NATIONAL CRIME VICTIM LAW INSTITUTE

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

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

INTRODUCTION

Best practice in victim services is about facilitating victims' ability to exercise meaningful choices. This requires understanding of 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 those 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 requires 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, and 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 Florida. 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 - Florida*.

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OVERVIEW

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

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 vary; for example, victim advocates, victim-witness coordinators, 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 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?

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 dissemination 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. The victims' willingness to share the information may be premised on the professionals' promise not to disclose the victims' information. 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, and 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.A. § 12291(b)(2)(A)-(B); and (3) Family Violence Prevention and Services Act (FVPSA), 42 U.S.C.A. § 10406 (c)(5)(B). For example, VAWA (Section 3), VOCA and FVPSA regulations prohibit sharing personally identifying information about victims without informed, written, 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 applying to 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 "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 and thereby limit 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 (e.g., 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 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, FOIA and VOCA, and why are these relevant to my work as an advocate?[8]

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.

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.[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]

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.'"[15] 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.'"[16] 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.

VOCA: The Victims of Crime Act of 1984 (VOCA)–codified at 34 U.S.C. §§ 20101-20111–established the "Crime Victims Fund," which is managed by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The Crime Victims Fund (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.[17] The Fund supports victim assistance programs that offer direct victim services and crime victim compensation.[18] 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.[19]

Agencies that receive VOCA funding are mandated to protect crime victims' confidentiality and privacy except in 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).

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).

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 mandates regarding victims' confidentiality and privacy protections and if so, understand how these mandates interact with disclosure obligations.

Is there an ethical code relevant to my work as an advocate?

Yes, there is an ethical code–or "principles of conduct"–that guides 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]

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

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 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 federal constitutional right to general discovery.[24] 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.[25] 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."[26] 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."[27]

Federal and state courts have found that prosecution-based victim advocates are considered part of the "prosecution team" for *Brady* purposes.[28] 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.[29] 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?

Giglio v. United States, 405 U.S. 150 (1972), is a case that was heard before the United States Supreme Court.[30] 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?[31]

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.[32] 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.[33]

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.[34] 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 limited, 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; which 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 Florida?

Victims of crime in Florida have an explicit state constitutional right to privacy. Fla. Const. art. I, § 23 (providing "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein"). In addition to this standalone privacy provision, victims of crime in Florida have myriad constitutional rights–under Article 1, section 16 of Florida's Constitution (Marsy's Law)–that were created, *inter alia,* to ensure victims' rights and interests are protected and that contemplate or necessitate victim privacy. *See* Fla. Const. art. I, § 16(b)(1)-(5) (amended 2018) (guaranteeing victims of crime the rights, among others, "to due process and to be treated with fairness and respect for the victim's dignity"; "to be free from intimidation, harassment[] and abuse"; "within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused"; "to have the safety and welfare of the victim . . . considered when setting bail, including setting pretrial release conditions"; and "to prevent the disclosure of information or records that could be used to locate or harass the victim . . . or which could disclose confidential or privileged information").

Privacy rights are protected by statute at various stages of the criminal justice process, including during the discovery process. *See, e.g.,* Fla. R. Crim. P. 3.220(m)(1) (allowing anyone to motion the court "for an order denying or regulating disclosure of sensitive matters"); Fla. R. Crim. P. 3.220(b)(2) (providing that a court may prohibit full or partial disclosure of a police report if the court finds that information in the police report is: (a) irrelevant and sensitive; and (b) that disclosure "may seriously impair law enforcement or jeopardize the investigation of . . . other crimes"); Fla. R. Crim. P. 3.220(l)(1) (protecting victim-witnesses from invasions of privacy by allowing protective orders, if good cause can be shown, to restrict, defer or exempt "specified disclosures"; to seal depositions; or to allow any other court order appropriate under the facts and circumstances of a case).

Victims also have privacy protections when persons attempt to collect their personal information through alternate means, such as through a public records request. *See, e.g.,* Fla. Stat. Ann. § 119.071(2)(i), (o) (exempting from public records and Article 1, section 24(a) of Florida's Constitution criminal intelligence and investigative information that discloses victims' "personal assets . . . other than property stolen or destroyed during the commission of the crime"; and "[t]he address of a victim of an incident of mass violence").

In some instances, additional protections and rights are afforded to child-victims and victims of select offenses. *See, e.g.,* Fla. Stat. Ann. § 918.16(2) (affording privacy protections to victims of sex offenses by mandating that courts clear their courtrooms of select persons during the victim's testimony about the offense, if requested by the victim); Fla. Stat. Ann. § 794.026(1) (holding persons liable for damages who reveal personally

identifiable information about victims of select offenses before the commencement of open judicial proceedings); Fla. Stat. Ann. § 794.024(1) (affording victims of select offenses privacy protections in their photographs, names and addresses by prohibiting public employees and officers who have access to such information from "willfully and knowingly disclos[ing]" such information to persons not authorized by law to receive such information); Fla. Stat. Ann. § 921.243 (mandating that courts at sentencing hearings involving child-victims "stamp on the face of the judgment 'VICTIM IS A MINOR' and . . . note this fact on any document or information sent to the Department of Law Enforcement for its incorporation into the criminal justice information system of the Department of Law Enforcement").

