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LAW ENFORCEMENT-BASED VICTIM SERVICES IN TENNESSEE: 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 are necessary. Compliance is the fulfillment of legal responsibilities to victims and 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 laws governing crime victims' rights to privacy, confidentiality and privilege in Tennessee. 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 - Tennessee*.

This resource was developed by the National Crime Victim Law Institute (NCVLI) under 2018-V3-GX-K049 and 2020-V3-GX-K001, awarded to the International Association of Chiefs of Police (IACP) by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this resource are those of the contributors and do not necessarily represent the official position of the U.S. Department of Justice.

TABLE OF CONTENTS

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 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 Tennessee?

Victims of crime in Tennessee have constitutional rights—under Article 1, section 35—that protect or contemplate victims' privacy. *See generally* Tenn. Const. art. I, § 35 (stating that article I, section 35 "preserve[s] and protect[s] the rights of victims of crime to justice and due process"); *see, e.g., id.* § 35(2) (providing victims the right "to be free from intimidation, harassment and abuse throughout the criminal justice system"). Victims also have statutory privacy-related rights. *See, e.g.*, Tenn. Code Ann. § 40-38-102(a)(1) (providing victims the right to "[b]e treated with dignity and compassion"); *id.* § 40-38-102(a)(2) (providing victims the right to "[p]rotection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant's agents or friends"); *id.* § 40-38-117 (providing victims the right "to refuse a request by the defendant, the defendant's attorney or any other person acting on behalf of the defendant for an interview or other communication with the victim").

State law protects victims' privacy rights and interests as part of various aspects of the criminal justice process, including production and discovery. Under Tennessee discovery rules, the parties may seek a protective order from the court denying, restricting or deferring discovery or inspection "for good cause shown." Tenn. R. Crim. P. 16(d)(1). If the court orders relief "following an ex parte submission, the court shall preserve under seal in the court records the entire text of the party's written statement." *Id.* Additional discovery-related protections exist for children in criminal proceedings involving child sex abuse images. In such proceedings, the court must, "on motion of the state":

> (A) Deny any request by the defendant to copy or photograph any documents or objects depicting the sexual exploitation of minors under title 39, chapter 17, part 10, so long as the state shows that the documents or objects will be made reasonably available to the defendant throughout the proceeding.
> (B) For the purposes of subdivision (d)(3)(A), documents or objects shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination at a state facility of the documents or objects by the defendant, the defendant's attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial. The Court may, in its discretion, permit other individuals to have access to the documents or objects if necessary to protect the rights of the defendant.
> (C) If the state fails to demonstrate that the documents or objects will be made reasonably available to the defendant throughout the proceeding, or fails to make the documents or objects reasonably available to the defendant

> at any time during the proceeding, the trial court may order the state to permit the defendant to copy or photograph any documents or objects subject to terms and conditions set by the court in an appropriate protective order.

Tenn. R. Crim. P. 16(d)(3).

The state also protects victim privacy through its rape shield law, which prohibits, in certain sex offense cases, the introduction of evidence regarding a victim's sexual behavior or predisposition, except in limited circumstances. *See* Tenn. R. Evid. 412.

For information about victims' privacy protections when people attempt to access their personal information through alternate means, such as through a public records request, *see* "Select Confidentiality Laws" section below.

SELECT CONFIDENTIALITY LAWS

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

Tennessee offers crimes victims a range of confidentiality protections. Many of these confidentiality protections guard against the disclosure of victims' identifying and contact information. For example, crime victims need to keep their contact information current with certain agencies in order to receive notification of their rights; any identifying information that a victim provides to effectuate their notification rights is confidential. *See, e.g.*, Tenn. Code Ann. § 40-28-505(h) (confidentiality of victims' "identifying information" provided for the purposes of notification of parole hearings and parole board decisions); *id.* § 40-38-103(b) (confidentiality of violent crime victims' "identifying information" contained in requests for notification of their offenders' release from custody); *id.* § 40-38-110 (confidentiality of victims' "identifying information" provided for the purposes of notification of cancelled or rescheduled hearings, bail hearings, dismissal of a defendant's case, defendant's pardon, defendant's recapture, defendant's release from a mental institution or defendant's transfer to a different and lower security correctional complex); *id.* § 40-38-111(i) (confidentiality of "identifying information concerning crime victims obtained" to ensure the victims are afforded their constitutional rights to notice and other information).

