domestic violence counselor or advocate in the course of the relationship, as well as advice, reports, statistical data, memoranda or working papers, records or the like, given or made in the course of the relationship. The term also includes communications made by or to a linguistic interpreter assisting the victim, counselor or advocate in the course of the relationship.</p> <p>“Domestic violence counselor/advocate.” An individual who is engaged in a domestic violence program, the primary purpose of which is the rendering of counseling or assistance to victims of domestic violence, who has undergone 40 hours of training.</p>

	<p>“Domestic violence program.” A nonprofit organization or program whose primary purpose is to provide services to domestic violence victims which include, but are not limited to, crisis hotline; safe homes or shelters; community education; counseling systems intervention and interface; transportation, information and referral; and victim assistance.</p> <p>...</p> <p>“Victim.” A person who is physically or sexually abused by a family or household member. For purposes of section 6116 (relating to confidentiality), a victim is a person against whom abuse is committed who consults a domestic violence counselor or advocate for the purpose of securing advice, counseling or assistance. The term shall also include persons who have a significant relationship with the victim and who seek advice, counseling or assistance from a domestic violence counselor or advocate regarding abuse of the victim.</p>
<p>Sexual Assault Counselor-Victim Privilege Definitions.</p>	<p>42 Pa. Stat. and Cons. Stat. Ann. § 5945.1(a).</p> <p>Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:</p> <p>“Confidential communication.” All information, oral or written, transmitted between a victim of sexual assault and a sexual assault counselor in the course of their relationship, including, but not limited to, any advice, reports, statistical data, memoranda, working papers, records or the like, given or made during that relationship, including matters transmitted between the sexual assault counselor and the victim through the use of an interpreter.</p> <p>“Coparticipant.” A victim participating in group counseling.</p> <p>“Interpreter.” A person who translates communications between a sexual assault counselor and a victim through the use of sign language, visual, oral or written translation.</p> <p>“Rape crisis center.” Any office, institution or center offering assistance to victims of sexual assault and their families through crisis intervention, medical and legal accompaniment and follow-up counseling.</p>

	<p>“Sexual assault counselor.” A person who is engaged in any office, institution or center defined as a rape crisis center under this section, who has undergone 40 hours of sexual assault training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.</p> <p>“Victim.” A person who consults a sexual assault counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault. The term shall also include those persons who have a significant relationship with a victim of sexual assault and who seek advice, counseling or assistance from a sexual assault counselor concerning a mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault of a victim.</p>
<p>Human Trafficking Advocate-Victim Privilege Definitions.</p>	<p>42 Pa. Stat. and Cons. Stat. Ann. § 5945.3(c).</p> <p>Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:</p> <p>“Confidential communication.” All information, oral or written, transmitted between a victim of human trafficking and a human trafficking caseworker in the course of their relationship. The term includes advice, reports, statistical data, memoranda, working papers and records, given or made during that relationship, including matters transmitted between the human trafficking caseworker and the victim through the use of an interpreter.</p> <p>“Human trafficking caseworker.” An individual: (1) who is engaged by any organization whether financially compensated or not; (2) whose primary purpose is the rendering of advice or assistance to a victim of human trafficking, as defined in 18 Pa.C.S. § 3001 (relating to definitions); and (3) who: (i) holds a master's degree or higher in counseling or a related field; (ii) has an undergraduate degree or equivalent in a human services profession; or (iii) is supervised by an individual qualified under subparagraph (i) or (ii) and has at least 80 hours of training received under that supervision in: (A) the history of human trafficking; (B) civil law and criminal law as they relate to human trafficking; (C) societal attitudes toward human trafficking; (D)</p>

	<p>peer counseling techniques; (E) housing, public assistance and other financial resources available to meet the needs of victims of human trafficking; (F) referral services available to victims of human trafficking; (G) privileged communications; or (H) human trauma therapy counseling.</p> <p>“Interpreter.” An individual who translates communications between a human trafficking caseworker and a victim of human trafficking through the use of sign language, visual, oral or written translation.</p>
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¹ See *Office for Victims of Crime, Ethical Standards, Section I: Scope of Services*, https://www.ovc.gov/model-standards/ethical_standards_1.html.

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

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

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

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

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

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

⁸ Terms that inform the intersection of victim services and HIPAA, FERPA, FOIA, VAWA or VOCA are “informed consent” and “waiver.” “Informed consent” is defined as “1. [a] person’s agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. For the legal profession, informed consent is

defined in Model Rule of Professional Conduct 1.0(e);] [or] 2. [a] patient’s knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical field community would give to a patient regarding the risks involved in the proposed treatment or procedure.” *Informed consent*, Black’s Law Dictionary (8th ed. 2004). “Waiver” is defined as “[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage” *Waiver*, Black’s Law Dictionary (8th ed. 2004).

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

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

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

¹⁴ *Id.*

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

¹⁶ *Id.*

¹⁷ *Id.*

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

¹⁹ *Id.*

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

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

²² *Id.* Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For “Scope of Services,” the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_1.html. For “Coordinating within the Community,” the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_2.html. For “Direct Services,” the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_3.html. For “Privacy, Confidentiality, Data Security and Assistive Technology,” the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_4.html. For “Administration and Evaluation,” the ethical standard and the corresponding commentary can be located at https://www.ovc.gov/model-standards/ethical_standards_5.html.

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

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

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

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

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

²⁸ *Id.*

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

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

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

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

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

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

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

³⁶ Article I, Section 9.1 of the Pennsylvania Constitution was subject to voter approval at the November 5, 2019 Municipal Election. Before the election, litigation prevented the counting or certifying of ballots until the resolution of a legal challenge to this provision. In January of 2021, the proposed amendment that would have added this section to Pennsylvania’s Constitution was found to be unconstitutional and the votes cast were declared invalid. See *League of Women Voters of Pennsylvania v. Boockvar*, No. 578 M.D. 2019, 2021 WL 62268 (Pa. Commw. Ct. Jan. 7, 2021) (per curiam) (unpublished). As of October 2021, that decision is being reviewed by the Pennsylvania Supreme Court and the validity of this provision will remain unclear until the Pennsylvania Supreme Court issues its decision. Legislative efforts are also underway to incorporate the rights included in this section into Pennsylvania’s statutes.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

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