NATIONAL CRIME VICTIM LAW INSTITUTE

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

INTRODUCTION

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

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

USING THIS RESOURCE

This resource is designed to enhance victim services personnel's knowledge and understanding of the law governing crime victims' rights to privacy, confidentiality and privilege in Indiana. It provides an overview of key concepts and excerpts of key legal citations that can help facilitate victims' meaningful choices regarding these rights. To keep this *Guide* as user-friendly as possible in light of the breadth, complexity and evolving nature of law, the *Guide* does not include all laws. It does not constitute legal advice, nor does it substitute for legal advice. This resource is best used together with its companion resource: *Select Victims' Rights - Indiana*.

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OVERVIEW

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

Key Takeaways

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

Discussion

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

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

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

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

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

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

Key Takeaways

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

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

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

Discussion

Privacy

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

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

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

Confidentiality

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

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

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

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

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

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

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

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

Privilege

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

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

Understanding the Differences

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

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

Key Takeaways

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Key Takeaways

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

Discussion

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

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

The third area—Ethical Standards for Serving Victims & Survivors of Crime—contains "ethical expectations" of victim service providers that are "based on core values" in the field and are intended to serve as guidelines for providers in the course of their work. The Ethical Standards are comprised of five sections:
(1) Scope of Services;
(2) Coordinating within the Community;
(3) Direct Services;
(4) Privacy, Confidentiality, Data Security and Assistive Technology; and
(5) Administration and Evaluation.[22]

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

responsible manner."[23]

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

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

Key Takeaways

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

Key Takeaways

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

Discussion

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

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

Key Takeaways

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

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

Discussion

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

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

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

SELECT LAWS

SELECT PRIVACY LAWS

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

Although Indiana's victims' rights laws do not offer victims a broad right to privacy, the state affords victims a series of narrow privacy protections. For instance, Indiana provides crime victims with privacy protections related to the nondisclosure of their personal identifying and locating information. *See, e.g.*, Ind. Code Ann. § 35-40-5-12 (providing that sex crime victims and child-victims of crimes of violence must be identified in court documents by means of a designation that omits their name, such as "Victim 1" and requiring that the state provide the court with a confidential document identifying the victims named in the court document); *id.* at § 11-13-3-3(f) (providing that an inmate may not have access to the name and address of a victim and that, if a person requests or objects to the release of victim information held by the department of corrections, the court must "review the information that is the subject of the motion in camera before ruling on the motion"); *id.* at § 34-26-5-7 (providing that victims petitioning for a civil order of protection may omit their address from all nonconfidential documents filed with the court, but must provide the court with complete information concerning the protected address on the confidential form); *id.* at § 35-37-4-12(a) (providing that a victim "may not be required to give personal information during the course of sworn testimony" regarding their telephone number, place of employment or residential address, if their physical safety or the physical safety of their immediate family is in danger); *id.* at § 35-37-4-12(b) (providing that, in any hearing to determine the introduction into evidence of a victim's personal information when the physical safety of the victim or their immediate family is in danger, "if the court finds an actual danger to the victim or the victim's immediate family exists, [the court] may require the party possessing the personal information to disclose the personal information to the court in camera"); Ind. Ct. Access R. 5(C)(2) (providing that the names of child victims of sex offenses in court records must be excluded from public access and requiring the use of alternative designations to preserve anonymity); *id.* at R. 5(C)(3) (providing that certain identifying and locating information of victims must be excluded from public access).

In addition to such express privacy protections, Indiana safeguards crime victim privacy through general constitutional and statutory guarantees of the right to be treated with fairness, dignity and respect. Ind. Const. art. I, § 13(b); Ind. Code Ann. § 35-40-5-1.

