



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

INTRODUCTION

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

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

USING THIS RESOURCE

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

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OVERVIEW

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

Key Takeaways

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

Discussion

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

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

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

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

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

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

Key Takeaways

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

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

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

Discussion

Privacy

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

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

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

Confidentiality

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

As part of accessing services, victims frequently share highly sensitive personal information

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

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

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

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

information falls within the state's required disclosures to defendant pursuant to the United States Supreme Court case *Brady v. Maryland*.

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

Privilege

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

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

Understanding the Differences

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Key Takeaways

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

Discussion

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

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

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

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

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

responsible manner.”²³

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

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

Key Takeaways

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

Key Takeaways

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

Discussion

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

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

Key Takeaways

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

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

Discussion

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

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

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

SELECT LAWS

SELECT PRIVACY LAWS

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

Although Washington's victims' rights laws do not offer victims a broad right to privacy, the state affords victims a series of narrow privacy protections. For example, victims have a statutory right, "whenever practical," to be provided with "a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants." Wash. Rev. Code Ann. § 7.69.030(6); *see also id.* at § 7.69A.030(3) (affording child-victims the right to secure waiting area); *id.* at § 7.69B.020(1)(c) (affording dependent person-victims the right to a secure waiting area).

Washington also recognizes enhanced privacy protections for certain victims, such as child-victims, victims of sexual offenses and victims of domestic violence. For instance, child-victims have the express right, in criminal cases, to not have their names, addresses or photographs disclosed by a law enforcement officer, prosecutor or state agency, without permission from the victim or their parent or guardian, to anyone other than another law enforcement agency, prosecutor or government victims' services provider. Wash. Rev. Code Ann. § 7.69A.030(4). Child-victims of sexual assault also have additional privacy rights related to the disclosure of their identifying information, such as the "right not to have disclosed to the public or press at any court proceeding involved in the prosecution of the sexual assault, the child victim's name, address, location, photographs, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator." *Id.* at § 10.52.100; *see also id.* at § 10.97.030(1) (stating that child sexual abuse victims' identifying and contact information is confidential and not subject to release to press or public as part of criminal history record). Courts must "ensure that information identifying the child victim is not disclosed to the press or the public and that in the event of any improper disclosure the court shall make all necessary orders to restrict further dissemination of identifying information improperly obtained." *Id.* at § 10.52.10. Courts must also "order that any portion of any court records, transcripts, or recordings of court proceedings that contain information identifying the child victim shall be sealed and not open to public inspection unless those identifying portions are deleted from the documents or tapes." *Id.*

Child-victim' privacy is also protected by a statute authorizing such victims, under certain circumstances, to give testimony by closed-circuit television. Wash. Rev. Code Ann. § 9A.44.150. All recorded tapes of such testimony "shall be subject to any protective order of the court for the purpose of protecting the privacy of the child witness." *Id.* at § 9A.44.150(7). In cases involving the sexual exploitation of children, to protect victim privacy, Washington expressly recognizes limitations on access to depictions of such exploitation, *id.* at § 9.68A.170, and regulates the sealing, storage and destruction of such

depictions, *id.* at § 9.68A.180. *See also id.* at § 9.68A.190 (providing that “[a]ny depiction of a minor engaged in sexually explicit conduct, in any format, distributed as discovery to defense counsel or an expert witness prior to June 7, 2012, shall either be returned to the law enforcement agency that investigated the criminal charges or destroyed, if the case is no longer pending in superior court” and, “[i]f the case is still pending, the depiction shall be returned to the superior court judge assigned to the case or the presiding judge”).

Audio and video recordings of child forensic interviews are confidential and cannot be disclosed without a court order. Wash. Rev. Code Ann. § 26.44.188. This protection reflects the legislature’s recognition of “an inherent privacy interest that a child has with respect to the child’s recorded voice and image when describing the highly sensitive details of abuse or neglect upon the child.” *Id.* Noting that “reasonable restrictions on the dissemination of these recordings can accommodate both privacy interests and due process, the legislature further stated its intention to, *inter alia*, “provide additional sanction authority for violations of protective orders that set forth such terms and conditions as are necessary to protect the privacy of the child.” *Id.*

Washington also offers a narrow privacy protection in the restitution context for child-victims of rape who become pregnant; in such a scenario, the restitution order may not contain the victim or the child’s identifying information. Wash. Rev. Code Ann. § 9.94A.750(6); *id.* at § 9.94A.753(6).