Tennessee law recognizes the confidentiality of communications between victims and certain providers of counseling and other physical and mental health support services, as well as the records related to the provision of the services. *See, e.g.*, Tenn. Code Ann. § 16-20-103 (confidentiality of victim-offender mediation center memoranda, work notes or products or case files); *id.* § 24-1-204(b) (confidentiality of crisis intervention-participant communications); *id.* § 36-3-623(a) (confidentiality of domestic violence shelter, rape crisis center and human trafficking service provider records); *id.* § 63-22-114 (confidentiality of licensed marital and family therapist-, licensed professional counselor- or certified clinical

pastoral therapist-client communications); *id.* § 63-11-213 (confidentiality of licensed psychologist-, licensed psychological examiner- or certified psychological assistant-client communications); *id.* § 63-23-109(a) (confidentiality of licensed social worker-client communications).

Tennessee law also protects the confidentiality of the addresses of victims of domestic abuse, stalking, human trafficking and sex offenses through its Address Confidentiality Program. *See* Tenn. Code Ann. § 40-38-602. The program provides eligible victims with a substitute mailing address to use for state and local government purposes. *Id.* § 40-38-602(b)-(c). Participants' actual addresses are confidential and will not appear in public records unless an exception applies. *Id.* § 40-38-602(f).

Additionally, Tennessee provides victims with a number of confidentiality protections in the context of public records requests. For example, "[w]here a defendant has pled guilty, to, or has been convicted of, and has been sentenced for a sexual offense or violent sexual offense," the following victim information "shall be treated as confidential and shall not be open to inspection by members of the public": "(A) [n]ame, unless waived pursuant to subdivision (q)(2); (B) [h]ome, work and electronic mail addresses; (C) [t]elephone numbers; (D) [s]ocial security number; and (E) [a]ny photographic or video depiction of the victim." Tenn. Code Ann. § 10-7-504(q)(1). In cases involving child-victims, the same categories of personal and identifying information are confidential and not subject to public inspection, as well as information regarding "[w]hether the defendant is related to the victim unless the relationship is an essential element of the offense." *Id.* § 10-7-504(t)(1).

Under Tennessee's public records law, "identifying information compiled and maintained by a utility service provider concerning a person who has obtained a valid protection document shall be treated as confidential and not open for inspection by the public." Tenn. Code Ann. § 10-7-504(a)(15)(B). A victim who has a protective order and wishes to invoke these privacy protections must present a copy of the protection document "to the records custodian of the utility service provider whose records [the victim] seeks to make confidential, and [the victim] must request that all identifying information about [them] be maintained as confidential." *Id.* § 10-7-504(a)(15)(C). Similarly, if a victim provides a copy of the protection order to governmental entities—defined to "mean[] the state of Tennessee and any county, municipality, city or other political subdivision of the state of Tennessee"—those entities must also treat all "identifying information compiled and maintained by [the] governmental entity concerning [the victim] as confidential and" not open to public inspection. *Id.* § 10-7-504(a)(16)(A)(i); *id.* § 10-7-504(a)(16)(B).

Other victim-related information that is confidential and not subject to disclosure pursuant to public records requests includes: the locating information of a domestic violence shelter, family safety center, rape crisis center, or human trafficking service provider, Tenn. Code Ann § 10-7-504(a)(17); and certain locating and personal information of victims who apply for crime victim compensation, *id.* § 10-7-504(k). Additional protections from disclosure pursuant to public records requests exist for certain general law enforcement, medical and educational records. *See, e.g.*, Tenn. Code Ann. § 10-7-504(a)(1)(A) (medical records); *id.*

§ 10-7-504(a)(2)(A) (investigative records); *id.* § 10-7-504(a)(4)(A) (educational records); *id.* § 10-7-504(u)(1) (body-worn cameras).[36]

SELECT PRIVILEGE LAWS

What are key privileges in Tennessee?