The state further protects victim privacy through statutory safety-related rights. *See, e.g.*, Ind. Code Ann. §§ 32-31-9-9 through 32-31-9-12 (affording certain victims rights to have their locks changed in the aftermath of crime); *id.* at § 35-37-4-6(e)(2)(B) (authorizing the admissibility of statement or videotapes in lieu of live testimony for certain victims, where there is evidence that testifying in the defendant's physical presence will cause the victim,

inter alia, emotional distress that would interfere with their ability to communicate); *id.* at § 35-37-4-8(c) (authorizing certain victims to testify outside of the courtroom, via closed circuit television); *id.* at § 35-37-4-11 (requiring courts to provide safeguards to minimize contact between victims and offenders, such as secure waiting areas).

Indiana also protects victim privacy in the discovery context. For instance, when a party seeks production of a victim's mental health records, they must file a petition with the court. Ind. Code Ann. § 16-39-3-3. The court will then hold a hearing regarding whether certain factors are present to warrant disclosure. *Id.* at § 16-39-3-7. The victim-patient must receive notice of such a hearing at least fifteen days before it is set to take place. *Id.* at § 16-39-3-4. The victim-patient has the right to have an attorney present at such a hearing and the notice of the hearing must inform them of this right. *Id.* at § 16-39-3-5. At the conclusion of the hearing, the court may order the release of the victim-patient's mental health records if it finds, by a preponderance of the evidence, that there are no other effective means of obtaining the information and the need for disclosure outweighs the potential for harm to the victim-patient, including the harms of disclosure on the victim-patient's privilege and rehabilitation. *Id.* at § 16-39-3-7.

The state also protects victim privacy through its rules regarding access to court records. Although there is a presumption that all court records are accessible to the public, Ind. Ct. Access Records Rule 4, there are a number of exceptions to this general rule that apply to victims. For example, court records are not accessible to the public where they contain: victim information that is made confidential by rule or statute, *id.* at R. 5(A)(1), (B)(1)–(2); privileged victim communications, *id.* at R. 5(B)(5); victims' medical and mental health records, *id.* at R. 5(B)(8)-(9); images of certain parts of victims' bodies, *id.* at R. 5(B)(11); or images of victims engaging in or being subjected to sexual contact, *id.* at R. 5(B)(12). Additionally, the names of child-victims in sex offense cases must be "excluded from public access and any references shall be replaced with initials or similar designation that ensures their anonymity, with no notice of exclusion from Public Access required. Names shall not be redacted in protection order cases or on no contact orders." *Id.* at R. 5(C)(2). Because using a child-victim's initials may, in some cases, identify the victim, "the Rule gives flexibility to craft a method to protect the child's identity." *Id.* at R. 5, Comment. All crime victims' addresses, dates of birth and phone numbers are also excluded from public access. *Id.* at R. 5(C)(3). When a document containing court records that are excluded from public access are filed, they must contain a header, label or stamp indicating that they are confidential, per Access to Court Records R. 5. For example, "when a subpoena is returned after service, the return will contain the victim's full name and address. This heading notifies individuals who are processing the document to "lock" the document and maintain its exclusion from Public Access." *Id.* at Rule 5, Comment.

Victim information that does not fall within the express protections of Indiana's Access to Court Records Rule 5 may still be protected from public disclosure pursuant to a written request that demonstrates, *inter alia*, that "[t]he public interest will be substantially served by prohibiting access" or "[a]ccess or dissemination of the Court Record will create a

significant risk of substantial harm to the requestor, other persons or the general public." Ind. Ct. Access Records R. 6(A).

Indiana offers heightened privacy protections to certain categories of victims. For instance, the state protects the privacy of sexual assault victims through: rape shield laws, which prohibit, in sex offense cases, the introduction of evidence of a victim's sexual behavior or predisposition, except under limited circumstances, Ind. Code Ann. § 35-37-4-4, Ind. R. Evid. 412; privilege protections for the communications between sexual assault victims and victim advocates, victim service providers, victims assistance or social workers, *id.* at § 35-40.5-3-2; and statutory provisions barring law enforcement from requiring sexual assault victims to submit to a polygraph or other truth telling device, *id.* at § 35-37-4.5-2, or conditioning an investigation, charge or prosecution on the victim's submission to such a test, *id.* at § 35-37-4.5-3.

