



## TRIBAL LAW ENFORCEMENT-BASED VICTIM SERVICES IN NEBRASKA: 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.<sup>1</sup> 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: JURISDICTIONAL

In the context of crimes perpetrated on tribal land or against tribal members<sup>2</sup> 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 Nebraska's borders is beyond the scope of this resource; instead, it provides general guidance for tribal law enforcement-based victim services providers facing jurisdictional questions. Ultimately, understanding which justice system has jurisdiction over a crime committed on tribal land or against a tribal member on nontribal land—as well as the privacy, confidentiality and privilege rights recognized within each justice system—is critical to providing effective victims' services.

The determination of which justice system has jurisdiction over a crime committed on tribal land or against a tribal member on nontribal land depends upon various sources of law, including federal statutes, court decisions, and regulations, as well as tribal laws and agreements with state and local governments. Some factors in the jurisdictional analysis for crimes committed on tribal land include: whether the perpetrator and/or victim is an Indian<sup>3,4</sup>; the type and seriousness of the crime at issue;<sup>5</sup> the type of punishment sought;<sup>6</sup> and whether Public Law 280<sup>7</sup> or another federal statute<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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

## USING THIS RESOURCE

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

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

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 Nebraska: Select Federal and State Victims' Rights*.

TABLE OF CONTENTS

**Introduction**.....1

**Limited Scope of Resource: Jurisdiction** .....1

**Using This Resource** .....3

**Overview** .....5

    System-Based and Community-Based Advocates .....5

    Privacy, Confidentiality and Privilege .....6

    HIPAA, FERPA, FOIA, VAWA and VOCA .....10

    Ethical Code Relevant to Advocates .....14

*Brady v. Maryland*.....15

*Giglio v. United States* .....18

    Subpoena Considerations .....18

**Select Laws** .....19

    Privacy.....19

    Confidentiality.....23

    Privilege .....26

    Definitions.....29

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

## 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> Victims also have a federal constitutional right to privacy.<sup>18</sup>

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.<sup>19</sup> 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).<sup>20</sup>

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.<sup>21</sup> Some privileges that have been recognized by federal courts include victim-advocate, attorney-client, psychotherapist-patient, and spousal.<sup>22</sup>

### 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?**<sup>23</sup>**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.”<sup>24</sup> FERPA applies to those agencies and institutions that receive funding under any U.S. Department of Education program.<sup>25</sup> “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.”<sup>26</sup>

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.<sup>27</sup>

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.”<sup>28</sup> 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).”<sup>29</sup>

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.<sup>30</sup> The Fund supports victim assistance programs that offer direct victim services and crime victim compensation.<sup>31</sup> 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.<sup>32</sup>

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

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

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

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

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

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

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

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.<sup>37</sup>

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.”<sup>38</sup>

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.<sup>39</sup>

**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.<sup>40</sup> 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.<sup>41</sup> 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."<sup>42</sup> 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."<sup>43</sup>

Federal and state courts have found that prosecution-based victim advocates are considered part of the "prosecution team" for *Brady* purposes.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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?<sup>47</sup>

#### 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.<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> 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](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 Nebraska state cases?**

Nebraska provides crime victims with a number of privacy protections related to the nondisclosure of their personal identifying information. For instance, victims have an express right to have any personal identifying information, other than their name, remain private and not be disclosed in pleadings or other documents filed in criminal actions. Neb. Rev. Stat. Ann. § 81-1848(1)(h). Nebraska Court Rule § 6-1466(C) implements this right with respect to individuals who meet the statutory definition of “victim” under Neb. Rev. Stat. Ann. § 29-119. Under this rule, which is applicable to all pleadings or other documents filed in county courts, no “[p]ersonal identifying information, other than a victim’s name, shall be . . . disclosed on pleadings and documents filed in criminal actions that may be available to the public.” Neb. Ct. R. § 6-1466(C). The rule also requires the prosecuting attorney: complete a “Crime Victim Information Form” at the time of initial filing; separately tender the Form with any such pleading or other document; and “always have the following language visible, “THIS DOCUMENT IS CONFIDENTIAL AND SHALL NOT BE PART OF THE COURT FILE OR PROVIDED TO THE PUBLIC PURSUANT TO N.R.S. 81-1848.” *Id.* As part of the rule, the clerk of the court is required to keep the document separate from the case file. *Id.* The rule further provides that the personal identifying information in the Form “shall not be included in any court order or judgment.” *Id.* This rule also protects other private victim information by authorizing the filing of certain documents under seal and the issuance of protective orders that require redaction of such information or limit or prohibit a nonparty’s access to court documents. *Id.* at § 6-1466(D)–(E).

