NATIONAL CRIME VICTIM LAW INSTITUTE

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# TRIBAL LAW ENFORCEMENT-BASED VICTIM SERVICES IN KANSAS: 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 can be found in federal, state and tribal constitutions, statutes, rules, policies and cultural practices. In this resource, victims' rights to privacy, confidentiality and privilege are analyzed under federal and state law.[1] 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 one's role as an advocate, including limitations on that role, is critical to victims' ability to make informed decisions about whether, when and how to exercise their rights, as well as whether, what and how much information to share with any particular victim services provider. In addition, advocates need to build and maintain relationships throughout the community in order to provide meaningful referrals to victim services providers with complementary roles when a victim needs the referral.

## LIMITED SCOPE OF RESOURCE: JURISDICTION

In the context of crimes perpetrated on tribal land or against tribal members[2] on nontribal land, victims' meaningful choices about whether to assert their rights require that they know in which justice system—tribal, federal or state—their case will be investigated and prosecuted, as well as what their rights are within that system. The authority of a justice system to investigate and try crimes is known as "jurisdiction" and, for crimes committed on tribal land or against tribal members on nontribal land, the determination of jurisdiction can be complex.

Given this complexity, full analysis of jurisdiction over crimes happening within Kansas's borders is beyond the scope of this resource; instead, it provides general guidance for tribal law enforcement-based victim services providers facing jurisdictional questions. Ultimately, understanding which justice system has jurisdiction over a crime committed on tribal land or against a tribal member on nontribal land—as well as the privacy, confidentiality and privilege rights recognized within each justice system—is critical to providing effective victims' services.

The determination of which justice system has jurisdiction over a crime committed on tribal land or against a tribal member on nontribal land depends upon various sources of law, including federal statutes, court decisions, and regulations, as well as tribal laws and agreements with state and local governments. Some factors in the jurisdictional analysis for crimes committed on tribal land include: whether the perpetrator and/or victim is an Indian[3];[4] the type and seriousness of the crime at issue;[5] the type of punishment sought;[6] and whether Public Law 280[7] or another federal statute[8] expressly affords a state jurisdiction over crimes committed on tribal land in place of the federal government and, when applicable, whether the state has retroceded any or all of such criminal jurisdiction to the federal government.[9] The process for determining jurisdiction over a crime committed against a tribal member on nontribal land also depends upon consideration of multiple factors, though the primary concern is whether the crime at issue violates tribal, federal and/or state law.[10] Although jurisdiction over such crimes generally falls to the federal government or the states, in some instances, tribal jurisdiction may extend to crimes committed on nontribal land.[11]

Consultation with other professionals, including a tribe's legal counsel as well as tribal- and nontribal-based prosecutors, and reliance on other resources can provide further guidance regarding these jurisdictional questions. For a general guide to criminal jurisdiction on tribal land, *see* Tribal Law and Pol'y Inst. *General Guide to Criminal Jurisdiction in Indian Country*, Tribal Court Clearinghouse, https://www.tribal-institute.org/lists/jurisdiction.htm.

## USING THIS RESOURCE

This resource is designed to enhance victim services personnel's knowledge and understanding of the laws governing crime victims' rights to privacy, confidentiality and privilege. It focuses on the federal and state laws that protect these rights; depending on the outcome of the jurisdictional analysis, such laws may apply when a crime is committed on tribal land or against a tribal member on nontribal land. This resource provides an overview of key concepts that can help facilitate victims' meaningful choices regarding these rights, as well as a discussion of relevant federal and state laws and the text of some of these laws.

To make the best use of this resource, it is recommended that victim services providers determine—in consultation with other system professionals, including a tribe's legal counsel as well as tribal- and nontribal-based prosecutors—whether there is tribal, federal and/or state jurisdiction to investigate and prosecute the crime(s) at issue. When there is federal and/or state jurisdiction, the victim services provider can refer to this resource to help determine the privacy, confidentiality and privilege rights that are available and applicable to crime victims. If a tribe that is located within Kansas—such as the Prairie Band Potawatomi Nation—has jurisdiction, the victim services provider can contact the relevant tribal court or tribal legal department to learn about applicable tribal-based victims' rights to privacy, confidentiality or privilege.[12] Additionally, even if a tribe has jurisdiction over a crime, certain federal- and/or state-based victim services and resources may be available to the victim, such as crime victim compensation; if such services or resources are available, the federal and/or state rights discussed in this resource as connected to such services and resources may apply.[13]

In light of the breadth, complexity and evolving nature of law, this resource does not include all laws. Nothing in this resource constitutes legal advice, nor does it substitute for legal advice. This resource is best used together with its companion resource, *Tribal Law Enforcement-Based Victim Services in Kansas: Select Federal and State Victims' Rights*.