The privacy-related rights and interests of victims of sexual assault include the right to not be asked or required to submit to a truth telling device. Wash. Rev. Code Ann. § 10.58.038. The state also protects victim privacy through its rape shield law, under which a sex crime victim’s sexual history cannot be admitted into evidence, except under limited circumstances. *Id.* at § 9A.44.020. In the context of a sexual assault protection order, Washington law provides that where the petition states that disclosure of the victim’s address would jeopardize the victim’s safety, that address may be omitted from court filings. *Id.* at § 7.90.020(6).

Stalking victims petitioning for a protection order have a similar right to omit their address, for safety reasons, from court filings related to the petition. Wash. Rev. Code Ann. § 7.92.030(5).

Additionally, Washington protects the privacy rights and interests of victims of child abuse, domestic violence, human trafficking, sexual offenses and stalking through its Address Confidentiality Program, Wash. Rev. Code Ann. §§ 40.24.010 to 40.24.110, which is discussed more fully in the section “Select Confidentiality Laws.”

The section “Select Confidentiality Laws” also contains information about victims’ privacy protections in the context of public records requests.

SELECT CONFIDENTIALITY LAWS

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

Washington offers a number of confidentiality protections to crime victims, many of which relate to protecting the victim's locating information from disclosure. For example, where victim information is contained in criminal records, Washington has a stated policy "to provide for the completeness, accuracy, confidentiality, and security" of such information under the state's Criminal Records Privacy Act. Wash. Rev. Code Ann. § 10.97.010. In particular, pursuant to this Act, "[i]nformation revealing the specific details that describe the alleged or proven child victim of sexual assault under age eighteen, or the identity or contact information of an alleged or proven child victim under age eighteen is confidential and not subject to release to the press or public without the permission of the child victim and the child's legal guardian." *Id.* at § 10.97.130(1). Such identifying information "includes the child victim's name, addresses, location, photographs, and in cases in which the child victim is a relative, stepchild, or stepsibling of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator." *Id.* For the purposes of the statute, "[c]ontact information includes phone numbers, email addresses, social media profiles, and user names and passwords." *Id.* Otherwise protected identifying and contact information regarding a child sex abuse victim "may be released to law enforcement, prosecutors, judges, defense attorneys, or private or governmental agencies that provide services to the child victim of sexual assault." *Id.* Before criminal history record information is released, "the releasing agency shall delete any contact information or information identifying a child victim of sexual assault from the information except as provided in this section." *Id.* These restrictions on disclosure do not apply to court documents or other materials admitted in open court proceedings. *Id.* at § 10.97.130(2).

Washington also protects the confidentiality of victims' information in the context of victim notification. For example, victims have a right to notice of a criminally committed offender's escape or disappearance from a state facility; information regarding the victim and the notice are confidential and not available to the committed offender. Wash. Rev. Code § 10.77.165(2). Victim confidentiality is similarly protected when affording victims their rights to notice of changes in certain offenders' custody status, including release and escape. *Id.* at § 10.77.205(1); *id.* at § 71.09.140(2); *id.* at § 72.09.712(2). Additionally, any information regarding a crime victim who receives notice of a hearing before the clemency and pardon board or the indeterminant sentence review board is confidential and is not available to the offender. *Id.* at § 9.94A.885(3); *id.* at § 9.95.260(3).

Victims who apply for crime victim compensation are also entitled to confidentiality protections. Information contained in victim compensation claim files and records are confidential and not open to public inspection, subject to certain exceptions. Wash. Rev. Code Ann. § 7.68.140. One exception to this general rule of confidentiality exists where state or federal law authorizes the limited disclosure of such information and records to public employees in the performance of their official duties. *Id.* Another exception exists

for physicians treating or examining victims seeking benefits or physicians giving medical advice to the department of labor and industries regarding a victim's claim; such physicians may, at the discretion of the department and as not otherwise limited by state or federal law, inspect victims' claim files and records. *Id.* at § 7.68.140.