In addition to such express privacy protections, Nebraska safeguards crime victim privacy through safety-related rights. *See, e.g.*, Neb. Rev. Stat. Ann. § 81-1848 (affording victims the right to “a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families and friends of defendants).

Nebraska offers heightened privacy protections to certain categories of victims. For instance, the state protects the privacy interests of victims of abuse, sexual assault, stalking and trafficking through its Address Confidentiality Program. *See* Neb. Rev. Stat. Ann. § 42-1208 (requiring the Secretary of State to protect the privacy of information of participants in the Address Confidentiality Program and that no such records will be made available for inspection or copying). This program is discussed more below, in the section “Select Confidentiality Laws.”

The state further protects the privacy of sexual assault victims through: provisions that bar disclosure of their identifying information, *see, e.g., id.* at § 81-1842 (mandating that the name of any victim of a sexual assault appearing in information or records of the Crime Victim’s Reparations Committee when the victim is applying for compensation under the Nebraska Crime Victim’s Reparations Act not be made public), *id.* at § 29-4009(2) (providing that information obtained pursuant to the Sex Offender Registration Act is generally not confidential, however, “[t]he identity of any victim of a sex offense shall not be released”); the state’s rape shield law, which prohibits, in sexual misconduct cases, evidence of a victim’s sexual behavior or predisposition, except under limited circumstances, *id.* at § 27-412(1); and a statutory provision barring law enforcement from asking sex offense victims to submit to a polygraph examination or other truth-telling device as a condition of the investigation moving forward, *id.* at § 29-216.

Nebraska also affords child-victims additional privacy protections, including limitations on the disclosure of materials that depict child sexual abuse or through which a child victim describes the abuse perpetrated against them. *See, e.g.*, Neb. Rev. Stat. Ann. § 27-1301 (requiring that any “property or material that constitutes a visual depiction of sexually explicit conduct, as defined in section 28-1463.02, and which has a child, as defined in such section, as one of its participants or portrayed observers, shall remain constantly and continuously in the care, custody, and control of law enforcement, the prosecuting attorney, or the court having properly received it into evidence,” and that “[a]ll courts and administrative agencies shall unequivocally deny any request by the defendant, his or her attorney, or any other person, agency, or organization, regardless of whether such defendant, attorney, or other person, agency, or organization is a party in interest or not, to acquire possession of, copy, photograph, duplicate, or otherwise reproduce” such property or material); *id.* at § 29-1926 (protecting the privacy of child victims through the use of videotaped depositions; providing that videotaped depositions in which children discuss sexual assault or abuse may not be released without a court order; and stating that the court order may govern the purposes for which such a videotape is used and impose requirements on use “reasonably necessary for the protection of the privacy and best interests of the child victim . . .”).

For information about victims’ privacy protections when persons attempt to access victims’ personal information through alternate means, such a public records request, *see* the “Select Confidentiality Laws” section below.

## 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 administered 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 Nebraska state cases?**

Nebraska 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.*, Neb. Rev. Stat. Ann. § 29-4303(1) (domestic violence advocate- and sexual assault advocate-victim confidentiality); *id.* at § 27-504 (physician-, psychologist- and professional counselor-client/patient confidentiality); *id.* at 28-902 (confidentiality of sexual assault victim’s identity and details of sexual assault or attempted sexual assault when healthcare provider is required to report such crimes and the victim elects anonymous reporting protocol); *id.* at § 42-918 (confidentiality of Department of Health and Human Services records regarding victims of domestic violence). Nebraska also protects the confidentiality of communications between victims and their attorneys, *id.* at § 27-503(d); spouses, *id.* at § 27-505; and clergy, *id.* at § 27-506. The state further protects the confidentiality of locating information of a safe house, abuse shelter or other facility that provides victims temporary emergency shelter. *Id.* at § 29-4303(2). These confidentiality protections do not relieve mandatory reporters of their obligation to report suspected abuse or neglect. *See, e.g., id.* at § 29-4304(3) (victim advocate-victim confidentiality does not relieve the advocate of duty to report adult or child abuse or neglect).