Victims in Tennessee have a number of privileges that they can assert to prevent disclosure of their private communications with certain victim services programs, counselors, social workers, psychiatrists and others. *See, e.g.*, Tenn. Code Ann. § 16-20-103(a) (victim-offender mediation center privilege); *id.* § 24-1-204(c) (crisis intervention communications privilege); *id.* § 24-1-207(a) (psychiatrist-patient privilege); *id.* § 24-1-210(b) (interpreter and dual party relay operator privilege); *id.* § 24-1-111(f) (deaf and hearing impaired person-interpreter privilege); *id.* § 63-11-213 (licensed psychologist-, licensed psychological examiner- or certified psychological assistant-client privilege); *id.* § 63-22-114 (licensed marital and family therapist-, licensed professional counselor- and certified clinical pastoral therapist-client privilege); *id.* § 63-23-109(a) (licensed social worker-client privilege).

Many of these privileges contain express provisions stating that they may not be construed to prevent disclosure of confidential communications in proceedings related to mandatory child abuse reports. *See, e.g., id.* § 63-22-114 (licensed marital and family therapist-, licensed professional counselor- and certified clinical pastoral therapist-client privilege); *id.* § 63-23-109(b) (social worker-client privilege); *see also id.* § 24-1-204(d)(2) ("The [crisis intervention communications] testimonial privilege . . . shall not apply if . . . [t]he communication indicates the existence of past or present child abuse or neglect of the individual, abuse of an adult . . . or family violence . . . ."); *id.* § 37-1-411 ("Neither the husband-wife privilege as preserved in § 24-1-201, nor the psychiatrist-patient privilege as set forth in § 24-1-207, nor the psychologist-patient privilege as set forth in § 63-11-213 is a ground for excluding evidence regarding harm or the cause of harm to a child in any dependency and neglect proceeding resulting from a report of such harm under § 37-1-403 or a criminal prosecution for severe child abuse.").

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

Victim-Offender Mediation Center Privilege	Tenn. Code Ann. § 16-20-103. (a) All memoranda, work notes or products, or case files of centers established under this chapter are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent

	proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege. (b) The privilege and limitation on evidentiary use described in subsection (a) does not apply to any communication of a threat that injury or damage may be inflicted on any person or on the property of a party to the dispute, to the extent the communication may be relevant evidence in a criminal matter. Such communications shall not be construed to be public records pursuant to title 10, chapter 7.
Crisis Intervention Communications Privilege	Tenn. Code Ann. § 24-1-204(b)–(d). (b) All communications between a team member or team leader providing, and a group participant or person participating in, a crisis intervention shall be considered confidential and no such person shall be required to disclose any such communication unless otherwise required by law or rule of court. (c) Except as provided under subsection (d), no person, whether a team member, team leader or group participant, providing or participating in a crisis intervention shall be required to testify or divulge any information obtained solely through such crisis intervention. (d) The testimonial privilege established under subsection (c) shall not apply if any of the following are true: (1) The communication indicates the existence of a danger to the individual who receives crisis response services or to any other person or persons; (2) The communication indicates the existence of past or present child abuse or neglect of the individual, abuse of an adult as defined in title 71, chapter 6 or family violence as defined in title 71, chapter 6, part 2; (3) The communication indicates the existence of past or present acts constituting an intentional tort or crime; provided, that the applicable statute of limitation has not expired on the act indicated; or (4) All parties involved in the crisis intervention, including the individual or individuals who received crisis response services, expressly waive the privilege and consent to the testimony.