Indiana also protects the privacy interests of victims of domestic violence, sexual assault, stalking, human trafficking, harassment, intimidation and invasion of privacy through its address confidentiality program, Ind. Code Ann. §§ 5-26.5-1-1 through 5-26.5-5-6. This program is discussed more below, in the section "Select Confidentiality Laws."

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

SELECT CONFIDENTIALITY LAWS

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

Indiana offers numerous confidentiality protections with respect to victims' locating and identifying information. *See, e.g.*, Ind. Code Ann. § 35-38-1-33(f) (providing that, in the context of determinations regarding residency restrictions for sex offenders, "[t]he address of the victim of the offender's sex offense is confidential even if the court grants a waiver [of the residency restrictions]"); *id.* at § 35-38-2-2.6(f) (providing for confidentiality of address of a stalking victim, even if the court or parole board waives limitation on where the stalking offender may reside while on probation or parole); *id.* at § 35-38-7-16(b) (providing that the victim's name and address are confidential for the purposes of chapter regarding an offender's postconviction DNA testing); *id.* at § 36-1-8.5-7 (providing for confidentiality of information a victim of domestic violence participating in the state's address confidentiality program submits in support of request to restrict access to their home address on an online public property database).

Indiana also protects the confidentiality of certain materials used in a criminal case that contain private victim information, such as: presentence investigation reports submitted to the court in connection with sentencing, Ind. Code Ann. § 35-38-1-13(a); victims' mental health records and/or testimony related to their mental health records offered or admitted

into evidence in a legal proceeding, *id.* at § 16-39-3-10; personal information and medical records submitted in connection with a sexual assault victim's forensic examination, *id.* at § 16-21-8-11; photographs, film, video records or other similar mediums showing certain victims' body parts or demonstrating the victim being subjected to sexual contact, Ind. Ct. Access Records R. 5(B)(11)–(12); and victims' dates of birth and locating information, *id.* at R. 5(C)(3).

Indiana also affords victims certain confidentiality protections in the context of public records requests. In general, government records in Indiana are open to the public. Ind. Code Ann. § 5-14-3-1. The state provides a number of exceptions and exemptions to this general rule of disclosure, some of which apply to crime victims. For instance, public records containing victim information may not be disclosed absent a requirement under state or federal law or a court order, where those records are declared confidential by state or federal law. *Id.* at § 5-14-3-5(a)(1)–(3), (8). A victim's telephone number and address contained in law enforcement records are also generally exempt from disclosure pursuant to a public records request. *Id.* at § 5-14-3-4(b)(21). Where an offender, their agent or relative seeks records that contain information relating to the victim or the victim's family, such records generally may not be released. *Id.* at § 5-14-3-4(b)(23)(A)(vi)–(vii). A private university's police department must redact a victim's name before releasing records. *Id.* at § 5-14-3-2.2. When a public agency discloses a law enforcement recording, it must obscure the victim and any information identifying the victim, if the agency believes obscuring such information is "necessary for the victim's safety." *Id.* at § 5-14-3-5.2(e)(1)(B)(viii).

Indiana also protects the confidentiality of victims of domestic violence, sexual assault, stalking, human trafficking, harassment, intimidation and invasion of privacy through its address confidentiality program. *See generally* Ind. Code Ann. §§ 5-26.5-1-1 through 5-26.5-5-6. This program allows such victims to maintain a confidential address through the Attorney General's Office. Victim-participants use this substitute address to receive mail and for accessing state and local government services, such as obtaining a driver's license or registering to vote. *See, e.g., id.* at § 5-26.5-2-5 (procedure for voting when program participant).