SELECT CONFIDENTIALITY LAWS

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

Crime victims in Florida have an explicit constitutional right to prohibit disclosure of verbal or written information that *may* disclose victims' confidential information. *See* Fla. Const. art. I, § 16(b)(5) (amended 2018) (guaranteeing victims constitutional rights to "ensure [that] . . . victims' rights and interests are respected and protected by law in a manner no less vigorous than . . . defendants and juvenile delinquents . . . beginning at the time of [his/her/their] victimization[,] including the express right "to prevent the disclosure of information or records that . . . could disclose confidential . . . information of the victim").

Victims also have statutory-based confidentiality protections, including protections concerning victims' confidentiality in public records. One area of public records where victims have an explicit right to confidentiality is in body worn camera recordings. Although there are instances when law enforcement may or is required to disclose body worn camera recordings, victims of crime have confidentiality in body worn camera recordings, or portions thereof, if the recording was taken inside a victim's home or another private residence; inside a facility that provides social services, mental health care or health care generally; or a place where a victim has a reasonable expectation of privacy. *See* Fla. Stat. Ann. § 119.071(2)(l)(2)-(4) (providing that "[a] body camera recording, or a portion thereof, is confidential and exempt from [section] 119.07(1) and [Article 1, section 24(a) of Florida's Constitution] if the recording: a. [i]s taken within the interior of a private residence; b. [i]s taken within the interior of a facility that offers health care, mental health care, or social services; or c. [i]s taken in a place that a reasonable person would expect to be private"). If law enforcement, for example, is mandated to provide body worn camera per court order, the court is required, as a part of its determination, to consider myriad factors, including whether: "[t]he recording could be redacted to protect privacy interests"; "[d]isclosure would reveal information regarding a person that is of a highly sensitive personal nature"; [d]isclosure may harm the reputation or jeopardize the safety of a person depicted in the recording"; "[t]he recording contains information that is otherwise exempt or confidential and exempt under the law"; and "[c]onfidentiality is necessary to prevent a

serious and imminent threat to the fair, impartial, and orderly administration of justice . . . ." Fla. Stat. Ann. § 119.071(2)(l)(4).

Other areas where victims have confidentiality in public records include criminal intelligence and investigative information that contains the identity of victims of sex offenses or victims of select child abuse and human trafficking offenses; identity or location of victims certified for protective or relocation services; and any information revealing the identity of child-victims who provided videotaped statements, including their school or church. *See, e.g.,* Fla. Stat. Ann. § 914.27(1)(a), Fla. Stat. Ann. § 119.071(2)(h)(1)(a)-(c), (j)(2) (emphasis added) (extending confidentiality to and exempting from public records and Article 1, section 24(a) of Florida's Constitution "[t]he following criminal intelligence or [investigative] information[:]" (1) the identity of child-victims of select child abuse and human trafficking offenses; (2) "[a]ny information that *may* reveal the identity of a . . . victim of any sex[] offense"; and (3) photographs, videotapes and images of any body part of a victim of a sex offense whether it identifies the victim or not; and any information, even if not criminal intelligence or investigative information: (1) from a child-victims' videotaped statement that identifies the child-victim, including the child-victim's image, "home, school, church, or employment telephone number" or reveals which crime the child suffered or their personal assets; and (2) that reveals the "identity or location of a victim . . . who has been identified or certified for protective or relocation services").

Media is another area where victims of select offenses have additional, explicit protections, such as a prohibition on the release of identifying information in the form of print, publication or broadcasts. *See, e.g.,* Fla. Stat. Ann. § 794.03 (affording victims of sex offenses confidentiality in their name, addresses and other identifying information by prohibiting the printing, publishing and broadcasting of such information "in any instrument of mass communication" except in limited exceptions).

SELECT PRIVILEGE LAWS

What are key privileges in Florida?

Victims in Florida have an explicit constitutional right to prohibit disclosure of information or records that *may* disclose victims' privileged information. *See* Fla. Const. art. I, § 16(b)(5) (amended 2018) (guaranteeing victims constitutional rights to "ensure [that] . . . victims' rights and interests are respected and protected by law in a manner no less vigorous than . . . defendants and juvenile delinquents . . . beginning at the time of [his/her/their] victimization[,] including the express right "to prevent the disclosure of information or records that . . . could disclose privileged . . . information of the victim").

