NATIONAL CRIME VICTIM LAW INSTITUTE

1130 SW Morrison St., Suite 200, Portland OR 97205

TRIBAL LAW ENFORCEMENT-BASED VICTIM SERVICES IN MINNESOTA: 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 Minnesota'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.

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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 located within Minnesota—such as the Red Lake Nation—has jurisdiction, the victim services provider can contact the relevant tribal court or tribal legal department to learn about applicable tribal-based crime 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 privacy, confidentiality and privilege protections 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 Minnesota: 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 services 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 services 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 Minnesota state cases?

Minnesota provides crime victims with a number of privacy protections related to the nondisclosure of their personal identifying and locating information. *See, e.g.*, Minn. Stat. Ann. § 13.82, subd. 17(b) (requiring law enforcement to withhold public access to data that would reveal the identity of a victim of criminal sexual conduct or sex trafficking); *id.* at § 13.82, subd. 17(d) (quiring law enforcement to withhold public access to data that would reveal the identity of any crime victim, where that victim has specifically requested that they not be publicly identified); *id.* at § 244.052, subd. 4(e) (providing that law enforcement's disclosure of information to the public regarding a predatory offender may not include a victim's identity or identifying characteristics); *id*. at § 609.3471 (providing that records containing a sex crime victim's identity may not be accessible to the public, except by order of the court); *id.* at § 611A.035, subd. 1 (providing the prosecutor with discretion to not disclose certain locating and identifying victim information when nondisclosure is necessary to address the victim's safety or security concerns and such information is not relevant to the case); *id.* at § 611A.035, subd. 2 (providing victims with the right to not be compelled to "state a home or employment address, telephone number, or the date of birth of the victim or witness on the record in open court unless the court finds that the testimony would be relevant evidence"); *id.* at § 611A.06 (providing that victims' identifying data, including a victim's request for notice of an offender's release and the notice provided of such release are private and not subject to public disclosure); *id.* at § 611A.32, subd. 5 (providing that personal history information of victims participating in a battered women's program is private and not subject to public disclosure); *id.* at § 611A.371, subd. 3 (providing that personal history information provided to shelters for battered women and their children is private and not subject to public disclosure); *id.* at

§ 611A.46 (providing that identity of victim contained in records of crime victim crisis center is private and not subject to public disclosure); *id.* at § 629.341, subd. 4 (providing that a victim's identifying information in a police report of a domestic violence investigation is private and not subject to disclosure, where the victim has requested, under Minn. Stat. Ann. § 13.82, subd. 17(d), that they not be identified publicly); Minn. Stat. Ann. Access to Rec. Rule 4, subd. 1(m) (providing that "[n]o person shall submit information that specifically identifies a minor victim on any pleading or document filed with the court in [criminal or juvenile delinquency] cases except on a separate, confidential document entitled Confidential Victim Identifier Information"; stating that [i]t shall not be a violation of this rule for a pleading or document to include generic references, including but not limited to 'the victim' or 'Child 1,' and unless otherwise ordered by the presiding judge, the victim's initials and year of birth"; and providing one exception to such rules against disclosure with respect to a transcript of a public court proceeding during which the minor victim's identifying information was disclosed); *id.* at Rule 4, subd. 4(b) (providing that rule allowing parties or the court to mention the contents of non-public court documents does not apply to the identity of a minor victim of sexual assault "except that unless otherwise ordered by the presiding judge, such victim may be referred to by initials and year of birth"); *id.* at Rule 8, subd. 2 (limiting remote public access to data fields in electronic court records that disclose certain crime victim identifying and locating information).

The state also protects victim privacy in the context of investigations into rights violations by providing that the records of such investigations are private and not subject to public disclosure. Minn. Stat. Ann. § 611A.74, subd. 2.

In addition to such express privacy protections, Minnesota safeguards crime victim privacy through safety-related rights. *See, e.g.*, Minn. Stat. Ann. § 611A.034 (providing victims with the right to a separate waiting area in the courthouse or other measures that minimize victims' contact with defendants, defendants' families, and defendants' witnesses).