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## OVERVIEW

**What are 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.[14] 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.[15] 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.[16]

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.[17] Victims also have a federal constitutional right to privacy.[18]

In addition to the broad rights to privacy that exist in federal and state prosecutions, 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.[19] 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).[20]

In contrast with the states, the federal government has not passed legislation recognizing explicit evidentiary privileges. For this reason, the recognition of privileges in federal criminal cases is grounded in federal common law—meaning it is found in federal court opinions.[21] Some privileges that have been recognized by federal courts include victim-advocate, attorney-client, psychotherapist-patient, and spousal.[22]

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?**[23]

**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."[24] FERPA applies to those agencies and institutions that receive funding under any U.S. Department of Education program.[25] "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."[26]

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.[27]

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."[28] 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)."[29]

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.[30] The Fund supports victim assistance programs that offer direct victim services and crime victim compensation.[31] 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.[32]

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

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

Even if disclosure of individual client information is required by statute or court order, state administering agencies and sub-recipients' privacy and confidentiality obligations owed to crime victims do not disappear. State administering agencies and subrecipients of VOCA funds "shall make reasonable attempts to provide notice to victims affected by the

disclosure of the information, and take reasonable steps necessary to protect the privacy and safety of the persons affected by the release of the information." 28 C.F.R. § 94.115(b). VAWA imposes similar requirements on recipients of funding. *See* 34 U.S.C. § 12291(b)(2)(C) ("If release of information . . . is compelled by statutory or court mandate[,] . . . grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the disclosure of information[] and **. . .** shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information."). VOCA also mandates that none of the protections afforded to victims be circumvented. For example, a crime victim may neither be required to release personally identifying information in exchange for services nor be required to provide personally identifying information for recording or reporting purposes. 28 C.F.R. § 94.115(d).

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

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

The federal open records' law, known as the Freedom of Information Act (FOIA or the "Act"), 5 U.S.C. §552, was enacted in 1966. Similar to its state counterparts, FOIA provides for the legally enforceable right of any person to obtain access to federal agency records subject to the Act, except to the extent that any portions of such records are protected from public disclosure by one of the nine exemptions. Three such exemptions, Exemptions 6, 7(C) and 7(F) protect different types of personal information in federal records from disclosure. Exemption 6 "protects information about individuals in 'personnel and medical files and similar files' when the disclosure of such information 'would constitute a clearly unwarranted invasion of personal privacy.'"[33] 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.'"[34] 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 understand 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.[35] 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."[36]

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.[37]

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."[38]

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.[39]

**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 federal 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*, federal and state statutes or procedural rules 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.

*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. With respect to federal or state law enforcement, 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 those records 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.[40] 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.[41] 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."[42] 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."[43]

Federal and state courts have found that prosecution-based victim advocates are considered part of the "prosecution team" for *Brady* purposes.[44] 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.[45] 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.

*Giglio v. United States,* 405 U.S. 150 (1972), is a case that was heard before the United States Supreme Court.[46] The impact of the Court's decision in *Giglio* intersects with advocates' work as it makes it imperative that state and federal law enforcement-based 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?[47]**

**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 state and federal system-based advocates, their superiors and the attorneys with whom they work is determining the type

of subpoena received.[48] 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.[49]

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.[50] 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 federal cases?**

As noted above, crime victims have a federal constitutional privacy right that is applicable in federal and state cases. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973). Victims of crime in federal cases also have myriad statutory and rule-based privacy rights. *See, e.g.*, 18 U.S.C. § 3771(a)(8) (crime victims have "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy"); 18 U.S.C. § 3509(b), (d), (e), (m) (providing privacy protections to child-victims and witnesses, such

as: alternatives to live in-court testimony; requirements that documents containing victim information are only disclosed to certain participants in the proceedings; requirements that court papers are filed under seal; protective orders to protect the child's name and information from public disclosure and to implement other measures necessary to "protect the privacy of the child"; courtroom closure during the child's testimony; and special protections regarding reproduction and review of child sexual abuse images); Fed. R. Evid. 412 (barring admission of evidence of the victim's sexual behavior or predisposition in prosecutions of sexual offenses, subject to limited exceptions; requiring the party seeking admission of such evidence to provide notice to the victim; and sealing all records associated with a hearing addressing admission of this evidence).

Papers filed with federal courts—including motions, pleadings and other case-related documents—must comply with additional privacy-related protections for victims. *See, e.g.*, Fed. R. Crim. P. 49.1(a)–(b), (d)–(e) (permitting court to order filings to be made under seal, with or without redaction; allowing court, for good cause, to impose a protective order requiring redaction of documents or prohibiting or limiting a non-party's access to documents; and, with some exceptions, requiring that all court filings that include certain identifying and personal information contain only (1) the last four digits of a social-security number or taxpayer-identification number, (2) the year of an individual's birth, (3) a minor's initials, (4) the last four digits of a financial-account number, and (5) the city and state of a home address); 18 U.S.C. § 3509(d)(2) (requiring that papers that reference a child's name or information be filed under seal, with the child's information redacted from public records).

Victims' privacy rights are also protected under rules related to discovery and production. In particular, Rule 17(c)(3) of the Federal Rules of Criminal Procedure mandates that a court require notice to the victim of a subpoena seeking the victim's "personal or confidential information . . . so that the victim can move to quash or modify the subpoena or otherwise object." Fed. R. Crim. P. 17(c)(3). The rule also prohibits service of such a subpoena on third parties except by court order. *Id.* As the advisory committee's rules expressly note, Rule 17(c)(3) implements the CVRA right to be treated with respect for the victim's dignity and privacy. Fed. R. Crim. P. 17 advisory committee's note to 2008 amendment.

Other Federal Rules of Criminal Procedure protect victim privacy by providing that a victim's address and telephone number are not to be automatically provided to the defense, when certain defenses are raised. *See, e.g.*, Fed. R. Crim. P. 12.1(b)(1)(B) (alibi defense); Fed. R. Crim. P. 12.3(a)(4)(D) (public authority defense). If the government intends to rely upon a victim's testimony to oppose an alibi or public-authority defense, the defendant must demonstrate a need for such information. Fed. R. Crim. P. 12.1(b)(1)(B); Fed. R. Crim. P. 12.3(a)(4)(D). Upon a showing of need, the court may order disclosure or "fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests." Fed. R. Crim. P. 12.1(b)(1)(B); Fed. R. Crim. P. 12.3(a)(4)(D). These Rules implement victims' rights, under the CVRA, to reasonable protection from the accused and to be treated with respect for the victim's dignity and privacy. Fed. R. Crim. P. 12.1,

advisory committee's note to 2008 amendment; Fed. R. Crim. P. 12.3, advisory committee's note to 2010 amendment.