Psychiatrist-Patient Privilege	Tenn. Code Ann. § 24-1-207(a), (c). (a) Communications between a patient and a licensed physician when practicing as a psychiatrist in the course of and in connection with a therapeutic counseling relationship regardless of whether the therapy is individual, joint, or group, are privileged in proceedings before judicial and quasi-judicial tribunals. Neither the psychiatrist nor any member of the staff may testify or be compelled to testify as to such communications or otherwise reveal them in such proceedings without consent of the patient except: (1) In proceedings in which the patient raises the issue of the patient's mental or emotional condition; (2) In proceedings for which the psychiatrist was ordered by the tribunal to examine the patient if the patient was advised that communications to the psychiatrist would not be privileged, but testimony as to the communications is admissible only on issues involving the patient's mental or emotional condition; and (3) In proceedings to involuntarily hospitalize the patient under title 33, chapter 6, part 4 or title 33, chapter 6, part 5, if the psychiatrist decides that the patient is in need of care and treatment in a residential facility. Unless otherwise ordered by the court, the exception is limited to disclosures necessary to establish that the patient poses a substantial likelihood of serious harm requiring involuntary hospitalization under title 33, chapter 6, part 4 or title 33, chapter 6, part 5. (c)(1) Privileged communications between a patient and a licensed physician when practicing as a psychiatrist in the course of and in connection with a therapeutic counseling relationship, regardless of whether the therapy is individual, joint, or group, may be disclosed without consent of the patient if: (A) Such patient has made an actual threat to physically harm an identifiable victim or victims; and (B) The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat. (2) The psychiatrist may disclose patient communications to the extent necessary to warn or protect any potential victim. No civil or criminal action shall be instituted, nor shall liability be imposed due to the disclosure of otherwise confidential communications by a psychiatrist pursuant to this subsection (c).
Dual Relay and Interpreter Privilege	Tenn. Code Ann. § 24-1-210(b).

	No interpreter or dual-party relay operator shall be permitted or required to disclose information obtained by virtue of facilitating any confidential communication.
Deaf and Hearing Impaired Persons Interpreter Privilege	Tenn. Code Ann. § 24-1-211(f). Before a qualified interpreter will participate in any proceedings subsequent to an appointment under this section, such interpreter shall make an oath or affirmation that such interpreter will make a true interpretation in an understandable manner to the deaf person for whom the interpreter is appointed and that such interpreter will interpret the statements of the deaf person desiring that statements be made, in the English language to the best of such interpreter's skill and judgment. The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates. Any and all information that the interpreter gathers from the deaf person pertaining to any proceeding then pending shall at all times remain confidential and privileged, or on an equal basis with the attorney-client privilege, unless such deaf person desires that such information be communicated to other persons.
Psychologist-Client Privilege	Tenn. Code Ann. § 63-11-213. For the purpose of this chapter, the confidential relations and communications between licensed psychologist or psychological examiner or senior psychological examiner or certified psychological assistant and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.
Licensed Social Worker-Client Privilege	Tenn. Code Ann. § 63-23-109. (a) The confidential relations and communications between a client and licensed social worker as defined in this chapter, are placed upon the same basis as those provided by law between licensed psychologists, licensed psychological examiners, licensed senior psychological examiners, certified psychological assistants and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed. (b) Nothing contained in this section shall be construed to prevent disclosure of confidential communications in proceedings arising

	under title 37, chapter 1, part 4, concerning mandatory child abuse reports.
Licensed Marital and Family Therapist-, Licensed Professional Counselor- or Certified Clinical Pastoral Therapist-Client Privilege	Tenn. Code Ann. § 63-22-114. The confidential relations and communications between licensed marital and family therapists, licensed professional counselors or certified clinical pastoral therapists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this part shall be construed to require any such privileged communication to be disclosed. However, nothing contained within this section shall be construed to prevent disclosures of confidential communications in proceedings arising under title 37, chapter 1, part 4 concerning mandatory child abuse reports.