Minnesota protects victim privacy in the discovery context. For instance, a subpoena requiring the production of a victim's privileged or confidential records may only be served on a third party by court order. Minn. Stat. R. Crim. P. 22.01, subd. 2(c). Before issuing such an order, "the court may require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object." *Id.* Court orders are often required for other disclosures that jeopardize victims' privacy. For instance, a videotape of a child abuse victim describing acts of physical or sexual abuse as part of an investigation or evaluation may only be disclosed pursuant to a court order, which "may govern the purposes for which the videotape may be used, reproduction, release to other persons, retention and return of copies, and other requirements reasonably necessary for protection of the privacy and best interests of the child." Minn. Stat. Ann. § 611A.90, subd. 2(b). Additionally, disclosure of the actual address of a victim participating in Minnesota's address confidentiality program cannot be compelled during discovery or during a court proceeding unless the court finds: "(1) there is a reasonable belief that the address is needed to obtain information or evidence without which the investigation, prosecution, or litigation cannot proceed; and (2) there is no other practicable way of obtaining the information or evidence."

Id. at § 5B.11. In such a situation, victims have the right to present evidence regarding the potential harm to their safety if their address is disclosed. In deciding "whether to compel disclosure, the court must consider whether the potential harm to the safety of the participant is outweighed by the interest in disclosure. In a criminal proceeding, the court must order disclosure of a program participant's address if protecting the address would violate a defendant's constitutional right to confront a witness." *Id.*

The Government Data Practices Act also protects victim privacy by barring the release of certain victim information during discovery, except in limited circumstances. *See generally* Minn. Stat. Ann. § 13.03, subd. 6 (governing discoverability of non-public data). Where the government opposes discovery of such data pursuant to a court order on the ground that the data are classified as not public, the court must first decide if the data are discoverable or releasable under the state's rule of criminal procedure and evidence. *Id.* at § 13.03, subd. 6. If it finds the data are discoverable, the court must then decide "whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the entity maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data." *Id.* In reaching such a decision, the court must "consider whether notice to the subject of the data is warranted and, if warranted, what type of notice must be given." *Id.* The court may also "fashion and issue any protective orders necessary to assure proper handling of the data by the parties." In particular, "[i]f the data are a videotape of a child victim or alleged victim alleging, explaining, denying, or describing an act of physical or sexual abuse," the court must consider other relevant statutory provisions governing the disclosure of such private material. *Id.*; *see, e.g.*, *id.* at § 5B.11 (governing disclosure of address confidentiality program participant's actual address in legal proceedings); *id.* at 13.045 (providing that identifying and locating information of victims participating in the state's address confidentiality program are private data and not subject to disclosure, except in limited circumstances); *id.* at § 611A.90, subd. 2(b) (requiring court order for release of videotape depicting child abuse victim discussing act of physical or sexual abuse as part of an investigation or evaluation). The Data Practices Act protects victims information from disclosure in other contexts, as noted above, regarding the nondisclosure of victims' identifying and personal information, and discussed in more detail below, with respect to public records requests, in the section "Select Confidentiality Laws."

Minnesota offers heightened privacy protections to certain categories of victims. For instance, the state protects the privacy interests of victims of domestic violence, sexual assault, harassment or stalking through its address confidentiality program, Safe at Home. *See generally* Minn. Stat. Ann. §§ 5B.01through 5B.13. This program is discussed more below, in the section "Select Confidentiality Laws." Victims of domestic violence, criminal sexual conduct or harassment also have the right to have their personal information protected when exercising their right to terminate a lease due to fears of imminent violence. *See id.* at § 504B.206, subd. 2 (providing that landlord may not disclose information received from a victim in the course of the victim's exercise of their right to terminate a lease). Court records related to domestic abuse protective orders and harassment restraining orders are private and, upon the victim's request, are not accessible to the public. Minn. Stat. Ann. Access to Rec. Rule 4, subd. 1(a)

The state further protects the privacy of sexual assault victims through its: rape shield laws, which prohibit, in sexual crime cases, evidence of a victim's sexual behavior or predisposition, except under limited circumstances, Minn. Stat. Ann. § 609.34, subd. 3, Minn. R. Evid. 412; restrictions on the admission of psychotherapy evidence in sexual conduct cases, Minn. Stat Ann. § 609.34, subd. 6; and a prohibition on requiring victims of criminal sexual conduct or sex trafficking offenses from undergoing a polygraph examination as part of, or a condition to proceeding with, the case, *id.* at § 611A.26.