The Guidelines governing Department of Justice personnel, including federal prosecutors, describe the obligation of such personnel to ensure that victims' privacy rights are afforded. *See* U.S. Dept. of Just., Office of Just. Programs, Office for Victims of Crime, *Att'y Gen. Guidelines for Victim and Witness Assistance* 3–4 (2012), https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf (requiring Department of Justice personnel "engaged in the investigation or prosecution of a crime": to "be mindful of the privacy concerns of victims and witnesses"; to "use their best efforts to protect private information by redacting this information from records or documents that will be placed in the public record, unless specifically required by court rules or procedure," where "[p]rivate information includes Social Security numbers, bank account information, dates of birth, and, in some circumstances, may include an individual's identity, address, contact information, or location"; to "seek protective orders or employ other means when necessary to safeguard private information from becoming public or from being used in proceedings if the information is not relevant"; and, "[i]f private information must be disclosed in proceedings or in the course of discovery," to "seek protective orders to prevent dissemination of this information outside of the proceedings").

**What are key privacy rights and/or protections in Kansas state cases?**

Kansas guarantees crime victims the right to be "treated . . . with respect for their dignity and privacy." Kan. Stat. Ann. § 74-7333(a)(1). In addition to this broad right to privacy, the Bill of Rights for Victims of Crime Act protects victims' privacy interests through safety guarantees. For example, the statute provides that "[m]easures may be taken when necessary to provide for the safety of victims and their families and to protect them from intimidation and retaliation." *Id.* at § 74-7333(a)(7).

The state's criminal discovery rules also protect victim privacy by authorizing prosecutors to redact victims' identifying information from any disclosures. Kan. Stat. Ann. § 22-3212(b)(5). If such information is not redacted, defense counsel is barred from further disclosing it "to the defendant or any other person, directly or indirectly, except as authorized by court order." *Id.* at § 22-3212(b)(6). A court may, at any time, order that discovery be restricted, enlarged, deferred or otherwise modified as appropriate. *Id.* at § 22-3212(g). The state's criminal discovery rules also protect victim privacy through limitations on the possession of visual images of victims of child exploitation; such images must remain in the care, custody and control of the prosecution, law enforcement or the court. *Id.* at § 22-3212(l)(1).

Kansas also extends heightened privacy protections to certain categories of victims. For instance, the state protects victim privacy through its rape shield law, which prohibits a sex crime victim's sexual history from being admitted into evidence, except under limited circumstances. Kan. Stat. Ann. § 21-5502. Additionally, victims of domestic violence, sexual assault, human trafficking or stalking may participate in the state's address

confidentiality program, *id.* at §§ 75-451 through 75-458, which is discussed more fully in the following section, "Select Confidentiality Laws."

The section "Select Confidentiality Laws" also includes information about victims' privacy protections when someone attempts to access their personal information through a public records request.

## SELECT CONFIDENTIALITY LAWS

**What are key confidentiality rights and/or protections in federal cases?**

Federal law recognizes the confidentiality of certain victim information. For example, federal law protects as confidential the names of children, as well as other information about them. 18 U.S.C. § 3509(d)(1). In particular, certain participants in the criminal justice system—including court personnel, government employees, the defendant, those hired by the defendant to provide assistance in the proceedings and jury members—are required to "keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access" and to "disclose [such] documents . . . or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information." *Id.* Other confidentiality protections extend to victims' information collected or held by the prosecutor or court for purposes of ensuring that victims receive court-ordered restitution, 18 U.S.C. § 3612(b)(1)(G), as well as to results of no-cost tests administrated to victims of sexual assault to screen for sexually transmitted diseases, 34 U.S.C. § 20141(c)(7).

The federal government also provides victims with rule-based confidentiality protections. For instance, Federal Rule of Criminal Procedure 17 governs the procedure for subpoenaing personal or confidential information about a victim. Under the rule, "[a]fter a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object." Fed. R. Crim. P. 17(c).

The Guidelines governing Department of Justice personnel noted above also require prosecutors and other Department personnel to protect the confidentiality of victim information. *See Att'y Gen. Guidelines for Victim and Witness Assistance* at 3–4 (providing that Department of Justice personnel "should use their best efforts to refrain from releasing personal or confidential information about victims and witnesses to the press or public[,]" and that "[p]ersonal or confidential information in this context may include the individual's name, address, contact information, identifying information, or other information or material that may allude to the identity of the victim or witness"; and noting that

"Department personnel receiving requests for information about a case or matter should be mindful that information generally subject to release under the Privacy Act of 1974 (Privacy Act), 5 U.S.C. § 552a (West 2010), or the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006 & Supp. III 2009), may otherwise be protected from disclosure by virtue of the privacy considerations due to victims under the CVRA.").