SELECT DEFINITIONS

Key definitions are included below.	
Victims' Constitutional Rights Definitions	Tenn. Code Ann. § 40-38-302. As used in [Tennessee's Constitutional Rights of Victims, Tenn. Const., Art. I, § 35], unless the context otherwise requires: (1) "Crime" means: (A) Any offense the punishment for which is a Class A, B, C, D or E felony; (B) First degree murder; or (C) Assault under § 39-13-101(a)(1); (2) "Critical stages of the criminal justice process" are: (A) Bond hearings or bond reduction hearings if hearing from the victim is deemed relevant by the appropriate district attorney general; (B) Any hearing on a motion to dismiss or on a plea agreement requiring approval by the trial court; (C) The defendant's sentencing hearing; (D) Any hearing at which the issue of whether the defendant should pay restitution or the amount of restitution that should be paid is discussed;

	(E) Any parole hearing at which the defendant's release on parole will be discussed or determined; and (F) Any other hearing that proposes a final disposition of the case; (3) "Family member" means the victim's spouse, natural parent, child, adopted child, grandparent, grandchild, stepparent, adoptive parent, or brother or sister of the whole or half-blood or by adoption. If a "family member" is a minor, the minor may be represented by a guardian where appropriate; and (4)(A) "Victim" means: (i) A natural person against whom a crime was committed; (ii) If the victim is a minor, then the parent or legal guardian of the minor; or (iii) If the victim is deceased or is physically or emotionally unable to exercise the victim's rights, then the following persons, or their designees, in the order of preference in which they are listed: (*a*) A family member; or (*b*) A person who resided with the victim; (B) "Victim" does not include any person charged with or alleged to have committed the crime or who is charged with some form of criminal responsibility for commission of the crime. *See also* Tenn. Const. art. I, § 35 ("The general assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section."); Tenn. Code Ann. § 40-38-301(c) ("If any other provision of law contains a broader definition of 'crime,' 'victim' or 'critical stages of the criminal justice process' for any purpose other than implementation of Article I, § 35 of the Constitution of Tennessee, the broader definition shall control for such purpose.").
Human Trafficking Service Provider Confidentiality Definition	Tenn. Code Ann. § 36-3-623(b). (b) As used in this section [governing human trafficking service provider-client confidentiality], "human trafficking service providers" means agencies or groups that are incorporated as a not-for-profit organization for at least six (6) months, are tax-exempt under § 501 of the Internal Revenue Code (26 U.S.C. § 501), and that have provided services to victims of human trafficking.
Address Confidentiality Program Definitions	Tenn. Code Ann. § 40-38-601. As used in [Tennessee's Home Address Confidentiality Program]:

	(1) "Address confidentiality program" or "program" means the program created under this part to protect the confidentiality of the confidential address of a relocated victim of domestic abuse, stalking, human trafficking, rape, sexual battery, or any other sexual offense; (2) "Administrator of elections" means the chief county election administrative officer appointed by the county election commission and such official's designee or designees; (3) "Applicant" means the person who applies to be a program participant and who is or has been a victim of domestic abuse, stalking, human trafficking, rape, sexual battery, or another sexual offense; (4) "Application" means the form or forms submitted, in the manner prescribed by the secretary of state, by an individual requesting certification for the address confidentiality program; (5) "Application assistant" means an employee or volunteer at an agency or organization that serves victims of domestic abuse, stalking, human trafficking, rape, sexual battery, or any other sexual offense, who has received training and certification from the secretary of state to help individuals complete applications to be program participants; (6) "Co-applicant" means the spouse, parent, or fiduciary of the applicant who lives in the same residence as the applicant at the time the application is made and who resides in the same residence with the applicant while the applicant is a program participant; (7) "Confidential address" means the actual address of a program participant's residence, school, institution of higher education, business, or place of employment, as specified on an application to be a program participant or on a notice of change of address filed under this part; (8) "Coordinator of elections" means the official appointed by the secretary of state in accordance with § 2-11-201 as the chief administrative election officer of the state and such official's designee or designees; (9) "Domestic abuse" has the same meaning as defined in § 36-3-601;