Minnesota affords child-victims additional privacy protections, including limitations on the disclosure of: a child-victim's identifying information in court records, Minn. Stat. Ann. Access to Rec. Rule 4, subd. 1(m); video recordings of child-victims detailing acts of physical or sexual abuse for the purposes of an investigation or evaluation; *id.* at Rule 4, subd. 1(l), Minn. Stat. Ann. § 13.821; and materials that depict child sexual abuse, Minn. Stat. Ann. Access to Rec. Rule 4, subd. 1(s) (barring public disclosure of court records containing child sex abuse images). The state further protects the privacy of child-victims by allowing for the admissibility of certain out-of-court statements by child-victims of physical or sexual abuse and authorizing certain child victims to testify outside of the courtroom. Minn. Stat. Ann. § 595.02, subds. 3, 4.

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 Minnesota state cases?

Minnesota law recognizes the confidentiality of communications between victims and certain providers of counseling and other physical and mental health support services, as well as of records related to the provision of the services. *See, e.g.*, Minn. Stat. Ann. § 13.822 (sexual assault counselor-victim confidentiality); *id.* at § 148E.230, subd. 3 (social worker-client confidentiality).

The state offers additional confidentiality protections with respect to victims' locating and identifying information. *See, e.g.*, Minn. Stat. Ann. § 609.3471 (confidentiality of records pertaining to minor sex offense victim's identity); *id.* at § 611A.035 (confidentiality of victims' home and work address, telephone number and date of birth, upon certain showings by the state). State law also provides for the confidentiality of the proceedings and records related to a domestic violence fatality review. *Id.* at § 611A.203. Additionally, Minnesota protects victim confidentiality in the employment context. *See id.* at § 611A.036, subd. 4 (providing that any information that a victim provides to an employer, in support of their right to time off from work to attend criminal proceedings related to the victim's case, must be kept confidential by the employer).

Minnesota also affords victims certain confidentiality protections in the context of public records requests under the Government Data Practices Act. In general, in Minnesota, government data are public and subject to disclosure. Minn. Stat. Ann. § 13.03, subd. 1. Data that are made private or confidential by statute or federal law—such as data related to a victim's participation in the state's address confidentiality program—are exempt from this general rule favoring disclosure. *See, e.g.*, *id.* at § 13.045 (providing that identifying and locating information of victims participating in the state's address confidentiality program are private data and not subject to disclosure, except in limited circumstances). The state's government data practices also expressly exempt from the general disclosure requirement certain data specifically related to crime victims that is classified as "private data on individuals"; this classification generally means the information is not subject to disclosure without consent, court order or statutory authorization. Such private data include confidential data collected, created, received or maintained by law enforcement or clerks of court regarding protective orders in cases of domestic abuse, *id.* at § 13.80; active or inactive investigative data that identify a child victim of abuse or neglect, *id.* at § 13.82, subd. 8; inactive investigative data regarding child abuse, *id.* at § 13.82, subd. 9; active or inactive investigative data that identify a victim of vulnerable adult maltreatment, *id.* at § 13.82, subd. 10; inactive investigative data regarding a victim of vulnerable adult maltreatment, *id.* at § 13.82, subd. 11; and videotapes of child victims of physical or sexual abuse detailing the abuse, *id.* at § 13.821. Additionally, Minnesota expressly requires law enforcement to withhold public access to data that would reveal the identity of a sex crime victim. *Id.* at § 13.82, subd. 17(b). The state also affords all victims the right to request that law enforcement withhold from public access data that would identify the victim. *Id.* at § 13.82, subd. 17(d); *id.* at § 611A.021. Such a request will be granted, "unless the agency reasonably determines that revealing the identity of the victim . . . would not threaten the personal safety of the individual." *Id.* at § 13.82, subd. 17(d). Importantly, the Data Practices Act applies to government data; where a non-governmental program—such as a community-based provider of domestic abuse or sexual assault services—is in possession of private victim information, such information is not subject to the statute's public disclosure obligations. *Id.* at § 13.823, subd. 2.