Additionally, Indiana law recognizes the confidentiality of communications between victims and certain providers of counseling and other support services. *See, e.g.*, Ind. Code Ann. § 20-28-10-17 (school counselor-student confidentiality); *id.* at § 35-37-6-9 (victim advocate- and victim service provider-victim confidentiality). These confidentiality protections are discussed further the section "Select Privilege Laws."

SELECT PRIVILEGE LAWS

What are key privileges in Indiana?

Victims in Indiana have a number of privileges that they can assert to prevent the disclosure of their private communications with certain professionals and service providers. *See, e.g.*, Ind. Code Ann. § 20-28-10-17 (school counselor-student privilege); *id.* at § 25-23.6-6-1 (counselor-client privilege, including social worker-, marriage and family therapist-, mental health counselor- and addiction counselor-client communications); *id.* at § 25-33-1-17 (psychologist-patient privilege); *id.* at § 34-46-3-1(2) (physician-patient privilege); *id.* at § 35-37-6-9(a) (victim advocate- and victim service provider-victim privileges); *id.* at § 35-40.5-3-2 (victim advocate-, victim service provider-, victims assistance- and social worker-sexual assault victim privileges). The state also protects victim advocates, victim service providers and victims from being compelled to provide testimony that would identify the locating information of a facility that provided temporary emergency shelter to the victim, unless the facility is a party to the proceedings. *Id.* at § 35-37-6-9(b).

Indiana's communication privileges are subject to certain limitations. For instance, Indiana expressly provides that that numerous privileges are not grounds for excluding evidence in a judicial proceeding resulting from a report of the abuse or neglect or a child and/or vulnerable adult. *See* Ind. Code Ann. § 31-32-11-1 (providing that the privileged communications between the following individuals are not grounds for excluding evidence in a proceeding resulting from a report of child abuse or neglect: husband and wife; health care provider and patient; social worker and client; marriage and family therapist and client; mental health counselor and client; addiction counselor and client; school counselor and student; and school psychologist and student); *id.* at § 35-37-6-8 (providing that victim advocate-victim privilege does not relieve advocate of their mandatory reporting obligations regarding the abuse, neglect or exploitation of children or vulnerable adults).

Certain privileges do not apply in specific criminal justice settings. For example, the counselor-client and psychologist-patient privileges do not apply in a proceeding involving a homicide, if the disclosure relates directly to the fact or immediate circumstances of the homicide. Ind. Code Ann. § 25-23.6-6-1(1); *id.* at § 25-33-1-17(1). Additionally, the counselor-client does not bar disclosure of information communicated to the social worker indicating that the client was the victim of a crime "if the client is an unemancipated minor or an adult adjudicated to be incompetent[.]" *Id.* at § 25-23.6-6-1(3)(b).

Victims may waive the privilege protecting their communications from disclosure. In the context of the victim advocate- and victim services provider-victim privileges, Indiana expressly provides that a victim does not waive these privileges by testifying in the court; but "if the victim partially discloses the contents of a confidential communication in the course of testifying, either party may request the court to rule that justice requires the protections of this chapter to be waived, to the extent they apply to that portion of the communication." Ind. Code Ann. § 35-37-6-10(a). Any such waiver "applies only to the

extent necessary to require any witness to respond to questions concerning the confidential communication that are relevant to the facts and circumstances of the case." *Id.* at § 35-37-6-10(b). Additionally, state law expressly provides that a victim does not waive any privilege or confidentiality protection regarding their communications with a victim advocate or victim service provider if the victim "testifies about underlying acts of domestic violence, dating violence, sexual assault or stalking" or "reveals that he or she used or attempted to use the services of a victim service provider or advocate." *Id.* at § 35-37-6-14(b). The partial disclosure of any confidential communication protected by this privilege "does not waive any privilege concerning the remainder of the confidential communication." *Id.* at § 35-37-6-15. Additionally, the victim advocate- and victim services provider-victim privilege does not "relieve a prosecuting attorney of the constitutional and ethical obligation to disclose exculpatory evidence" or "prohibit impeachment of a victim as permitted by the Indiana Rules of Evidence." *Id.* at § 35-37-6-14(a). Victim advocates and victim services providers must make "reasonable attempts" to notify a victim when the advocate or service provider is required to disclose confidential information or confidential communications. *Id.* at § 35-37-6-13(c).