Nebraska’s legislature has expressly recognized the need for confidentiality in communications between victims and sexual and domestic violence advocates. As the legislature has explained, “because of the fear and stigma that often results from crimes of sexual assault or domestic violence, and because of the risk of retaliatory violence by the



perpetrator, many victims hesitate to seek help even when it is available at no cost to them. Without assurances that communications made while receiving assistance in overcoming the adverse effects of a sexual assault or domestic violence situation will be confidential and protected from disclosure, victims will be even more reluctant to seek assistance or to confide openly to their advocates and to explore legal and social remedies fully.” Neb. Rev. Stat. Ann. § 29-430. To ensure that victims receive the “vital care and counseling” that they need, the state protects the confidentiality of such communications between victims and sexual and domestic violence advocates. *Id.* In this context, “[c]onfidential communication means any written or spoken information exchanged between a victim and an advocate in private or in the presence of a third party who is necessary to facilitate communication or further the advocacy process and which is disclosed to the advocate for the purposes of overcoming the adverse effects of domestic violence or sexual assault.” *Id.* § 29-4302(3). These confidentiality protections do not apply to communications with victim advocates who are affiliated with a law enforcement or prosecutor’s office. *Id.* at § 29-4302(1).

There are certain situations in which a victim, victim advocate or third party who witnessed the confidential communication may be compelled, in a criminal proceeding, to give testimony or produce records regarding the communication. For instance, a party seeking disclosure of such a confidential communication may file a motion that sets for the issues on which disclosure is sought and specifies the reasons why the party is seeking disclosure and why disclosure is necessary. Neb. Rev. Stat. Ann. § 29-4303(1)(a). Such a motion must be “accompanied by an affidavit or affidavits containing specific information which establishes that the confidential communication constitutes relevant and material evidence in the case.” *Id.* The court or a hearing officer will then “review the confidential communication in camera and out of the presence and hearing of all persons, except the victim, the advocate, and any other person the victim is willing to have present, to determine whether a failure to disclose the confidential communication would violate the constitutional rights of the party seeking disclosure. *Id.* at § 29-4303(2).

Importantly, a victim does not waive the confidentiality of their communications with a victim advocate by testifying in court about the offense. Neb. Rev. Stat. Ann. § 29-4304(1). There is one exception to this general rule: if a victim partially discloses the contents of a confidential communication when testifying, either party may request that the court rule that “justice requires” waiver of the confidentiality protections. *Id.* at § 29-4304(1)(a). Any such waiver only applies to the extent necessary to respond to relevant questions concerning the confidential communication. *Id.* at § 29-4304(1)(b).

Nebraska statutes also protect the confidentiality of victims’ information in other communications and records. *See, e.g.,* Neb. Rev. Stat. Ann. § 28-311.11(13) (confidentiality of sexual assault victim’s identifying information related to sexual assault protection order enforcement); *id.* at § 23-311.09(12) (confidentiality of victim’s identifying information related to harassment protection order); *id.* at § 81-1842 (confidentiality of sexual assault victim’s name contained in records related to crime victim compensation); *id.* at § 42-926(3) (confidentiality of victim’s identifying information related to protection order enforcement).

Additional protections exist for victims to prevent their information from being accessed via public records requests. For example, Nebraska’s Records Management Act defines public records to “include[] all records and documents . . . of or belonging to this state or any agency, branch, department, board, bureau, commission, council, subunit, or committee of this state except when any other statute expressly provides that particular information or records shall not be made public.” Neb. Rev. Stat. Ann. § 84-1202(15). The Act further requires that “[w]hen an essential record is required by law to be treated in a confidential manner, the administrator, in effectuating the purposes of the Records Management Act, shall protect its confidential nature, as well as that of any preservation duplicate or other copy thereof.” *Id.* at § 84-1211(1). Certain types of victim information are specifically exempted from public records access. *See, e.g., id.* at § 81-1850(1), (8) (noting that “[u]pon request of the victim and at the time of conviction of the offender, the county attorney of the jurisdiction in which a person is convicted of a felony shall forward to the Board of Parole, the Department of Correctional Services, the county corrections agency, or the Department of Health and Human Services the name and address of any victim, as defined in section 29-119, of the convicted person[,]” and although the victim’s name shall remain in defendant’s file, “the name shall not be part of the public record of any parole hearings of the convicted person”; also providing that “[t]he victim’s address and telephone number maintained by the Department of Correctional Services, the Department of Health and Human Services, the county corrections agency, or the Board of Parole pursuant to subsection (1) of this section shall be exempt from disclosure under public records laws and federal freedom of information laws, as such laws existed on January 1, 2004”).