While case records are generally open to the public, Minnesota law specifies that certain victim case records are not publicly accessible, including records maintained by a court administrator related to domestic abuse or harassment, Minn. Stat. Ann. Access to Records Rule 4, subd. 1(a); records related to a petition for the release of or access to a video

recording of a child victim recounting an act of physical or sexual abuse as part of an investigation or prosecution; *id.* at Rule 4, subd. 1(l); and information that specifically identifies a victim who is a minor at the time of the offense, *id.* at Rule 4, subd. 1(m).

Minnesota also protects the confidentiality of victims of domestic abuse, sexual assault, harassment and stalking through its address confidentiality program. *See generally* Minn. Stat. Ann. §§ 5B.01 through 5B.13. This program is designed to "to enable state and local agencies to respond to requests for data without disclosing the location of a victim of domestic violence, sexual assault, or harassment or stalking; to enable interagency cooperation with the secretary of state in providing address confidentiality for victims of domestic violence, sexual assault, or harassment or stalking; and to enable program participants to use an address designated by the secretary of state as a substitute mailing address for all purposes." *Id.* at § 5B.01.

The state also expressly protects the confidentiality of impact statements that victims provide in presentence domestic abuse investigations. Minn. Stat. Ann. § 609.2244, subd. 2.

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 Minnesota state cases?

Victims in Minnesota have a number of privileges that they can assert to prevent disclosure of their private communications with certain professionals and service providers. *See, e.g.*, Minn. Stat. Ann. § 595.02, subd. 1(b) (attorney-client privilege); *id.* at § 595.02, subd. 1(d) (physician-, surgeon-, dentist- and chiropractor-patient privilege); *id.* at § 595.02, subd. 1(g)

(registered nurse-, psychologist-, consulting psychologist- and licensed social worker-client privilege); *id.* at § 595.02, subd. 1(h) (interpreter-person disabled in communication privilege); *id.* at § 595.02, subd. 1(k) (sexual assault counselor-victim privilege); *id.* at § 595.02, subd. 1(l) (domestic abuse advocate-victim privilege).

These privileges are subject to certain limitations. For instance, in proceedings related to a victims' request for crime victim reparations, "[t]here is no privilege as to communication or records relevant to an issue of the physical, mental or emotional condition of the claimant or victim," when such a condition is at issue. Minn. Stat. Ann. § 611A.62. Additionally, these privileges do not relieve mandatory reporters of their obligations to report the abuse or neglect of children or vulnerable adults. *See, e.g.*, *id.* at 595.02, subd. 1(g) (providing that nothing in the social worker-client privilege exempts social workers from compliance with their reporting obligations regarding the abuse or neglect of children or vulnerable adults); *id.* at 595.02, subd. 1(k) (same with respect to sexual assault counselor-victim privilege); *id.* at § 592.02, subd. 1(l) (same with respect to domestic abuse advocate-victim privilege).

Under the sexual assault counselor-victim privilege, "[s]exual assault counselors may not be allowed to disclose any opinion or information received from or about the victim without the consent of the victim." Minn. Stat. Ann. § 592.02, subd. 1(k). Compelled disclosure is permissible "to identify or disclose information in investigations or proceedings related to neglect or termination of parental rights if the court determines good cause exists. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the treatment relationship, and the treatment services if disclosure occurs." *Id.* Similarly, "[a] domestic abuse advocate may not be compelled to disclose any opinion or information received from or about the victim without the consent of the victim unless ordered by the court. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the relationship between the victim and domestic abuse advocate, and the services if disclosure occurs." *Id.* at § 592.02, subd. 1(l).