As detailed above, FOIA, the federal open records law, contains nine exemptions from disclosure for certain categories of information and records. Three such exemptions—Exemptions 6, 7(C) and 7(F)—protect different types of personal information in federal records from disclosure. Exemption 6 protects against the disclosure of "personnel and medical files and similar files disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) applies to records or information compiled for law enforcement purposes, to the extent that disclosure of such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* at § 552(b)(7)(C). Under both Exemptions 6 and 7(C), "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.'" 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 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989)). Exemption 7(F), which also applies to law enforcement records, exempts records that contain information that, if disclosed, "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F).

**What are key confidentiality rights and/or protections in Kansas state cases?**

Kansas offers a number of confidentiality rights and protections to crime victims. For example, although a victim's current address is part of the secretary of corrections files for the purposes of providing the victim with notice of an inmate's public comment session, that information is "confidential" and must be kept "separate from all other records and shall not be available to the inmate or any other party other than the victim or the victim's family." Kan. Stat. Ann. § 74-7338(c). Along similar lines, a victim's statement in a presentence investigation is not accessible to the public, but only to "[t]he parties, the sentencing judge, the department of corrections, any entity required to receive the information under the interstate compact for adult offender supervision; and, if requested, the Kansas sentencing commission." *Id.* at § 21-6813(c). Additionally, when victims of stalking, sexual assault or human trafficking obtain a protective order, state law bars the disclosure of the victim's address or telephone number to the defendant or to the public. *Id.* at § 60-31a04(f).

Kansas law also offers heightened confidentiality protections to certain victims. For example, victims of sexual assault have the right to maintain the confidentiality of a medical examination related to the assault, when that exam takes place solely upon the victims' request. Kan. Stat. Ann. § 65-448. Additionally, victims of domestic violence and sexual assault have certain rights as employees regarding time taken off for reasons related to the

crime committed against them; employers must maintain the confidentiality of any employee and records related to such leave. *Id.* at § 44-1132(c).

As detailed in the following section, "Select Privilege Laws," Kansas law protects the confidentiality of communications between victims and certain professionals, as well as the confidentiality of records related to the provision of these services. *See, e.g.*, Kan. Stat. Ann. § 65-5810 (counselor-client confidentiality); *id.* at § 65-6315 (social worker-client privilege); *id.* at § 60-426 (attorney-client confidentiality); *id.* at § 60-427 (physician-patient confidentiality); *id.* at § 74-5372 (psychologist-client and psychotherapist-client confidentiality).

Kansas also protects victim confidentiality in the context of public records requests. In general, "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" are not subject to disclosure pursuant to a public records request. Kan. Stat. Ann. § 45-221(a)(30). More narrowly, the state explicitly exempts victim records that are otherwise protected by federal or state law from disclosure pursuant to a public records request. *Id.* at § 45-221(a)(1). Such records include those that are subject to an evidentiary privilege, as well as any medical, psychiatric, psychological, alcoholism or drug dependency treatment records that are related to an identifiable person. *Id.* at § 45-221(a)(2), (3). Criminal investigation records are also generally exempt from disclosure. *Id.* at § 45-221(a)(10). In a civil action to enforce a public records request, a court may order disclosure of such records if it finds, *inter alia*, that disclosure "would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto." *Id.* at § 45-221(a)(10)(F). Records "that would reveal the location of a shelter or a safehouse or similar place where persons are provided protection from abuse or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault" are also not subject to disclosure pursuant to a public records request. *Id.* at § 45-221(a)(47). The public records law also generally bars disclosure of correctional records; information provided to law enforcement pursuant to the state's sex offender registration act, however, is subject to disclosure, "except that the name, address, telephone number or any other information which specifically and individually identifies the victim of any offender required to register as provided by the Kansas offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, shall not be disclosed." Kan. Stat. Ann. § 45-221(a)(29)(C); *see also id.* at § 22-4909(f)(1) (offender registry open to the public, except for victims' identifying information). Another exception to the general rule that corrections records are not subject to disclosure exists for records that a victim seeks regarding an inmate's financial assets. *Id.* at § 45-221(a)(29)(D).

Finally, Kansas's Safe at Home Program—an address confidentiality program for victims of domestic violence, sexual assault, human trafficking and stalking—protects victim confidentiality by offering these victims a free post office box to use for receiving mail, filling out government documents, registering to vote, and other purposes. The program is designed "to enable state and local agencies to respond to requests for public records

without disclosing the location of a victim of domestic violence, sexual assault, human trafficking or stalking, to enable interagency cooperation with the secretary of state in providing address confidentiality for victims of domestic violence, sexual assault, human trafficking or stalking, and to enable state and local agencies to accept a program participant's use of an address designated by the secretary of state as a substitute mailing address." Kan. Stat. Ann. § 75-451. Kansas state and local agencies must accept this substitute address in lieu of a residential or other mailing address. *Id.* at § 75-455(a). For further details about the program, *see* https://sos.ks.gov/about-the-office/safe-at-home.html; *see also* Kan. Stat. Ann. §§ 75-451 to 75-458.

## SELECT PRIVILEGE LAWS

**What are key privileges in federal cases?**

As noted earlier, in contrast with the states, the federal government has not passed legislation recognizing explicit evidentiary privileges. For this reason, the recognition of privileges in federal criminal cases is grounded in federal common law—meaning it is found in federal court opinions—and includes psychotherapist-patient, social worker-client, spousal, attorney-client and victim advocate-victim privileges. *See* Fed. R. Evid. 501 (providing that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless" provided otherwise in the U.S. Constitution, a federal statute or by rules prescribed by the Supreme Court); *Jaffee v. Redmond*, 518 U.S. 1, 15–17 (1996) (licensed psychotherapists-patient and licensed social workers-client privileges); *Trammel v. United States*, 445 U.S. 40, 53 (1980) (spousal privilege); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (attorney-client privilege); *Doe v. Old Dominion Univ.*, 289 F. Supp. 3d 744, 753–54 (E.D. Va. 2018) (victim advocate-victim privilege).