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

Counselor-Client Privilege (including Social Worker-, Marriage and Family Therapist-, Mental Health Counselor-, and Addiction Counselor-Client Communications)	Ind. Code Ann. § 25-23.6-6-1. Matters communicated to a counselor in the counselor's official capacity by a client are privileged information and may not be disclosed by the counselor to any person, except under the following circumstances: (1) In a criminal proceeding involving a homicide if the disclosure relates directly to the fact or immediate circumstances of the homicide. (2) If the communication reveals the contemplation or commission of a crime or a serious harmful act. (3) If: (A) the client is an unemancipated minor or an adult adjudicated to be incompetent; and (B) the information communicated to the counselor indicates the client was the victim of abuse or a crime. (4) In a proceeding to determine mental competency, or a proceeding in which a defense of mental incompetency is raised. (5) In a civil or criminal malpractice action against the counselor. (6) If the counselor has the express consent of: (A) the client; or (B) in the case of a client's death or disability, the express consent of the client's legal representative. (7) To a physician if the physician is licensed under IC 25-22.5 and has established a physician-patient relationship with the client.

	(8) Circumstances under which privileged communication is abrogated under Indiana law.
Psychologist-Patient Privilege	Ind. Code Ann. § 25-33-1-17. A psychologist licensed under this article may not disclose any information acquired from persons with whom the psychologist has dealt in a professional capacity, except under the following circumstances: (1) Trials for homicide when the disclosure relates directly to the fact or immediate circumstances of said homicide. (2) Proceedings the purpose of which is to determine mental competency, or in which a defense of mental incompetency is raised. (3) Actions, civil or criminal, against a psychologist for malpractice. (4) Upon an issue as to the validity of a document such as a will of a client. (5) If the psychologist has the expressed consent of the client or subject, or in the case of a client's death or disability, the express consent of the client's legal representative. (6) Circumstances under which privileged communication is abrogated under the laws of Indiana.
Physician-Patient Privilege	Ind. Code Ann. § 34-46-3-1(2). Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: . . . Physicians, as to matters communicated to them by patients, in the course of their professional business, or advice given in such cases.

Victim Advocate- and Victim Service Provider-Victim Privileges	Ind. Code Ann. § 35-37-6-9. (a) The following persons or entities may not be compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding: (1) A victim. (2) A victim advocate or victim service provider unless the victim specifically consents to the disclosure in a written authorization that contains the date the consent expires. (b) A victim advocate, victim service provider, or victim may not be compelled to provide testimony in any judicial, legislative, or administrative proceeding that would identify the name, address, location, or telephone number of any facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding. (c) A victim service provider or victim advocate may not require a victim to consent to the disclosure of information concerning confidential communications and confidential information as a condition of the victim receiving services. (d) This section does not prohibit a victim from providing testimony concerning an offense. (e) The consent to disclose information on behalf of: (1) a child who is less than eighteen (18) years of age and is unemancipated; or (2) an incapacitated victim; may be made by a custodial parent, custodian, guardian, or guardian ad litem in a written authorization that contains the date the consent expires. (f) A consent under subsection (e) may not be given by a custodial parent, custodian, guardian, or guardian ad litem of the victim if the custodial parent, custodian, guardian, or guardian ad litem: (1) committed; or (2) is alleged to have committed; an offense against the victim.