For reference, the text of the main privileges discussed in this section appears below.

Attorney Client Privilege	Minn. Stat. Ann. § 595.02, subd. 1(b). An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Physician-, Surgeon-, Dentist-, Chiropractor-Patient Privilege	Minn. Stat. Ann. § 595.02, subd. 1(d). A licensed physician or surgeon, dentist, or chiropractor shall not, without the consent of the patient, be allowed to disclose any information or any opinion based thereon which the professional acquired in attending the patient in a professional capacity, and which was necessary to enable the professional to act in that capacity; after the decease of the patient, in an action to recover insurance benefits, where the insurance has been in existence two years or more, the beneficiaries shall be deemed to be the personal representatives of the deceased person for the purpose of waiving this privilege, and no oral or written waiver of the privilege shall have any binding force or effect except when made upon the trial or examination where the evidence is offered or received.
Registered Nurse-, Psychologist-, Consulting Psychologist-, Licensed Social Worker Privilege	Minn. Stat. Ann. § 595.02, subd. 1(g). A registered nurse, psychologist, consulting psychologist, or licensed social worker engaged in a psychological or social assessment or treatment of an individual at the individual's request shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon which the professional has acquired in attending the client in a professional capacity, and which was necessary to enable the professional to act in that capacity. Nothing in this clause exempts licensed social workers from compliance with the provisions of section 626.557 and chapter 260E.
Interpreter-Person Disabled in Communication Privilege	Minn. Stat. Ann. § 595.02, subd. 1(h). An interpreter for a person disabled in communication shall not, without the consent of the person, be allowed to disclose any communication if the communication would, if the interpreter were not present, be privileged. For purposes of this section, a "person disabled in communication" means a person who, because of a hearing, speech or other communication disorder, or because of the inability to speak or comprehend the English language, is unable to understand the proceedings in which the person is required to participate. The presence of an interpreter as an aid to communication does not destroy an otherwise existing privilege.

Sexual Assault Counselor-Victim Privilege	Minn. Stat. Ann. § 595.02, subd. 1(k). Sexual assault counselors may not be allowed to disclose any opinion or information received from or about the victim without the consent of the victim. However, a counselor may be compelled to identify or disclose information in investigations or proceedings related to neglect or termination of parental rights if the court determines good cause exists. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the treatment relationship, and the treatment services if disclosure occurs. Nothing in this clause exempts sexual assault counselors from compliance with the provisions of section 626.557 and chapter 260E.
Domestic Abuse Advocate-Victim Privilege	Minn. Stat. Ann. § 595.02, subd. 1(l). A domestic abuse advocate may not be compelled to disclose any opinion or information received from or about the victim without the consent of the victim unless ordered by the court. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the relationship between the victim and domestic abuse advocate, and the services if disclosure occurs. Nothing in this paragraph exempts domestic abuse advocates from compliance with the provisions of section 626.557 and chapter 260E.

SELECT DEFINITIONS

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

	(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. (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. (3) District court; court. --The terms "district court" and "court" include the Superior Court of the District of Columbia. 18 U.S.C. § 3771(b)(2)(D). 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.	
Crime Victims' Statutory Rights Definitions	Minn. Stat. Ann. § 611A.01. (a) "Crime" means conduct that is prohibited by local ordinance and results in bodily harm to an individual; or conduct that is included within the definition of "crime" in section 609.02, subdivision 1, or would be included within that definition but for the fact that (1) the person engaging in the conduct lacked capacity to commit the crime under the laws of this state, or (2) the act was alleged or found to have been committed by a juvenile. (b) "Victim" means a natural person who incurs loss or harm as a result of a crime, including a good faith effort to prevent a crime, and for purposes of sections 611A.04 and 611A.045, also includes (1) a corporation that incurs loss or harm as a result of a crime, (2) a government entity that incurs loss or harm as a result of a crime, and (3) any other entity authorized to receive restitution under section 609.10 or 609.125. The term "victim" includes the family members, guardian, conservator, or custodian of a minor, incompetent, incapacitated, or deceased person. In a case where the prosecutor finds that the number of family members makes it impracticable to