Washington offers additional confidentiality protections to victims of domestic violence, sexual assault, trafficking or stalking through the state's address confidentiality program. Under this program, such victims can request a substitute address to use to receive first class mail, to register to vote and for other public and private purposes. Wash. Rev. Code Ann. § 40.24.030; *id.* at § 40.24.060. All state and local government agencies must accept the substitute address, absent statutory duties to the contrary. *Id.* at § 40.24.050. Records in a program participant's file are not available for inspection or copying, subject to certain exceptions. *Id.* at § 40.24.070. Court orders for address confidentiality participant information may only be issued upon a probable cause finding that disclosure of the information is legally necessary in the course of a criminal investigation or prosecution or to prevent immediate risk to a minor and to meet the statutory requirements of the state's child welfare system. *Id.* For more information about Washington's address confidentiality program, see <https://www.sos.wa.gov/acp/>.

Washington also protects victim confidentiality in the context of public records requests. In general, records in Washington are open to any person for inspection, copying or mechanical reproduction under the state's Public Records Act (PRA). Wash. Rev. Code Ann. § 42.56.080. Various categories of records and information relevant to crime victims are exempt from public inspection. For instance, the PRA exempts from disclosure portions of records that "would violate personal privacy or vital governmental interests," unless, after a hearing with notice to all interested persons, a court finds that such an exemption is "unnecessary to protect any individual's right of privacy or any vital governmental function." *Id.* at § 42.56.210(1)–(2). The PRA also exempts from public disclosure personal information from certain files, such as those related to students in public schools and patients or clients of public health agencies. *Id.* at § 42.56.230.

Most relevantly, the PRA exempts certain investigative, law enforcement and crime victim information from public inspection. Wash. Rev. Code Ann. § 42.56.240. This exemption covers "information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property." *Id.* at § 42.56.240(2). This exemption also covers any records related to sex offenses, *id.* at § 42.56.240(3), as well as any records containing specific details about child sexual abuse or the contact information for child sexual abuse victims, *id.* at § 42.56.240(5). Additionally, any body worn camera records are exempt from disclosure to the extent that nondisclosure is "essential for the protection of any person's right to personal privacy," including, but not limited to situations where the recording depicts: an intimate image; a minor; the identity of or communications with victims of domestic violence, sexual assault, and the disclosure of intimate images; or the location of a community-based domestic violence program or emergency shelter. *Id.* at § 42.56.240(14). The PRA also exempts

from disclosure files and records held by postsecondary educational institutions regarding victims of sexual misconduct. *Id.* at § 42.56.375; *see also id.* at § 28B.112.030(2) (records maintained by a campus-affiliated victim advocate are not subject to public inspection and copying, subject to certain exceptions). In many of these instances, where a victim has expressed a desire for disclosure or nondisclosure of their identifying information or records, that desire governs. *See, e.g., id.* at § 42.56.240(2) (when, at the time of filing a complaint, a victim indicates desire for disclosure or nondisclosure of identity, that desire governs); *id.* at § 42.56.240(14)(vi) (sexual assault, domestic violence and disclosure of indecent image victims desire for disclosure or nondisclosure of body worn camera records containing their identity or communications governs); *id.* at § 42.56.375 (sexual assault victim's desire for disclosure of personal identifying information contained in postsecondary educational records governs). The PRA also includes an exemption for client records of domestic violence programs, community sexual assault programs or services for underserved populations. *Id.* at § 42.56.370.

Some statutory provisions outside the PRA related to victims' rights and interests also expressly exempt victim records from disclosure. For example, one of the statutes governing child forensic interviews provides that recordings of such interviews are not subject to disclosure under the PRA. Wash. Rev. Code Ann. § 26.44.187. Likewise, the statute governing the confidentiality of campus-affiliate victim advocate records provides that such records not subject to public inspection and copying. *Id.* at § 28B.112.030(2).

Washington protects the confidentiality of the communications and related records between victims and certain service providers. *See, e.g.,* Wash. Rev. Code Ann. § 26.44.187 (confidentiality of child forensic interviews); *id.* at § 26.50.250 (confidentiality of name and location of domestic violence programs); *id.* at § 28B.112.030(1) (confidentiality of communications between student, faculty, staff or administrator at an institution of higher learning who are victims of sexual assault, dating or domestic violence or stalking and campus-affiliated victim advocates); *id.* at § 70.123.075 (confidentiality of domestic violence program records); *id.* at § 70.123.110 (confidentiality of addresses of domestic violence shelters); *id.* at § 70.125.065 (confidentiality of community sexual assault program and underserved populations providers records).