Victim Advocate-, Victim Service Provider-, Victims Assistance- and Social Worker-Sexual Assault Victim Privileges	Ind. Code Ann. § 35-40.5-3-2. A victim's communications with a victim advocate, victim service provider, victims assistance, or a social worker are not admissible into evidence for any purpose except with consent of the victim.

DEFINITIONS

Key definitions appear below.	
Victims' Statutory Rights, Definition of "Victim"	Ind. Code Ann. § 35-40-4-8. "Victim" means a person that has suffered harm as a result of a crime that was perpetrated directly against the person. The term does not include a person that has been charged with a crime arising out of the same occurrence.
Counselor-Client Privilege Definition of "Counselor"	Ind. Code Ann. § 25-23.6-1-3.8. Except as provided in IC 25-23.6-7-5, "counselor" refers to a social worker, a clinical social worker, a marriage and family therapist, a mental health counselor, an addiction counselor, or a clinical addiction counselor who is licensed under this article.
Victim Advocate- and Victim Service Provider-Victim Privileges Definitions	Ind. Code Ann. § 35-37-6-1. (a) As used in this chapter, "confidential communication" means any information: (1) exchanged between a victim and a victim advocate in the course of the relationship between the victim and the victim advocate; (2) exchanged or disclosed in a support group in which a victim is or was a participant; or (3) exchanged in the presence of a third person who facilitates or facilitated communication between a victim and a victim advocate. (b) The term includes communication that is verbal or written and includes: (1) advice; (2) notes;

	(3) reports; (4) statistical data; (5) memoranda; (6) working papers; (7) records; and (8) personally identifying information; produced in the course of advocating for a victim. Ind. Code Ann. § 35-37-6-1.5. (a) As used in this chapter, "confidential information" includes: (1) personally identifying information; (2) descriptions of physical appearance; (3) the case file; and (4) the case history; of a person who seeks, receives, or has received services from a victim advocate. (b) The term does not include: (1) information disclosed to a victim service provider or a victim advocate if the victim: (A) files criminal charges; (B) institutes a civil lawsuit; or (C) reports allegations of criminal conduct to a law enforcement agency; against the victim service provider or victim advocate; and (2) alleged child abuse or neglect that is required to be reported under IC 31-33. Ind. Code Ann. § 35-37-6-2.5. (a) As used in this chapter, "personally identifying information" means information that identifies a victim or the location where domestic violence, dating violence, sexual assault, or stalking occurred, including the victim's: (1) name; (2) mailing and physical address; (3) electronic mail address; (4) Internet protocol address; (5) telephone numbers, including facsimile numbers; (6) Social Security number; (7) date of birth; (8) racial or ethnic background; and (9) religious affiliation. (b) The term includes any other information that, in combination with other nonpersonally identifying information, would identify an individual.

	Ind. Code Ann. § 35-37-6-2.7. As used in this chapter, "student advocate office" means a student services office, victim assistance office, or other victim counselor as designated by a state educational institution or an approved postsecondary educational institution. Ind. Code Ann. § 35-37-6-3. As used in this chapter, "victim" means: (1) an individual against whom an act of: (A) domestic or family violence; (B) dating violence; (C) sexual assault (as defined in IC 5-26.5-1-8); (D) human and sexual trafficking (IC 35-42-3.5); or (E) stalking (IC 35-45-10-5); is committed; or (2) an individual: (A) who is not accused of committing an act of domestic or family violence, dating violence, sexual assault (as defined in IC 5-26.5-1-8), human and sexual trafficking (IC 35-42-3.5), or stalking (IC 35-45-10-5); and (B) who: (i) is a member of the family of an individual described in subdivision (1); but (ii) is not a family member who is accused of committing an act of domestic or family violence, dating violence, sexual assault (as defined in IC 5-26.5-1-8), human and sexual trafficking (IC 35-42-3.5), or stalking (IC 35-45-10-5). Ind. Code Ann. § 35-37-6-3.5. (a) As used in this chapter, "victim advocate" means an individual employed or appointed by or who volunteers for: (1) a victim services provider; or (2) the student advocate office of a state educational institution or an approved postsecondary educational institution, if the individual provides services to a victim. (b) The term does not include: (1) a law enforcement officer; (2) an employee or agent of a law enforcement officer; (3) a prosecuting attorney; or (4) an employee or agent of a prosecuting attorney's office. (c) The term includes an employee, an appointee, or a volunteer of a: (1) victim services provider; (2) domestic violence program; (3) sexual assault program;