**What are key privileges in Kansas state cases?**

Victims in Kansas have a number of privileges that they can assert to prevent disclosure of their private communications with certain professionals, including social workers, counselors, physicians, and mental health professionals. *See, e.g.*, Kan. Stat. Ann. § 65-5810 (counselor-client privilege); *id.* at § 65-6315 (social worker-client privilege); *id.* at § 60-426 (attorney-client privilege); *id.* at § 60-427 (physician-patient privilege); *id.* at § 74-5372 (psychologist-client and psychotherapist-client privileges).

The counselor-client privilege, social worker-client privilege, psychologist-client privilege and psychotherapist-client privilege are each "placed on the same basis as provided by law" as the attorney-client privilege. Kan. Stat. Ann. § 65-6315(b); *id.* at § 65-5810(a), (b); *id.* at § 74-5372(a), (b). The attorney-client privilege protects communications between "an attorney and such attorney's client in the course of that relationship and in professional

confidence." *Id.* at § 60-426(a). Under the privilege, the client may refuse to disclose such communication, prevent the attorney form disclosing such communication and prevent other witnesses from disclosing such communication that the witnesses have come to know "(i) in the course of its transmittal between the client and the attorney, (ii) in a manner not reasonably to be anticipated by the client or (iii) as a result of a breach of the attorney-client relationship." *Id.* The client or the attorney may claim the privilege, "or if an incapacitated person, by either such person's guardian or conservator, or if deceased, by such person's personal representative." *Id.*

The privileges available to crime victims are subject to certain limitations. *See, e.g.*, Kan Stat. Ann. § 60-246(b) (listing exceptions to attorney-client privilege, which apply to other privileges to the extent they apply in the same manner as the attorney-client privilege). For instance, the social worker-client privilege does not apply when, *inter alia*, the client "is a child under the age of 18 years and the information acquired by the licensed social worker indicated that the child was the victim or subject of a crime." *Id.* at § 65-6315(A)(2). In such a scenario, "the licensed social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such a crime is a subject of inquiry." *Id.* Additionally, nothing in the social worker-client, counselor-client, psychologist-client or psychotherapist privileges may be construed to prohibit such professionals "from testifying in court hearings concerning matters of adult abuse, adoption, child abuse, child neglect, or other matters pertaining to the welfare of children or from seeking collaboration or consultation with professional colleagues or administrative superiors, or both, on behalf of the client." *Id.* at § 65-6315(c); *id.* at § 65-5810(c); *id.* at § 74-5372(c). These privileges also do not apply to "information which is required to be reported to a public official." *Id.* at § 65-6315(c); *id.* at § 65-5810(c); *id.* at § 74-5372(c).

The physician-patient privilege has limited application in criminal proceedings. It does not apply in felony or DUI cases. Kan. Stat. Ann. § 60-427(b). Health information privacy laws and ethical duties of confidentiality may nonetheless protect victim-patient privacy interests in some contexts.

Lastly, Kansas limits privilege in the context of compensation requests. For example, the only privilege that applies in this context is the attorney-client privilege; otherwise, there is no privilege "as to communications or records relevant to an issue of the physical, mental or emotional conditions of the claimant or victim in a proceeding under [the crime victim compensation act] in which such a condition is an element." Kan. Stat. Ann. § 74-7308(a). Indeed, where a victim's mental, physical or emotional condition is "material to a claim, the board may order the victim . . . to submit to a mental or physical examination by a physician or psychologist, and may order an autopsy of a deceased person." *Id.* at § 74-7308(b). If a victim refuses to comply with an order for evidence or asserts a privilege other than that arising from the attorney-client relationship to withhold evidence related to a compensation claim, "the board may make any just order, including denial of the claim, but may not find the person in contempt. If necessary to carry out any of its powers and duties, the board may petition the district court for an appropriate order, but the court may not find a person in contempt for refusal to submit to a medical or physical examination." *Id.* at

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| § 74-7309. Any records or information provided to the board itself is confidential as to others; they are not "obtainable by any part to any action, civil or criminal, through any discovery process" except in three circumstances: (1) an appeal of a board decision; and (2) "upon a strict showing to the court in a separate civil or criminal action that particular information or documents are not obtainable after diligent effort from any independent source, and are known to exist otherwise only in board records, the court may inspect in camera such records to determine whether the specific requested information exists. If the court determines the specific information sought exists in the board records, the documents may then be released only by court order if the court finds as part of its order that the documents will not pose any threat to the safety of the victim or any other person whose identity may appear in board records"; or (3) "by any board order granting or denying compensation to a crime victim[.]" *Id.* at § 74-7308(c).<br><br>For reference, the key privileges referenced in this section appear below. | |
| Attorney-Client Privilege | Kan. Stat. Ann. § 60-426(a)–(b).<br><br>(a) General rule. Subject to K.S.A. 60-437, and amendments thereto, and except as otherwise provided by subsection (b), communications found by the judge to have been between an attorney and such attorney's client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege: (1) If such client is the witness, to refuse to disclose any such communication; (2) to prevent such client's attorney from disclosing it; and (3) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the attorney, (ii) in a manner not reasonably to be anticipated by the client or (iii) as a result of a breach of the attorney-client relationship. The privilege may be claimed by the client in person or by such client's attorney, or if an incapacitated person, by either such person's guardian or conservator, or if deceased, by such person's personal representative.<br><br>(b) Exceptions. Such privileges shall not extend to a communication: (1) If the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the commission or planning of a crime or a tort; (2) relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction; (3) relevant to an issue of breach of duty by the attorney to such attorney's client, or by the client to such client's attorney; (4) relevant to an issue concerning an attested document of which the attorney is an |