State law allows for disclosure of some of these otherwise confidential records in limited circumstances. For instance, confidential domestic violence program records are not subject to discovery in any judicial proceedings unless: there is a written pretrial motion with supporting affidavits; the court concludes, based upon in camera review of the records, that "the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records, taking into account the further trauma that may be inflicted upon the victim or the victim's children by the disclosure of the records"; and the court enters an order stating whether any part of the records are discoverable and setting forth the basis for the court's finding. Wash. Rev. Code Ann. § 70.123.075(1); *see also id.* at § 70.125.065 (setting forth similar procedure regarding defense counsel requests for disclosure of records of sexual assault programs and underserved population service providers). Disclosure of domestic violence program records pursuant to such an order does

not constitute a waiver of a victim's rights or privileges under other statutes, rules of evidence or common law. *Id.* at § 70.123.075(3). Additionally, where a court order requires disclosure of such records, the domestic violence program must make "reasonable attempts" to provide the victim with notice and must take steps necessary to protect the victim's privacy and safety. *Id.*

Similarly, no court or administrative body may compel disclosure of the name and location of a domestic violence program unless, following a hearing, the court concludes, by "clear and convincing evidence that disclosure is necessary for the implementation of justice after consideration of safety and confidentiality concerns of the parties and other residents of the domestic violence program, and other alternatives to disclosure that would protect the interests of the parties." Wash. Rev. Code Ann. § 26.50.250(1). Additionally, "[i]n any proceeding where the confidential name, address, or location of a domestic violence program is ordered to be disclosed, the court shall order that the parties be prohibited from further dissemination of the confidential information, and that any portion of any records containing such confidential information be sealed." *Id.* at § 26.50.250(2).

As detailed in the following section, "Select Privilege Laws," Washington relies upon evidentiary privileges to protect the confidentiality of communications between victims and certain providers of counseling and other support services, as well as the confidentiality of records related to the provision of these services. *See, e.g.*, Wash. Rev. Code Ann. § 5.60.060(7) (sexual assault advocate-victim privilege); *id.* at § 5.60.060(8) (domestic violence advocate-victim privilege); *id.* at § 5.60.060(4) (health care provider-patient privilege); *id.* at § 5.60.060; *id.* at § 5.60.060(9) (mental health counselor-, independent clinical social worker-, marriage and family therapist-client privilege); *id.* at § 5.60.060(1) (spouse or domestic partner privilege); *id.* at § 5.60.060(2) (attorney-client privilege); *id.* at § 5.60.060(3) (clergy-penitent privilege); *id.* at § 5.60.060(6) (peer support group counselor-client privilege); *id.* at § 5.62.020 (registered nurse-patient privilege).

SELECT PRIVILEGE LAWS

What are key privileges in Washington?

Victims in Washington have a number of privileges that they can assert to prevent disclosure of their private communications with certain individuals, including sexual assault and domestic violence victim advocates; health care providers; counselors; clinical social workers, marriage and family therapists; spouses or domestic partners; attorneys; clergy; peer support group counselors; and registered nurses. *See, e.g.*, Wash. Rev. Code Ann. § 5.60.060(7) (sexual assault advocate-victim privilege); *id.* at § 5.60.060(8) (domestic violence advocate-victim privilege); *id.* at § 5.60.060(4) (health care provider-patient privilege); *id.* at § 5.60.060; *id.* at § 5.60.060(9) (mental health counselor-, independent clinical social worker-, marriage and family therapist-client privilege); *id.* at § 5.60.060(1) (spouse or domestic partner privilege); *id.* at § 5.60.060(2) (attorney-client privilege); *id.* at

§ 5.60.060(3) (clergy-penitent privilege); *id.* at § 5.60.060(6) (peer support group counselor-client privilege); *id.* at § 5.62.020 (registered nurse-patient privilege); *see also id.* at § 7.90.060 (providing that sexual assault advocate privilege applies to communications between a victim advocate and victim seeking a sexual assault protection order).