	(4) rape crisis center; (5) battered women's shelter; (6) transitional housing program for victims of domestic violence; or (7) program that has as one (1) of its primary purposes to provide services to an individual: (A) against whom an act of: (i) domestic or family violence; (ii) dating violence; (iii) sexual assault (as defined in IC 5-26.5-1-8); (iv) human and sexual trafficking (IC 35-42-3.5); or (v) stalking (IC 35-45-10-5); is committed; or (B) who: (i) is not accused of committing an act of domestic or family violence, dating violence, sexual assault (as defined in IC 5-26.5-1-8), human and sexual trafficking (IC 35-42-3.5), or stalking (IC 35-45-10-5); and (ii) is a member of the family of an individual described in clause (A) other than a family member who is accused of committing an act of domestic or family violence, dating violence, sexual assault (as defined in IC 5-26.5-1-8), human and sexual trafficking (IC 35-42-3.5), or stalking (IC 35-45-10-5). Ind. Code Ann. § 35-37-6-5. As used in this chapter, "victim service provider" means a person: (1) that is: (A) a public agency; (B) a unit of a public agency; or (C) an organization that is exempt from federal income taxation under Section 501 of the Internal Revenue Code; (2) that is not affiliated with a law enforcement agency; (3) that has, as one (1) of its primary purposes, to provide services for emotional and psychological conditions that occur to an individual: (A) against whom an act of: (i) domestic or family violence; (ii) dating violence; (iii) sexual assault (as defined in IC 5-26.5-1-8); (iv) human and sexual trafficking (IC 35-42-3.5); or (v) stalking (IC 35-45-10-5); is committed; or (B) who: (i) is not accused of committing an act of domestic or family violence, dating violence, sexual assault (as defined in IC 5-26.5-

	1-8), human and sexual trafficking (IC 35-42-3.5), or stalking (IC 35-45-10-5); and (ii) is a member of the family of an individual described in clause (A) other than a family member who is accused of committing an act of domestic or family violence, dating violence, sexual assault (as defined in IC 5-26.5-1-8), human and sexual trafficking (IC 35-42-3.5), or stalking (IC 35-45-10-5).
Victim Advocate-, Victim Service Provider-, Victims Assistance- and Social Worker-Sexual Assault Victim Privileges Definitions	Ind. Code Ann. § 35-40.5-1-1. (6) "Victim" means an individual: (A) who is a victim of sexual assault (as defined in IC 5-26.5-1-8); or (B) who: (i) is a relative of or a person who has had a close personal relationship with the individual described under clause (A); and (ii) is designated by the individual described under clause (A) as a representative. The term does not include an individual who is accused of committing an act of sexual assault (as defined in IC 5-26.5-1-8) against the individual described under clause (A). (7) "Victim advocate" has the meaning set forth in IC 35-37-6-3.5. (8) "Victim service provider" has the meaning set forth in IC 35-37-6-5.

[1] *See Office for Victims of Crime, Ethical Standards, Section I: Scope of Services*, https://www.ovc.gov/model-standards/ethical_standards_1.html.
[2] Additional examples of system-based advocate titles include: district attorney's office/state attorney's office advocates or victim-witness coordinators; law enforcement advocates; FBI victim specialists; U.S. attorney's office victim-witness coordinators; board of parole and post-prison supervision advocates; and post-conviction advocates.
[3] Examples of community-based advocates include: crisis hotline or helpline staff; rape crisis center staff; domestic violence shelter staff; campus advocates; and homicide support program staff.
[4] *See* Nat'l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), June 2011, at 3 n.30 (listing victims' constitutional and statutory rights to privacy and to dignity, respect or fairness).
[5] *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (recognizing that the United States Constitution provides a right of personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) ("[A] right to personal privacy . . . does exist under the Constitution.").