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| | attesting witness; or (5) relevant to a matter of common interest between two or more clients if made by any of them to an attorney whom they have retained in common when offered in an action between any of such clients. |
| Social Worker-Client Privilege | Kan. Stat. Ann. § 65-6315.<br><br>(a) No licensed social work associate or licensed baccalaureate social worker, secretary, stenographer or clerk of a licensed social work associate or licensed baccalaureate social worker or anyone who participates in delivery of social work services or anyone working under supervision of a licensed social worker may disclose any information such person may have acquired from persons consulting such person in the person's professional capacity or be compelled to disclose such information except:<br>(1) With the written consent of the client, or in the case of death or disability, of the personal representative of the client, other person authorized to sue or the beneficiary of an insurance policy on the client's life, health or physical condition;<br>(2) when the person is a child under the age of 18 years and the information acquired by the licensed social worker indicated that the child was the victim or subject of a crime, the licensed social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such a crime is a subject of inquiry;<br>(3) when the person waives the privilege by bringing charges against the licensed social worker but only to the extent that such information is relevant under the circumstances.<br><br>(b) The confidential relations and communications between a licensed master social worker's or a licensed specialist clinical social worker's client are placed on the same basis as provided by law for those between an attorney and an attorney's client.<br><br>(c) Nothing in this section or in this act shall be construed to prohibit any licensed social worker from testifying in court hearings concerning matters of adult abuse, adoption, child abuse, child neglect, or other matters pertaining to the welfare of children or from seeking collaboration or consultation with professional colleagues or administrative superiors, or both, on behalf of the client. There is no privilege under this section for information which is required to be reported to a public official. |

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| Counselor-Client Privilege | Kan. Stat. Ann. § 65-5810.<br><br>(a) The confidential relations and communications between a licensed professional counselor and such counselor's client are placed on the same basis as provided by law for those between an attorney and an attorney's client.<br><br>(b) The confidential relations and communications between a licensed clinical professional counselor and such counselor's client are placed on the same basis as provided by law for those between an attorney and an attorney's client.<br><br>(c) Nothing in this section or in this act shall be construed to prohibit any licensed professional counselor or licensed clinical professional counselor from testifying in court hearings concerning matters of adult abuse, adoption, child abuse, child neglect, or other matters pertaining to the welfare of children or from seeking collaboration or consultation with professional colleagues or administrative superiors, or both, on behalf of the client. There is no privilege under this section for information which is required to be reported to a public official. |
| Psychologist-Client and Psychotherapist-Client Privileges | Kan Stat. Ann. § 74-5372.<br><br>(a) The confidential relations and communications between a licensed masters level psychologist and such psychologist's client are placed on the same basis as provided by law for those between an attorney and an attorney's client.<br><br>(b) The confidential relations and communications between a licensed clinical psychotherapist and such psychotherapist's client are placed on the same basis as provided by law for those between an attorney and an attorney's client.<br><br>(c) Nothing in this section or in this act shall be construed to prohibit any licensed masters level psychologist or licensed clinical psychotherapist from testifying in court hearings concerning matters of adult abuse, adoption, child abuse, child neglect, or other matters pertaining to the welfare of children or from seeking collaboration or consultation with professional colleagues or administrative superiors, or both, on behalf of the client. There is no privilege under this section for information which is required to be reported to a public official. |

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| Physician-Patient Privilege | Kan. Stat. Ann. § 60-427(b)–(h).<br><br>(b) Except as provided by subsections (c), (d), (e) and (f), a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor, other than a prosecution for a violation of K.S.A. 8-2,144 or 8-1567, and amendments thereto, or a city ordinance or county resolution which prohibits the acts prohibited by those statutes, to refuse to disclose, and to prevent a witness from disclosing, a communication, if the person claims the privilege and the judge finds that: (1) The communication was a confidential communication between patient and physician; (2) the patient or the physician reasonably believed the communication necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor; (3) the witness (i) is the holder of the privilege, (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or the physician's agent or servant; and (4) the claimant is the holder of the privilege or a person authorized to claim the privilege for the holder of the privilege.<br><br>(c) There is no privilege under this section as to any relevant communication between the patient and the patient's physician: (1) Upon an issue of the patient's condition in an action to commit the patient or otherwise place the patient under the control of another or others because of alleged incapacity or mental illness, in an action in which the patient seeks to establish the patient's competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor; (2) upon an issue as to the validity of a document as a will of the patient; or (3) upon an issue between parties claiming by testate or intestate succession from a deceased patient.<br><br>(d) There is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party. |

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| | (e) There is no privilege under this section: (1) As to blood drawn at the request of a law enforcement officer pursuant to K.S.A. 8-1001, and amendments thereto; and (2) as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.<br><br>(f) No person has a privilege under this section if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.<br><br>(g) A privilege under this section as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or the physician's agent or servant gained knowledge through the communication.<br><br>(h) Providing false information to a physician for the purpose of obtaining a prescription-only drug shall not be a confidential communication between physician and patient and no person shall have a privilege in any prosecution for unlawfully obtaining or distributing a prescription-only drug under K.S.A. 21-5708, and amendments thereto. |