Nebraska offers additional confidentiality protections to victims of abuse, sexual assault, stalking and trafficking through its address confidentiality program, Neb. Rev. Stat. Ann. §§ 42-1201 through 42-1210. This program is designed “to enable state and local agencies to respond to requests for public records without disclosing the location of a victim of abuse, sexual assault, or stalking, to enable interagency cooperation with the office of the Secretary of State in providing address confidentiality for victims of abuse, sexual assault, or stalking, and to enable state and local agencies to accept a program participant’s use of an address designated by the Secretary of State as a substitute mailing address. Neb. Rev. Stat. Ann. § 42-1202.

## 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 Nebraska state cases?**

Victims in Nebraska have a number of privileges that they can assert to prevent disclosure of their private communications with certain professionals and service providers, such as lawyers, doctors, psychologists and certified professional counselors. *See, e.g.*, Neb. Rev. Stat. Ann. § 27-503 (lawyer-client privilege); Neb. Rev. Stat. Ann. § 27-504 (physician-, psychologist- and certified professional counselor-client/patient privilege).

When disclosure of a confidential communication protected by one of these privileges is sought from a victim or the professional, the victim may assert the privilege to protect against disclosure. *See, e.g.*, Neb. Rev. Stat. Ann. § 27-503(2) (“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer’s representative, or (b) between his lawyer and the lawyer’s representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.”); *id.* at § 27-504(2)(a) (“A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his or her physical, mental, or emotional condition among himself or herself, his or her physician, or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient’s family.”); *id.* at § 27-504(2)(b) (“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made during counseling between himself or herself, his or her professional counselor, or persons who are participating in the counseling under the direction of the professional counselor, including members of the client’s family.”).

State law expressly provides that any communication with a sexual assault victim that is privileged, either by statute, court order or common law, retains its privilege “regardless of who is present during the communication so long as the victim has a privilege with respect to each individual present.” Neb. Rev. Stat. § 29-4310. This provision, however, does not relieve the prosecutor of their duty to disclose exculpatory or impeachment material to the defendant. *Id.*

Importantly, these privileges do not interfere with a professional’s mandatory child abuse reporting obligations or duties to report a crime. *See, e.g.*, Neb. Rev. Stat. Ann. § 27-

<p>504(4)(d) (no physician or psychologist-patient privilege or professional counselor-client privilege “in any judicial proceedings under the Nebraska Juvenile Code regarding injuries to children, incompetents, or disabled persons or in any criminal prosecution involving injury to any such person or the willful failure to report any such injuries”); <i>see also id.</i> at § 28-711(1) (mandating reporting of suspected child abuse or neglect by, <i>inter alia</i>, physicians, medical institutions, nurses, school employees and social workers).</p> <p>For reference, the text of the main privileges discussed in this section appears below.</p>	
<p>Attorney-Client Privilege</p>	<p>Neb. Rev. Stat. Ann. § 27-503(2).</p> <p>A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer’s representative, or (b) between his lawyer and the lawyer’s representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.</p>
<p>Physician-Patient and Psychologist-Patient Privilege</p>	<p>Neb. Rev. Stat. Ann. § 27-504(2)(a).</p> <p>A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his or her physical, mental, or emotional condition among himself or herself, his or her physician, or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient’s family.</p>
<p>Professional Counselor-Client Privilege</p>	<p>Neb. Rev. Stat. Ann. § 27-504(2)(b).</p> <p>A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made during counseling between himself or herself, his or her professional counselor, or persons who are participating in the counseling under the direction of the professional counselor, including members of the client’s family.</p>

**SELECT DEFINITIONS**

<b>Key Federal Definitions.</b>	
CVRA Definitions	<p>18 U.S.C. § 3771(e).</p> <p>(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.</p> <p>(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.</p> <p>(3) District court; court. --The terms “district court” and “court” include the Superior Court of the District of Columbia.</p> <p>18 U.S.C. § 3771(b)(2)(D).</p> <p>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.</p>
<b>Key State Definitions.</b>	
Definition of “Victim” for Statutory Victims’ Rights Provisions and	<p>Neb. Rev. Stat. Ann. § 29-119(2).</p> <p>(a) Victim means a person who has had a personal confrontation with an offender as a result of a homicide under sections 28-302 to</p>