[6] There are different levels of privileges: absolute, absolute diluted and qualified. When an absolute privilege attaches, only a victim has the right to authorize disclosure of that information and the court can never order the information to be disclosed without the victim's consent. Absolute privileges are rare, however, because privileges are seen to run contrary to the truth finding function of courts.
[7] *See, e.g.*, Ala. R. Evid. 503A(a)(7) ("'Victim counselor' means any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or prosecutor's office and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence."); Alaska Stat. Ann. § 18.66.250(5)(B) ("'[V]ictim counseling center' means a private organization, an organization operated by or contracted by a branch of the armed forces of the United States, or a local government agency that . . . is not affiliated with a law enforcement agency or a prosecutor's office[.]"); Haw. Rev. Stat. Ann. § 626-1, Rule 505.5(a)(6) ("A 'victim counseling program' is any activity of a domestic violence victims' program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor's office, or the department of human services."); Ind. Code Ann. § 35-37-6-5(2) ("'[V]ictim service provider' means a person . . . that is not affiliated with a law enforcement agency[.]"); Neb. Rev. Stat. Ann. § 29-4302(1) ("Advocate means any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor's office whose primary purpose is assisting domestic violence and sexual assault victims[.]"); N.M. Stat. Ann. § 31-25-2(E) ("'[V]ictim counselor' means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney[.]").
[8] Terms that inform the intersection of victim services and HIPAA, FERPA, FOIA or VOCA are "informed consent" and "waiver." "Informed consent" is defined as "1. [a] person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. For the legal profession, informed consent is defined in Model Rule of Professional Conduct 1.0(e)[;] [or] 2. [a] patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical field community would give to a patient regarding the risks involved in the proposed treatment or procedure." *Informed consent*, Black's Law Dictionary (8th ed. 2004). "Waiver" is defined as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage . . . ." *Waiver*, Black's Law Dictionary (8th ed. 2004).
[9] *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)*, https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Are law enforcement records considered education records?*, https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records.
[14] *Id.*
[15] *Office for Victims of Crime, Crime Victims Fund*, https://www.ovc.gov/pubs/crimevictimsfundfs/intro.html#VictimAssist.
[16] *Id.*
[17] *Id.*
[18] Department of Justice Guide to the Freedom of Information Act, at 1, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf.
[19] *Id.*
[20] *Ethic*, Merriam-webster.com, https://www.merriam-webster.com/dictionary/ethics (last visited July 31, 2019).
[21] *Office for Victims of Crime, Purpose & Scope of The Standards*, https://www.ovc.gov/model-standards/purpose_and_scope.html.
[22] *Id.* Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For "Scope of Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_1.html. For "Coordinating within the Community," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_2.html. For "Direct Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_3.html. For "Privacy,

Confidentiality, Data Security and Assistive Technology," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_4.html. For "Administration and Evaluation," the ethical standard and the corresponding commentary can be located at https://www.ovc.gov/model-standards/ethical_standards_5.html.

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

[24] For a sample law enforcement-based victim services code of ethics drafted by the International Association of Chiefs of Police, see *Law Enforcement-Based Victim Services – Template Package I: Getting Started*, https://www.theiacp.org/sites/default/files/LEV/Publications/Template%20Package%20I%2C%20final_11.02.20.pdf.

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

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

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

[28] *Id.*

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

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

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

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

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

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

[35] Attorney work product "is generally exempt from discovery or other compelled disclosure." *Work product*, Black's Law Dictionary (8th ed. 2004).

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