	(10) "Domestic abuse victim" has the same meaning as defined in § 36-3-601; (11) "Fiduciary" has the same meaning as defined in § 34-1-101; (12) "Governmental entity" means the state, a political subdivision of the state, or any department, agency, board, commission, or other instrumentality of the state or a political subdivision of the state; (13) "Human trafficking" has the same meaning as used in § 39-13-314; (14) Deleted by 2021 Pub.Acts, c. 140, § 1, eff. April 13, 2021. (15) "Parent" includes biological and adoptive parents, as defined in § 36-1-102; (16) "Person with a disability" has the same meaning as defined in § 34-1-101; (17) "Process" means judicial process and all orders, demands, notices, or other papers required or permitted by law to be served on a program participant; (18) "Program participant" or "participant" means a person who is certified by the secretary of state as a program participant and who is an applicant, co-applicant, the child of an applicant or co-applicant, or a person with a disability for whom an applicant or co-applicant serves as a fiduciary; (19) "Secretary of state" or "secretary" means the secretary of state of Tennessee and any designee of the secretary; (20) "Sexual offender" has the same meaning as defined in § 40-39-202; (21) "Sexual offense" means a sexual offense or violent sexual offense as defined in § 40-39-202; (22) "Stalking" has the same meaning as defined in § 39-17-315; and (23) "Substitute address" means an address designated by the secretary of state under the address confidentiality program that is used instead of a confidential address as set forth by this part.

Confidentiality of Victim Information in Protective Orders Definitions	Tenn. Code Ann. § 10-7-504(a)(15)(A). As used in this subdivision (a)(15), unless the context otherwise requires: (i) "Identifying information" means the home and work addresses and telephone numbers, social security number, and any other information that could reasonably be used to locate the whereabouts of an individual; (ii) "Protection document" means: (*a*) An order of protection issued pursuant to title 36, chapter 3, part 6, that has been granted after proper notice and an opportunity to be heard; (*b*) A similar order of protection issued by the court of another jurisdiction; (*c*) An extension of an ex parte order of protection granted pursuant to § 36-3-605(a); (*d*) A similar extension of an ex parte order of protection granted by a court of competent jurisdiction in another jurisdiction; (*e*) A restraining order issued by a court of competent jurisdiction prohibiting violence against the person to whom it is issued; (*f*) A court order protecting the confidentiality of certain information issued upon the request of a district attorney general to a victim or witness in a criminal case, whether pending or completed; and (*g*) An affidavit from the director of a rape crisis center, domestic violence shelter, or human trafficking service provider, as defined in § 36-3-623, certifying that an individual is a victim in need of protection; provided, that such affidavit is on a standardized form to be developed and distributed to such centers, shelters, and providers by the Tennessee task force against domestic violence; and (iii) "Utility service provider" means any entity, whether public or private, that provides electricity, natural gas, water, or telephone service to customers on a subscription basis, whether or not regulated by the Tennessee public utility commission. Tenn. Code Ann. § 10-7-504(a)(16)(A). As used in this subdivision (a)(16), unless the context otherwise requires:

	(i) "Governmental entity" means the state of Tennessee and any county, municipality, city or other political subdivision of the state of Tennessee; (ii) "Identifying information" means the home and work addresses and telephone numbers, social security number, and any other information that could reasonably be used to locate the whereabouts of an individual; (iii) "Protection document" means: (*a*) An order of protection issued pursuant to title 36, chapter 3, part 6, that has been granted after proper notice and an opportunity to be heard; (*b*) A similar order of protection issued by the court of another jurisdiction; (*c*) An extension of an ex parte order of protection granted pursuant to § 36-3-605(a); (*d*) A similar extension of an ex parte order of protection granted by a court of competent jurisdiction in another jurisdiction; (*e*) A restraining order issued by a court of competent jurisdiction prohibiting violence against the person to whom it is issued; (*f*) A court order protecting the confidentiality of certain information issued upon the request of a district attorney general to a victim or witness in a criminal case, whether pending or completed; and (*g*) An affidavit from the director of a rape crisis center or domestic violence shelter certifying that an individual is a victim in need of protection; provided, that such affidavit is on a standardized form to be developed and distributed to such centers and shelters by the Tennessee task force against domestic violence.
Crisis Intervention Communications Privilege Definitions	Tenn. Code Ann. § 24-1-204(a). As used in this section: (1) "Crisis intervention" means a session at which crisis response services are rendered by a critical incident stress management team member or leader during or after a crisis or disaster; (2) "Crisis response services" means consultation, risk assessment, referral and crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster;