There are a number of privileges that victims can assert to prevent disclosure of confidential information or records, barring exceptions and waivers. *See, e.g.,* Fla. Stat. Ann. § 90.5036(2) (recognizing a domestic violence advocate-victim privilege); Fla. Stat. Ann. § 90.5035(2) (recognizing a sexual assault counselor-victim privilege); Fla. Stat. Ann.

§ 490.0147 (recognizing a psychologist-patient privilege); Fla. Stat. Ann. § 90.503(2) (recognizing a psychotherapist-patient privilege).

Domestic violence advocate-victim privilege: "A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim. The privilege applies to confidential communications made between the victim and the domestic violence advocate and to records of those communications only if the advocate is registered under [section] 39.905 at the time the communication is made. This privilege includes any advice given by the domestic violence advocate in the course of that relationship." Fla. Stat. Ann. § 90.5036(2).

Sexual assault counselor-victim privilege: "A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim. Such confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege includes any advice given by the sexual assault counselor or trained volunteer in the course of that relationship." Fla. Stat. Ann. § 90.5035(2).

Psychologist-patient privilege: Absent waivers or exceptions, "[a]ny communication between a psychologist and [his/her/their] patient or client is confidential." Fla. Stat. Ann. § 490.0147(1).

Psychotherapist-patient privilege: "A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship." Fla. Stat. Ann. § 90.503(2).

DEFINITIONS

"Victim"

Under the Florida Constitution, "victim" is defined as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. The term 'victim' includes the victim's lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim, except upon a showing that the interest of such individual would be in actual or potential conflict with the interests of the victim. The term 'victim' does not include the accused. The terms 'crime' and 'criminal' include delinquent acts and conduct." Fla. Const. art. I, § 16(e) (amended 2018).

Under Florida Statutes, sections 960.01 through 960.28, "victim" is defined as: "(a) [a] person who suffers personal physical injury or death as a direct result of a crime;
(b) [a] person younger than 18 years of age who was present at the scene of a crime, saw or heard the crime, and suffered a psychiatric or psychological injury because of the crime but who was not physically injured; (c) [a] person younger than 18 years of age who was the victim of a felony or misdemeanor offense of child abuse that resulted in a mental injury as defined by [section] 827.03 but who was not physically injured; (d) [a] person against whom a forcible felony was committed and who suffers a psychiatric or psychological injury as a direct result of that crime but who does not otherwise sustain a personal physical injury or death; or (e) [a]n emergency responder, as defined in and solely for the purposes of [section] 960.194, who is killed answering a call for service in the line of duty." Fla. Stat. Ann. § 960.03(14).

Under Florida Statute, section 775.089 and in any provision of law relating to restitution, "victim" is defined as: "1. [e]ach person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode, and also includes the victim's estate if the victim is deceased, and the victim's next of kin if the victim is deceased as a result of the offense. The term includes governmental entities and political subdivisions, as those terms are defined in [section] 11.45, when such entities are a direct victim of the defendant's offense or criminal episode and not merely providing public services in response to the offense or criminal episode. 2. The term also includes the victim's trade association if the offense is a violation of [section] 540.11(3)(a) 3. involving the sale, or possession for purposes of sale, of physical articles and the victim has granted the trade association written authorization to represent the victim's interests in criminal legal proceedings and to collect restitution on the victim's behalf. The restitution obligation in this subparagraph relating to violations of [section] 540.11(3)(a) 3. applies only to physical articles and does not apply to electronic articles or digital files that are distributed or made available online." Fla. Stat. Ann. § 775.089(1)(c).

Under Florida Statutes, section 90.5036 ("Domestic Violence Advocate-Victim Privilege"), "victim" is defined as "a person who consults a domestic violence advocate for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by an act of domestic violence, an alleged act of domestic violence, or an attempted act of domestic violence." Fla. Stat. Ann. § 90.5036(1)(c).

Under Florida Statute, section 90.5035 ("Sexual Assault Counselor-Victim Privilege"), "victim" is defined as "a person who consults a sexual assault counselor or a trained volunteer for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by a sexual assault or sexual battery, an alleged sexual assault or sexual battery, or an attempted sexual assault or sexual battery." Fla. Stat. Ann. § 90.5035(1)(d).

How does Florida determine if a communication is confidential in the context of the domestic violence advocate-victim privilege?

Under Florida Statutes, section 90.5036 ("Domestic Violence Advocate-Victim Privilege"), "[a] communication between a domestic violence advocate and a victim is 'confidential' if it relates to the incident of domestic violence for which the victim is seeking assistance and if it is not intended to be disclosed to third persons other than: 1. [t]hose persons present to further the interest of the victim in the consultation, assessment, or interview. 2. [t]hose persons to whom disclosure is reasonably necessary to accomplish the purpose for which the domestic violence advocate is consulted." Fla. Stat. Ann. § 90.5036(1)(d).