Some of these privileges are subject to express limitations with respect to crime victims. For instance, the privilege governing communications between victims and their spouses or domestic partners does not apply in criminal proceedings involving a crime committed by one spouse or partner against the other; it also does not apply in cases where a crime was committed by one spouse or domestic partner against a child of the offender. Wash. Rev. Code Ann. § 5.60.060(1). The physician-, surgeon-, osteopath- and registered nurse-patient privileges do not apply in any judicial proceedings regarding a child's injury, neglect or sexual abuse. *Id.* at § 5.60.060(4)(a); *id.* at § 5.62.020(2). Generally, none of these privileges apply where the professional is a mandatory child abuse and neglect reporter and the communication causes the reporter to believe that a child has suffered abuse or neglect. *Id.* at § 26.44.030(1)(a); *id.* § 5.60.060(8)(b).

The sexual assault advocate-victim privilege bars the advocate, absent the victim's consent, from disclosing confidential communications made between the victim and the advocate. Wash. Rev. Code Ann. § 5.60.060(7); *see also id.* at § 7.90.060 (providing communications between a sexual assault advocate and a victim petitioning for a sexual assault protective order are protected by § 5.60.060). For the purposes of this privilege, a "sexual assault advocate" is an "employee or volunteer from a community sexual assault program or underserved populations provider, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings." *Id.* at § 5.60.060(7)(a). A sexual assault advocate may disclose a confidential communication without the victim's consent "if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and communications under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action." *Id.* at § 5.60.060(7)(b). In any civil or criminal proceeding arising out of a such a disclosure, "the good faith of the sexual assault advocate who disclosed the confidential communication shall be presumed." *Id.*

Under the domestic violence advocate-victim privilege, the advocate "may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate." Wash. Rev. Code Ann. § 5.60.060(8); *see also id.* at § 70.123.070 (providing that community-based domestic violence programs and emergency shelter programs receiving state funds must require employees and volunteers to protect victim confidentiality and privacy in accordance with, *inter alia*, the domestic violence advocate-victim privilege). For the purposes of this privilege, "'domestic violence advocate' means an employee or supervised volunteer from a community-based domestic

violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of children, youth, and families as defined in RCW 26.44.020." *Id.* at § 5.60.060(8)(a).

Importantly, as this statutory language provides, the domestic violence advocate-victim privilege does not apply to communications between victims and system-based domestic violence advocates. One of the official notes of this statutory provision addresses this issue: "The legislature intends, by amending RCW 5.60.060, to recognize that advocates help domestic violence victims by giving them the support and counseling they need to recover from their abuse, and by providing resources to achieve protection from further abuse. Without assurance that communications made with a domestic violence advocate will be confidential and protected from disclosure, victims will be deterred from confiding openly or seeking information and counseling, resulting in a failure to receive vital advocacy and support needed for recovery and protection from abuse." Wash. Rev. Code Ann. § 5.60.060, Official Notes, Intent 2006 c 259. The note goes on to explain that the "investigative or prosecutorial functions performed by individuals who assist victims in the criminal legal system and in other state agencies are different from the advocacy and counseling functions performed by advocates who work under the auspices or supervision of a community victim services program. The legislature recognizes the important role played by individuals who assist victims in the criminal legal system and in other state agencies, but intends that the testimonial privilege not be extended to individuals who perform an investigative or prosecutorial function." *Id.*

A domestic violence advocate may disclose a confidential communication without the victim's consent "if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person." Wash. Rev. Code Ann. § 5.60.060(8)(b). As noted above, the privilege does not apply in situations where the communication triggers the victim advocate's mandatory child abuse or neglect reporting obligations under Wash. Rev. Code Ann. § 26.44.030(1) and (15). *Id.* at § 5.60.060(8)(b). If a domestic violence advocate makes a disclosure that is otherwise protected by this privilege, the advocate is immune from liability that might result from such disclosure. *Id.* Should a civil or criminal action arise out of such a disclosure, "the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed." *Id.*

Although domestic violence program records are generally confidential, they may be disclosed where a court finds, upon in camera review of the records, that they are relevant and their probative value outweighs the victim's privacy interest in the confidentiality of such records, taking into account the further trauma disclosure will cause the victim and the victim's children. Wash. Rev. Code Ann. § 70.123.075(1)(c). Importantly, disclosure of such records does not waive "the victim's rights or privileges under statutes, rules of evidence, or common law." *Id.* at § 70.123.075(3). Additionally, where a victim of domestic violence, sexual assault or stalking supports her right to leave from work under