## SELECT DEFINITIONS

| **Key Federal Definitions.** | |
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| CVRA Definitions | 18 U.S.C. § 3771(e).<br><br>(1) Court of appeals. --The term "court of appeals" means--<br>(A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or<br>(B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.<br><br>(2) Crime victim. |

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| | (A) In general. --The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.<br>(B) Minors and certain other victims. --In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.<br><br>(3) District court; court. --The terms "district court" and "court" include the Superior Court of the District of Columbia.<br><br>18 U.S.C. § 3771(b)(2)(D).<br><br>For purposes of [victims' CVRA rights in habeas corpus proceedings], the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative. |
| **Key State Definitions.** | |
| Bill of Rights for Crime Victims Definitions | Kan. Stat. Ann. § 74-7333(b)–(c).<br><br>(b) As used in this act, "victim" means any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person.<br><br>(c) As used in this act and as used in article 15 of section 15 of the Kansas constitution, the term "crime" shall not include violations of ordinances of cities except for violations of ordinances of cities which prohibit acts or omissions which are prohibited by articles 33, 34, 35 and 36 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or articles 53, 54, 55 or 56 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 21-6104, 21-6325, 21-6326 or 21-6418 through 21-6421, and amendments thereto, and as provided in subsection (d). |

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| Address Confidentiality Program Definitions | Kan. Stat. Ann. § 75-452.<br><br>The following words and phrases when used in K.S.A. 75-451 to 75-458, inclusive, and amendments thereto, shall have the meanings respectively ascribed to them herein, unless the context clearly requires otherwise:<br><br>(a) "Abuse" means:<br>(1) Causing or attempting to cause physical harm;<br>(2) placing another person in fear of imminent physical harm;<br>(3) causing another person to engage involuntarily in sexual relations by force, threats or duress, or threatening to do so;<br>(4) engaging in mental abuse, which includes threats, intimidation and acts designed to induce terror;<br>(5) depriving another person of necessary health care, housing or food; or<br>(6) unreasonably and forcibly restraining the physical movement of another.<br><br>(b) "Confidential address" means a residential street address, school street address or work street address of an individual, as specified on the individual's application to be a program participant under K.S.A. 75-451 to 75-458, inclusive, and amendments thereto.<br><br>(c) "Confidential mailing address" means an address that is recognized for delivery by the United States postal service.<br><br>(d) "Domestic violence" means abuse committed against a victim or the victim's spouse or dependent child by:<br>(1) A current or former spouse of the victim;<br>(2) a person with whom the victim shares parentage of a child in common;<br>(3) a person who is cohabitating with, or has cohabitated with, the victim;<br>(4) a person who is related by blood or marriage; or<br>(5) a person with whom the victim has or had a dating or engagement relationship.<br><br>(e) "Program participant" means a person certified as a program participant under K.S.A. 75-453, and amendments thereto.<br><br>(f) "Enrolling agent" means state and local agencies, law enforcement offices, nonprofit agencies and any others designated by the secretary of state that provide counseling and shelter services |

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| | to victims of domestic violence, sexual assault, human trafficking or stalking.<br><br>(g) "Sexual assault" means an act which if committed in this state would constitute any crime defined in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, or K.S.A. 21-6419 through 21-6422, and amendments thereto.<br><br>(h) "Stalking" means an act which if committed in this state would constitute "stalking" as defined by K.S.A. 60-31a01, and amendments thereto.<br><br>(i) "Human trafficking" means an act which if committed in this state would constitute the crime of human trafficking as defined by K.S.A. 21-3446, prior to its repeal, or K.S.A. 21-5426(a), and amendments thereto. |
| Attorney-Client Privilege Definitions | Kan. Stat. Ann. § 60-426(c).<br><br>As used in this section:<br><br>(1) "Client" means a person or corporation or other association that, directly or through an authorized representative, consults an attorney or attorney's representative for the purpose of retaining the attorney or securing legal service or advice from the attorney in a professional capacity; and includes an incapacitated person who, or whose guardian on behalf of the incapacitated person, so consults the attorney or the attorney's representative in behalf of the incapacitated person.<br><br>(2) "Communication" includes advice given by the attorney in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the attorney incidental to the professional relationship.<br><br>(3) "Attorney" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and attorney. |

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| Physician-Patient Privilege Definitions | Kan. Stat. Ann. § 60-427(a).<br><br>As used in this section:<br><br>(1) "Patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of such person's physical or mental condition, consults a physician, or submits to an examination by a physician.<br><br>(2) "Physician" means a person licensed or reasonably believed by the patient to be licensed to practice medicine or one of the healing arts as defined in K.S.A. 65-2802, and amendments thereto, in the state or jurisdiction in which the consultation or examination takes place.<br><br>(3) "Holder of the privilege" means the patient while alive and not under guardianship or conservatorship or the guardian or conservator of the patient, or the personal representative of a deceased patient.<br><br>(4) "Confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted. |