	accord all of the family members the rights described in sections 611A.02 to 611A.0395, the prosecutor shall establish a reasonable procedure to give effect to those rights. The procedure may not limit the number of victim impact statements submitted to the court under section 611A.038. The term "victim" does not include the person charged with or alleged to have committed the crime. (c) "Juvenile" has the same meaning as given to the term "child" in section 260B.007, subdivision 3.
Sexual Assault Counselor-Victim Confidentiality Definitions	Minn. Stat. Ann. § 13.822, subd. 1. (a) "Community-based program" means any office, institution, or center offering assistance to victims of sexual assault and their families through crisis intervention, medical, and legal accompaniment and subsequent counseling. (b) "Sexual assault counselor" means a person who has undergone at least 40 hours of crisis counseling training and works under the direction of a supervisor in a crisis center, whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault. (c) "Victim" means a person who consults a sexual assault counselor for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by a sexual assault. (d) "Sexual assault communication data" means all information transmitted in confidence between a victim of sexual assault and a sexual assault counselor and all other information received by the sexual assault counselor in the course of providing assistance to the victim. The victim shall be deemed the subject of sexual assault communication data.
Sexual Assault Counselor-Victim Privilege Definition	Minn. Stat. Ann. § 595.02, subd. 1(k). "Sexual assault counselor" for the purpose of this section means a person who has undergone at least 40 hours of crisis counseling training and works under the direction of a supervisor in a crisis center, whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault.

Domestic Abuse Advocate-Victim Privilege Definition	Minn. Stat. Ann. § 595.02, subd. 1(l). For the purposes of this section, "domestic abuse advocate" means an employee or supervised volunteer from a community-based battered women's shelter and domestic abuse program eligible to receive grants under section 611A.32; that provides information, advocacy, crisis intervention, emergency shelter, or support to victims of domestic abuse and who is not employed by or under the direct supervision of a law enforcement agency, a prosecutor's office, or by a city, county, or state agency.
Address Confidentiality Program Definitions	Minn. Stat. Ann. § 5B.02. (a) For purposes of this chapter and unless the context clearly requires otherwise, the definitions in this section have the meanings given them. (b) "Address" means an individual's work address, school address, or residential street address, as specified on the individual's application to be a program participant under this chapter. (c) "Applicant" means an adult, a parent or guardian acting on behalf of an eligible minor, or a guardian acting on behalf of an incapacitated person, as defined in section 524.5-102. (d) "Domestic violence" means an act as defined in section 518B.01, subdivision 2, paragraph (a), and includes a threat of such acts committed against an individual in a domestic situation, regardless of whether these acts or threats have been reported to law enforcement officers. (e) "Eligible person" means an adult, a minor, or an incapacitated person, as defined in section 524.5-102 for whom there is good reason to believe (1) that the eligible person is a victim of domestic violence, sexual assault, or harassment or stalking, or (2) that the eligible person fears for the person's safety, the safety of another person who resides in the same household, or the safety of persons on whose behalf the application is made. An individual must reside in Minnesota in order to be an eligible person. A person registered or required to register as a predatory offender under section 243.166 or 243.167, or the law of another jurisdiction, is not an eligible person.

	(f) "Mail" means first class letters and flats delivered via the United States Postal Service, including priority, express, and certified mail, and excluding packages, parcels, periodicals, and catalogues, unless they are clearly identifiable as pharmaceuticals or clearly indicate that they are sent by a state or county government agency. (g) "Program participant" means an individual certified as a program participant under section 5B.03. (h) "Harassment" or "stalking" means acts criminalized under section 609.749 and includes a threat of such acts committed against an individual, regardless of whether these acts or threats have been reported to law enforcement officers.

[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 law 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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