<p>Wash. Rev. Code Ann. § 49.76.010 with documentation that the employee-victim sought assistance from a victim advocate, the provision of such documentation does not waive or diminish the confidential or privileged nature of the communications. <i>Id.</i> § 49.76.040(4)(c).</p> <p>For reference, the text of the privileges discussed in this section appears below.</p>	
<p>Spousal or Domestic Partner Privilege</p>	<p>Wash. Rev. Code Ann. § 5.60.060(1).</p> <p>A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 71.05 or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 71.05 or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.</p>
<p>Attorney-Client Privilege</p>	<p>Wash. Rev. Code Ann. § 5.60.060(2).</p> <p>(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.</p> <p>(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.</p>

<p>Clergy-Penitent Privilege</p>	<p>Wash. Rev. Code Ann. § 5.60.060(3).</p> <p>A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.</p>
<p>Health Care Provider-Patient Privilege</p>	<p>Wash. Rev. Code Ann. § 5.60.060(4).</p> <p>Subject to the limitations under RCW 71.05.217(6) and (7), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:</p> <p>(a) In any judicial proceedings regarding a child’s injury, neglect, or sexual abuse or the cause thereof; and</p> <p>(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such.</p>
<p>Peer Group Counselor-Client Privilege</p>	<p>Wash. Rev. Code Ann. § 5.60.060(6)(a).</p> <p>A peer support group counselor shall not, without consent of the peer support group client making the communication, be compelled to testify about any communication made to the counselor by the peer support group client while receiving counseling. The counselor must be designated as such by the agency employing the peer support group client prior to the incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding first responder, department of corrections staff person, or jail staff person; a witness; or a party to the incident which prompted the delivery of peer support group counseling services to the peer support group client.</p>

<p>Sexual Assault Advocate-Victim Privilege</p>	<p>Wash. Rev. Code Ann. § 5.60.060(7)(b).</p> <p>A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate. . . .</p> <p>A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and communications under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this section, the good faith of the sexual assault advocate who disclosed the confidential communication shall be presumed.</p>
<p>Domestic Violence Advocate-Victim Privilege</p>	<p>Wash. Rev. Code Ann. § 5.60.060(8)(b).</p> <p>A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate. . . .</p> <p>A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW 26.44.030(1) or to disclose relevant records relating to a child as required by RCW 26.44.030(15). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.</p>

<p>Mental Health Counselor-, Clinical Social Worker-, Marriage and Family Therapist-Client Privileges</p>	<p>Wash. Rev. Code Ann. § 5.60.060(9).</p> <p>A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:</p> <p>(a) With the written authorization of that person or, in the case of death or disability, the person’s personal representative;</p> <p>(b) If the person waives the privilege by bringing charges against the mental health counselor licensed under chapter 18.225 RCW;</p> <p>(c) In response to a subpoena from the secretary of health. The secretary may subpoena only records related to a complaint or report under RCW 18.130.050;</p> <p>(d) As required under chapter 26.44 or 74.34 RCW or RCW 71.05.217 (6) or (7); or</p> <p>(e) To any individual if the mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose.</p>
<p>Registered Nurse-Patient Privilege</p>	<p>Wash. Rev. Code Ann. § 5.62.020.</p> <p>No registered nurse providing primary care or practicing under protocols, whether or not the physical presence or direct supervision of a physician is required, may be examined in a civil or criminal action as to any information acquired in attending a patient in the registered nurse’s professional capacity, if the information was necessary to enable the registered nurse to act in that capacity for the patient, unless:</p> <p>(1) The patient consents to disclosure or, in the event of death or disability of the patient, his or her personal representative, heir, beneficiary, or devisee consents to disclosure; or</p>

	(2) The information relates to the contemplation or execution of a crime in the future, or relates to the neglect or the sexual or physical abuse of a child, or of a vulnerable adult as defined in RCW 74.34.020, or to a person subject to proceedings under chapter *70.96A, 71.05, or 71.34 RCW.
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DEFINITIONS