<p>Court Rule Governing Victims’ Personal Information in Pleadings and Other Court Documents</p>	<p>28-306, a first degree assault under section 28-308, a second degree assault under section 28-309, a third degree assault under section 28-310 when the victim is an intimate partner as defined in section 28-323, a first degree false imprisonment under section 28-314, a first degree sexual assault under section 28-319, a sexual assault of a child in the first degree under section 28-319.01, a second or third degree sexual assault under section 28-320, a sexual assault of a child in the second or third degree under section 28-320.01, domestic assault in the first, second, or third degree under section 28-323, or a robbery under section 28-324. Victim also includes a person who has suffered serious bodily injury as defined in section 28-109 as a result of a motor vehicle accident when the driver was charged with a violation of section 60-6,196 or 60-6,197 or with a violation of a city or village ordinance enacted in conformance with either section.”</p> <p>(b) In the case of a homicide, victim means the nearest surviving relative under the law as provided by section 30-2303 but does not include the alleged perpetrator of the homicide.</p> <p>(c) In the case of a violation of section 28-813.01, 28-1463.03, 28-1463.04, or 28-1463.05, victim means a person who was a child as defined in section 28-1463.02 and a participant or portrayed observer in the visual depiction of sexually explicit conduct which is the subject of the violation and who has been identified and can be reasonably notified.</p> <p>(d) In the case of a sexual assault of a child, a possession offense of a visual depiction of sexually explicit conduct, or a distribution offense of a visual depiction of sexually explicit conduct, victim means the child victim and the parents, guardians, or duly appointed legal representative of the child victim but does not include the alleged perpetrator of the crime.</p> <p>(e) Victim also includes a person who was the victim of a theft under section 28-511, 28-512, 28-513, or 28-517 when (i) the value of the thing involved is five thousand dollars or more and (ii) the victim and perpetrator were intimate partners as defined in section 28-323.</p> <p>(f) Victim also includes a sexual assault victim as defined in section 29-4309.</p>
--	--

<p>Victim and Domestic Violence and Sexual Assault Advocate Confidentiality Definitions</p>	<p>Neb. Rev. Stat. Ann. § 29-4302.</p> <p>(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;</p> <p>(2) Victim means a person who communicates with an advocate for assistance in overcoming the adverse effects of domestic violence or sexual assault; and</p> <p>(3) Confidential communication means any written or spoken information exchanged between a victim and an advocate in private or in the presence of a third party who is necessary to facilitate communication or further the advocacy process and which is disclosed to the advocate for the purposes of overcoming the adverse effects of domestic violence or sexual assault.</p>
<p>Protection from Domestic Abuse Act Definitions</p>	<p>Neb. Rev. Stat. Ann. § 42-903.</p> <p>For purposes of the Protection from Domestic Abuse Act, unless the context otherwise requires:</p> <p>(1) Abuse means the occurrence of one or more of the following acts between family or household members:</p> <p>(a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;</p> <p>(b) Placing, by means of credible threat, another person in fear of bodily injury. For purposes of this subdivision, credible threat means a verbal or written threat, including a threat performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct that is made by a person with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat shall not prevent the threat from being deemed a credible threat under this section; or</p> <p>(c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318;</p>

	<p>(2) Department means the Department of Health and Human Services;</p> <p>(3) Family or household members includes spouses or former spouses, children, persons who are presently residing together or who have resided together in the past, persons who have a child in common whether or not they have been married or have lived together at any time, other persons related by consanguinity or affinity, and persons who are presently involved in a dating relationship with each other or who have been involved in a dating relationship with each other. For purposes of this subdivision, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context; and</p> <p>(4) Law enforcement agency means the police department or town marshal in incorporated municipalities, the office of the sheriff in unincorporated areas, and the Nebraska State Patrol.</p>
<p>Address Confidentiality Act Definitions</p>	<p>Neb. Rev. Stat. Ann. § 42-1203.</p> <p>(1) Abuse means causing or attempting to cause physical harm, placing another person in fear of physical harm, or causing another person to engage involuntarily in sexual activity by force, threat of force, or duress, when committed by (a) a person against his or her spouse, (b) a person against his or her former spouse, (c) a person residing with the victim if such person and the victim are or were in a dating relationship, (d) a person who formerly resided with the victim if such person and the victim are or were in a dating relationship, (e) a person against a parent of his or her children, whether or not such person and the victim have been married or resided together at any time, (f) a person against a person with whom he or she is in a dating relationship, (g) a person against a person with whom he or she formerly was in a dating relationship, or (h) a person related to the victim by consanguinity or affinity;</p> <p>(2) Address means a residential street address, school address, or work address of an individual as specified on the individual’s application to be a program participant;</p> <p>(3) Dating relationship means an intimate or sexual relationship;</p>