How does Florida determine if a communication is confidential in the context of the psychotherapist-patient privilege?

Under Florida Statutes, section 90.503 ("Psychotherapist-Patient Privilege"), "[a] communication between psychotherapist and patient is 'confidential' if it is not intended to be disclosed to third persons other than: 1. Those persons present to further the interest of the patient in the consultation, examination, or interview. 2. Those persons necessary for the transmission of the communication. 3. Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist." Fla. Stat. Ann. § 90.503(1)(c).

How does Florida determine if a communication is confidential in the context of the sexual assault counselor-victim privilege?

Under Florida Statute, section 90.5035 ("Sexual Assault Counselor-Victim Privilege"), "[a] communication between a sexual assault counselor or trained volunteer and a victim is 'confidential' if it is not intended to be disclosed to third persons other than: 1. [t]hose persons present to further the interest of the victim in the consultation, examination, or interview. 2. [t]hose persons necessary for the transmission of the communication. 3. [t]hose persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor or the trained volunteer is consulted." Fla. Stat. Ann. § 90.5035(1)(e).

"Domestic violence advocate"

Under Florida Statutes, section 90.5036 ("Domestic Violence Advocate-Victim Privilege"), "domestic violence advocate" is defined as "any employee or volunteer who has 30 hours of training in assisting victims of domestic violence and is an employee of or volunteer for a program for victims of domestic violence whose primary purpose is the rendering of advice, counseling, or assistance to victims of domestic violence." Fla. Stat. Ann. § 90.5036(1)(b).

"Domestic violence center"

Under Florida Statutes, section 90.5036 ("Domestic Violence Advocate-Victim Privilege"), "domestic violence center" is defined as "any public or private agency that offers assistance to victims of domestic violence, as defined in [section] 741.28, and their families." Fla. Stat. Ann. § 90.5036(1)(a).

How does Florida define "patient" in the context of the psychotherapist-patient privilege?

Under Florida Statutes, section 90.503 ("Psychotherapist-Patient Privilege"), "patient" is defined as "a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction." Fla. Stat. Ann. § 90.503(1)(b).

"Psychotherapist"?

Under Florida Statutes, section 90.503 ("Psychotherapist-Patient Privilege"), "psychotherapist" is defined as "1. [a] person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; 2. [a] person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; 3. [a] person licensed or certified as a clinical social worker, marriage and family therapist, or mental health counselor under the laws of this state, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; 4. treatment personnel of facilities licensed by the state pursuant to chapter 394, chapter 395, or chapter 397, of facilities designated by the Department of Children and Families pursuant to chapter 394 as treatment facilities, or of facilities defined as community mental health centers pursuant to s. 394.907(1), who are engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or 5. [a]n advanced practice registered nurse licensed under s. 464.012, whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions, including chemical abuse, and limited only to actions performed in accordance with part I of chapter 464." Fla. Stat. Ann. § 90.503(1)(a).

"Rape crisis center"?

Under Florida Statute, section 90.5035 ("Sexual Assault Counselor-Victim Privilege"), "rape crisis center" is defined as "any public or private agency that offers assistance to

victims of sexual assault or sexual battery and their families." Fla. Stat. Ann. § 90.5035(1)(a).
"Sexual assault counselor" Under Florida Statute, section 90.5035 ("Sexual Assault Counselor-Victim Privilege"), "sexual assault counselor" is defined as "any employee of a rape crisis center whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault or sexual battery." Fla. Stat. Ann. § 90.5035(1)(b).
Hoe does Florida define "trained volunteer" in the context of the sexual assault counselor-victim privilege? Under Florida Statute, section 90.5035 ("Sexual Assault Counselor-Victim Privilege"), "trained volunteer" is defined as "a person who volunteers at a rape crisis center, has completed 30 hours of training in assisting victims of sexual violence and related topics provided by the rape crisis center, is supervised by members of the staff of the rape crisis center, and is included on a list of volunteers that is maintained by the rape crisis center." Fla. Stat. Ann. § 90.5035(1)(c).

[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. An absolute privilege is one in which only a victim has the right to authorize disclosure 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 HIPPA, FERPA, FOIA or VOCA are "implied 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] 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.

[16] *Id.*

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

[18] *Id.*

[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] *Office for Victims of Crime, Purpose & Scope of The Standards,* https://www.ovc.gov/model-standards/purpose_and_scope.html. 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] *See Weatherford v. Busey*, 429 U.S. 545, 559 (1977).

[25] *See United States v. Agers*, 427 U.S. 97, 106-07 (1976)

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

[27] *Id.*

[28] *See, e.g., Eakes v. Sexto*n, 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").

[29] 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.

[30] 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.

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

[32] 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).

[33] *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").

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