[1] Federal constitutional rights are applicable in state and federal cases. Other federal law is generally applicable in federal investigations and prosecutions. State law is generally applicable in in state investigations and prosecutions.
[2] This resource focuses on crimes committed on nontribal land that involve victims who are tribe members; it may also be useful, however, when tribal law enforcement-based victim services providers assist Indian and non-Indian victims who reside on tribal land but are not members of the tribe. *See infra* note 3 (discussing use of the term "Indian" in this resource).
[3] The terms "Indian(s)" and "Indian country" are used in this resource to refer, respectively, to the indigenous people of the United States and to their tribal lands; these terms are used in federal laws governing the relationship between the federal government and Indian tribes, as well as those defining criminal jurisdiction in Indian country. *See, e.g.*, *infra* notes 4–8.
[4] *See, e.g.*, General Crimes Act, 18 U.S.C. § 1152 (establishing federal jurisdiction, exclusive of state jurisdiction, over most crimes committed in "Indian country," except for crimes committed by one Indian against another Indian;

crimes committed by an Indian that have already been punished by the tribe; and cases where a treaty excludes federal jurisdiction); 18 U.S.C. § 1301(2) (amending the Indian Civil Rights Act of 1968 (ICRA) to clarify that tribes have jurisdiction to prosecute crimes committed on tribal land by Indians who are not members of the tribe); Violence Against Women Reauthorization Act of 2013 (VAWA 2013 Reauthorization), tit. IX, sec. 904, § 204(b), 127 Stat. at 121-22 (codified at 25 U.S.C. § 1304) (amending the ICRA to authorize tribes meeting certain requirements to elect to have jurisdiction over crimes of domestic violence committed on tribal land, except where the victim and the defendant are both non-Indians or where the defendant lacks sufficient ties to the tribe).

[5] *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153 (establishing federal jurisdiction, exclusive of state jurisdiction, over certain enumerated "major crimes" committed in Indian country involving only Indians); VAWA 2013 Reauthorization, 25 U.S.C. § 1304 (authorizing tribes to elect to have jurisdiction over crimes of domestic violence committed on tribal land, except where the victim and the defendant are both non-Indians or where the defendant lacks sufficient ties to the tribe, and providing that such jurisdiction is "concurrent with the jurisdiction of the United States, of a State, or of both").

[6] *See, e.g.*, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2279 (codified at 25 U.S.C. § 1302) (amending the ICRA to enhance the sentencing authority of tribes in criminal cases, subject to certain requirements).

[7] Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended in scattered sections of 18 U.S.C. and 25 U.S.C.) ("Public Law 280"); *see, e.g.*, 18 U.S.C. § 1162 (extending state criminal jurisdiction over Indian country in six states, exclusive of federal jurisdiction); 25 U.S.C. § 1321(a) (authorizing states to assume jurisdiction over criminal offenses committed by or against Indians in Indian Country within the state, with the consent of the United States and the affected tribe).

[8] *See, e.g.*, Kansas Act, 18 U.S.C. § 3243 (conferring jurisdiction on the State of Kansas "over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, . . . to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State" and providing that the law "shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations").

[9] *See, e.g.*, 25 U.S.C. § 1323 (authorizing the federal government to accept retrocession by any state of any or all criminal and/or civil jurisdiction acquired through Public Law 280).

[10] *See* 18 U.S.C. § 3231 (granting federal district courts original jurisdiction over criminal cases involving all offenses against the laws of the United States).

[11] *See* Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 Am. Indian L. Rev. 337, 449 n.31 (2015) (recognizing that tribal jurisdiction may, in some instances, extend to crimes committed on nontribal land and referencing federal court decisions and tribal laws to this effect).

[12] For a discussion of the importance of including crime victims' rights provisions within tribal codes and examples of tribal laws that afford victims' rights, such as the right to privacy, *see* Michelle Rivard Parks, et al., *Tribal Legal Code Resource: Crimes Against Children* 47–53 (Tribal Law and Pol'y Inst. 2022).

[13] To access information about some of these services and resources, *see Victim Resources Database*, NCVLI, https://ncvli.org/victim-resources-database/ (providing a database of national and state victim services programs).

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

[15] 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.

[16] 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.

[17] *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).

[18] *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.").

[19] 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.

[20] *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[.]").

[21] *See* Fed. R. Evid. 501 (providing that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless" provided otherwise in the U.S. Constitution, a federal statute or by rules prescribed by the Supreme Court).

[22] *See Jaffee v. Redmond*, 518 U.S. 1, 15–17 (1996) (recognizing a federal evidentiary privilege for confidential communications between licensed psychotherapists and their patients as well as licensed social workers and clients in the course of psychotherapy); *Trammel v. United States*, 445 U.S. 40, 53 (1980) (recognizing spousal privilege vested in the witness-spouse); *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981) (discussing scope of the attorney-client privilege); *Doe v. Old Dominion Univ.*, 289 F. Supp. 3d 744, 753–54 (E.D. Va. 2018) (recognizing a victim advocate-victim privilege under Federal Rule of Evidence 501 in the context of a civil Title IX case).

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

[24] *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.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Are law enforcement records considered education records?*, https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records.

[29] *Id.*

[30] *Office for Victims of Crime, Crime Victims Fund*, https://ovc.ojp.gov/sites/pubs/crimevictimsfundfs/intro.html#VictimAssist.

[31] *Id.*

[32] *Id.*

[33] 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.

[34] *Id.*

[35] *Ethic*, Merriam-webster.com, https://www.merriam-webster.com/dictionary/ethics (last visited July 31, 2019).

[36] *Office for Victims of Crime, Purpose & Scope of The Standards,* https://ovc.ojp.gov/model-standards/purpose_and_scope.html.

[37] *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.

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

[39] 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 Package I_04.2021.pdf.

[40] *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

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

[42] *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

[43] *Id.*

[44] *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").

[45] 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.

[46] 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.

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

[48] 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).

[49] *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").

[50] 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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