Key definitions appear below.	
Statutory Victims’ Rights Definition of “Victim”	<p>Wash. Rev. Code Ann. § 7.69.020(3).</p> <p>“Victim” means a person against whom a crime has been committed or the representative of a person against whom a crime has been committed.</p>
Address Confidentiality Definitions	<p>Wash. Rev. Code Ann. § 40.24.010.</p> <p>Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.</p> <p>(1) “Address” means a residential street address, school address, or work address of an individual, as specified on the individual’s application to be a program participant under this chapter.</p> <p>(2) “Domestic violence” means an act as defined in RCW 10.99.020 and includes a threat of such acts committed against an individual in a domestic situation, regardless of whether these acts or threats have been reported to law enforcement officers.</p> <p>(3) “Program participant” means a person certified as a program participant under RCW 40.24.030.</p> <p>(4) “Stalking” means an act defined in RCW 9A.46.110 and includes a threat of such acts committed against an individual, regardless of whether these acts or threats have been reported to law enforcement officers.</p> <p>(5) “Trafficking” means an act as defined in RCW 9A.40.100 or an act recognized as a severe form of trafficking under 22 U.S.C. Sec. 7102(8) as it existed on June 12, 2008, or such subsequent date as</p>

	<p>may be provided by the secretary of state by rule, consistent with the purposes of this subsection, regardless of whether the act has been reported to law enforcement.</p>
<p>Peer Support Group Counselor-Client Privilege Definitions</p>	<p>Wash. Rev. Code Ann. § 5.60.060(6)(b).</p> <p>For purposes of this section:</p> <p>(i) “First responder” means:</p> <ul style="list-style-type: none"> (A) A law enforcement officer; (B) A limited authority law enforcement officer; (C) A firefighter; (D) An emergency services dispatcher or recordkeeper; (E) Emergency medical personnel, as licensed or certified by this state; or (F) A member or former member of the Washington national guard acting in an emergency response capacity pursuant to chapter 38.52 RCW. <p>(ii) “Law enforcement officer” means a general authority Washington peace officer as defined in RCW 10.93.020.</p> <p>(iii) “Limited authority law enforcement officer” means a limited authority Washington peace officer as defined in RCW 10.93.020 who is employed by the department of corrections, state parks and recreation commission, department of natural resources, liquor and cannabis board, or Washington state gambling commission.</p> <p>(iv) “Peer support group client” means:</p> <ul style="list-style-type: none"> (A) A first responder; (B) A department of corrections staff person; or (C) A jail staff person. <p>(v) “Peer support group counselor” means:</p> <ul style="list-style-type: none"> (A) A first responder, department of corrections staff person, or jail staff person or a civilian employee of a first responder entity or agency, local jail, or state agency who has received training to provide emotional and moral support and counseling to a peer support group client who needs those services as a result of an incident in which the peer support group client was involved while acting in his or her official capacity; or (B) A nonemployee counselor who has been designated by the first responder entity or agency, local jail, or state agency to provide emotional and moral support and counseling to a peer support group

	client who needs those services as a result of an incident in which the peer support group client was involved while acting in his or her official capacity.
Sexual Assault Advocate-Victim Privilege Definition	<p>Wash. Rev. Code Ann. § 5.60.060(7)(a).</p> <p>For purposes of this section, “sexual assault advocate” means the employee or volunteer from a community sexual assault program or underserved populations provider, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.</p>
Domestic Violence Advocate-Victim Privilege Definition	<p>Wash. Rev. Code Ann. § 5.60.060(8)(a).</p> <p>For purposes of this section, “domestic violence advocate” means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor’s office, or the child protective services section of the department of children, youth, and families as defined in RCW 26.44.020.</p>

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

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

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

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

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

⁶ There are different levels of privileges: absolute, absolute diluted and qualified. When an absolute privilege attaches, only a victim has the right to authorize disclosure of that information and the court can never order the

information to be disclosed without the victim’s consent. Absolute privileges are rare, however, because privileges are seen to run contrary to the truth finding function of courts.

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

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

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

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

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

¹⁴ *Id.*

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

¹⁶ *Id.*

¹⁷ *Id.*

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

¹⁹ *Id.*

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

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

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

“Administration and Evaluation,” the ethical standard and the corresponding commentary can be located at https://www.ovc.gov/model-standards/ethical_standards_5.html.

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

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

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

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

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

²⁸ *Id.*

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

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

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

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

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

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

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

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