	<p>(4) Program participant means a person certified as a program participant under section 42-1204;</p> <p>(5) Sexual assault has the same meaning as in section 28-319, 28-319.01, 28-320, 28-320.01, or 28-386;</p> <p>(6) Stalking has the same meaning as in sections 28-311.02 to 28-311.05; and</p> <p>(7) Trafficking victim has the same meaning as in section 28-830.</p>
<p>Lawyer-Client Privilege Definitions</p>	<p>Neb. Rev. Stat. Ann. § 27-503(1).</p> <p>As used in this rule:</p> <p>(a) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;</p> <p>(b) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;</p> <p>(c) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services; and</p> <p>(d) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.</p>
<p>Physician-Patient, Psychologist-Patient, and Counselor-Client Privileges Definitions</p>	<p>Neb. Rev. Stat. Ann. § 27-504(1).</p> <p>As used in this rule:</p> <p>(a) A patient is a person who consults or is examined or interviewed by a physician for purposes of diagnosis or treatment of his or her physical, mental, or emotional condition;</p> <p>(b) A physician is (i) a person authorized to practice medicine in any state or nation or who is reasonably believed by the patient so to be or (ii) a person licensed as a psychologist under the laws of</p>

	<p>any state or nation who devotes all or a part of his or her time to the practice of psychology;</p> <p>(c) A client is a person who consults or is interviewed by a professional counselor for professional counseling as defined in section 38-2118;</p> <p>(d) A professional counselor is a person certified as a professional counselor pursuant to section 38-2132; and</p> <p>(e) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of (i) the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family, or (ii) the client participating in professional counseling by a professional counselor.</p>
--	---

<sup>1</sup> Federal constitutional rights are applicable in state and federal cases. Other federal law is generally applicable in federal investigations and prosecutions. State law is generally applicable in in state investigations and prosecutions.

<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4</sup> *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).

<sup>5</sup> *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”).

<sup>6</sup> *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).

<sup>7</sup> 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).

<sup>8</sup> 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”).

<sup>9</sup> 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).

<sup>10</sup> 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).

<sup>11</sup> 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).

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> See *Office for Victims of Crime, Ethical Standards, Section I: Scope of Services*, [https://www.ovc.gov/model-standards/ethical\\_standards\\_1.html](https://www.ovc.gov/model-standards/ethical_standards_1.html).

<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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).

<sup>18</sup> 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.”).

<sup>19</sup> 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.

<sup>20</sup> 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[.]”).

<sup>21</sup> 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).

<sup>22</sup> 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).

<sup>23</sup> 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).

<sup>24</sup> *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](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.*

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 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>.

<sup>34</sup> *Id.*

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

<sup>36</sup> *Office for Victims of Crime, Purpose & Scope of The Standards*, [https://ovc.ojp.gov/model-standards/purpose\\_and\\_scope.html](https://ovc.ojp.gov/model-standards/purpose_and_scope.html).

<sup>37</sup> *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](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](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](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](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](https://www.ovc.gov/model-standards/ethical_standards_5.html).

<sup>38</sup> *Office for Victims of Crime, Ethical Standards for Serving Victims & Survivors of Crime*, [https://www.ovc.gov/model-standards/ethical\\_standards.html](https://www.ovc.gov/model-standards/ethical_standards.html).

<sup>39</sup> 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](https://www.theiacp.org/sites/default/files/LEV/Publications/Template_Package_I_04.2021.pdf).

<sup>40</sup> See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

<sup>41</sup> See *United States v. Agurs*, 427 U.S. 97, 106–07 (1976).

<sup>42</sup> *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

<sup>43</sup> *Id.*

<sup>44</sup> 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”).

<sup>45</sup> 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.

<sup>46</sup> 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.

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

<sup>48</sup> 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).

<sup>49</sup> 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”).

<sup>50</sup> Attorney work product “is generally exempt from discovery or other compelled disclosure.” *Work product*, Black’s Law Dictionary (8th ed. 2004).

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