	(3) "Critical incident stress management team member or team leader," referred to also as "team member," or "team leader," means an individual specially trained to provide crisis response services as a member or leader of an organized community or local crisis response team that holds membership in a registered critical incident stress management team; (4) "Registered team" means a team formally registered with a recognized training agency. A recognized training agency shall include the International Critical Incident Stress Foundation, the National Organization for Victim Assistance, the American Red Cross, the Tennessee Public Safety Network and other such organizations; (5) "Training session" means a session providing crisis response training by a qualified trained trainer utilizing the standards established by the accrediting agencies set out in subdivision (a)(4); and (6) "Volunteer" means a person who serves and receives no remuneration for services except reimbursement for actual expenses.
Dual Relay and Interpreter Privilege Definitions	Tenn. Code Ann. § 24-1-210(a). (a) As used in this section, unless the context otherwise requires: (1) "Dual party relay operator" means a person who facilitates communication over the telephone between persons, one (1) of whom depends on the use of a special device for transmitting text rather than the spoken voice through the telephone line; and (2) "Interpreter" means a person who facilitates communication between persons who are unable to communicate with one another directly without such facilitation.
Deaf and Hearing Impaired Persons Interpreter Privilege Definitions	Tenn. Code Ann. § 24-1-211(a). As used in this section: (1) "Deaf person" means a person with a hearing loss so great as to prevent such person from understanding language spoken in a normal tone. "Deaf person" further includes, but is not limited to, a person who is mute and a person who is both deaf and mute. The

	archaic term "dumb" that formerly related to deaf people shall hereafter be struck from all future state publications that in any way refer to the deaf; (2) "Oral interpreter" means a person who interprets language through facial and lip movements only and who does not use manual communication. An oral interpreter shall be provided upon the request of a deaf person who does not communicate in sign language. The right of a deaf person to an interpreter may not be waived except by a deaf person who does not use sign language and who initiates such request for waiver in writing. Such waiver is subject to approval of counsel to such deaf person, if existent, and is subject to approval of the appointing authority; and (3) "Qualified interpreter" means an interpreter certified by the National Registry of Interpreters for the Deaf, Tennessee Registry of Interpreters for the Deaf, or, in the event an interpreter so certified is not available, an interpreter whose qualifications are otherwise determined. Efforts to obtain the services of a qualified interpreter certified with a Legal Skills Certificate or a Comprehensive Skills Certificate will be made prior to accepting services of an interpreter with lesser certification. No "qualified interpreter" shall be appointed unless the appointing authority and the deaf person make a preliminary determination that the interpreter is able to readily communicate with the deaf person and is able to accurately interpret the statements of the deaf person and interpret the proceedings in which a deaf person may be involved.

[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]nformally, 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] The part of the statute governing law enforcement body-worn camera videos will expire as of July 1, 2022. Tenn. Code Ann. § 10-7-504(u)(5) ("This subsection (u) is deleted on July 1, 2022, and shall no longer be effective on and after such date.").

This resource was developed by the National Crime Victim Law Institute (NCVLI) under 2018-V3-GX-K049 and 2020-V3-GX-K001, awarded to the International Association of Chiefs of Police (IACP) by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this resource are those of the contributors and do not necessarily represent the official position of the U.S. Department of Justice.