NATIONAL CRIME VICTIM LAW INSTITUTE

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LAW ENFORCEMENT-BASED VICTIM SERVICES IN NEVADA: 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 Nevada. 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 - Nevada*.

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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 Nevada?

Victims of crime in Nevada have an explicit state constitutional right to privacy. *See* Nev. Const. art. I, § 8A(1)(a) (guaranteeing victims of crime the right "[t]o be treated with fairness and respect for [his/her/their] privacy").

Nevada crime victims have additional constitutional rights that implicate and require protection of victims' right to privacy. *See, e.g., See* Nev. Const. art. I, § 8A(1)(a), (c)-(e) (guaranteeing victims of crime the right "[t]o be treated with fairness and respect for [his/her/their] . . . dignity, and to be free from intimidation, harassment and abuse, throughout the criminal or juvenile justice process"; [t]o prevent . . . disclosure of confidential information or records to . . . defendant which could be used to locate or harass the victim or the victim's family"; [t]o have the safety of the victim and the victim's family considered as a factor in fixing . . . bail and release conditions"; and "[t]o refuse an interview or deposition request, unless under court order, and to set reasonable conditions on the conduct of any such interview to which the victim consents").

Victims of select offenses have additional privacy rights and protections. For example, the legislature has declared that "fear of public identification and *invasion of privacy* are fundamental concerns for . . . victims of sexual offenses[,]" and offenses involving students, children and sex trafficking." Nev. Rev. Stat. Ann. § 200.377(2) (emphasis added). For this reason, Nevada statutes, such as sections "200.3771 to 200.3774, inclusive," were created to protect such victims "from harassment, intimidation, psychological trauma and the *unwarranted invasion of their privacy* by prohibiting the disclosure of their identities to the public." Nev. Rev. Stat. Ann. § 200.377(6) (emphasis added).

An example of the additional protections afforded under these sections is the explicit right to use pseudonyms. *See* Nev. Rev. Stat. Ann. § 200.3772(1) (providing that "[a] victim of a sexual offense, an offense involving a pupil or child or sex trafficking may choose a pseudonym to be used instead of the victim's name on all files, records and documents pertaining to the sexual offense, offense involving a pupil or child or sex trafficking, including, without limitation, criminal intelligence and investigative reports, court records and media releases"). Notably, if victims of select crimes file the requisite paperwork to use a pseudonym, law enforcement is mandated to make good faith efforts to substitute the victim's name for the pseudonym on all documentation within their possession and to inform the prosecutor of the pseudonym. *See* Nev. Rev. Stat. Ann. § 200.3772(3) ("If the victim files a form to use a pseudonym, as soon as practicable the law enforcement agency shall make a good faith effort to: (a) [s]ubstitute the pseudonym for the name of the victim on all reports, files and records in the agency's possession; and (b) [n]otify the prosecuting

attorney of the pseudonym. The law enforcement agency shall maintain the form in a manner that protects the confidentiality of the information contained therein."); *cf.* Nev. Rev. Stat. Ann. § 200.3773(1) (providing that "[a] public officer or employee who has access to any records, files or other documents which include the photograph, likeness, name, address, telephone number or other fact or information that reveals the identity of a victim of a sexual offense, an offense involving a pupil or child or sex trafficking shall not intentionally or knowingly disclose the identifying information to any person other than: (a) . . . defendant or . . . defendant's attorney; (b) [a] person who is directly involved in the investigation, prosecution or defense . . . ; (c) [a] person specifically named in a court order issued pursuant to [Nevada Revised Statutes] 200.3771; or (d) [a] nonprofit organization or public agency approved to receive the information pursuant to [Nevada Revised Statutes] 200.3771").

Nevada crime victims also have statutory-based mechanisms to protect victims' right to privacy. *See, e.g.,* Nev. Rev. Stat. Ann. § 174.275 (authorizing courts, "[u]pon a sufficient showing, . . . at any time [to] order that discovery or inspection pursuant to [section] 174.234 to 174.295, inclusive, be denied, restricted or deferred, or make such other order as is appropriate"); *cf.* Nev. Rev. Stat. Ann. § 50.090 (providing protections, except in narrowly defined circumstances, for victims of select sex offenses that prohibit defendants from presenting evidence of a victim's "previous sexual conduct . . . to challenge the victim's credibility as a witness").

SELECT CONFIDENTIALITY LAWS

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

Victims of crime in Nevada have an explicit state constitutional right to protection of confidential information and records to ensure their safety and the safety of their families. *See, e.g.,* Nev. Const. art. I, § 8A(1)(d) (guaranteeing victims of crime a right "[t]o prevent the disclosure of confidential information or records to the defendant which could be used to locate or harass the victim or the victim's family").

In addition to this constitutional right, Nevada crime victims have an explicit statutory right to confidentiality in personal information. *See* Nev. Rev. Stat. Ann. § 178.5691 (providing that "[a]ll personal information, including, but not limited to, a current or former address, which pertains to a victim, . . . which is received pursuant to the provisions of [sections] 178.569 to 178.5698, inclusive, is confidential"); *see also* Nev. Rev. Stat. Ann. § 239.0115 (carving out exceptions to public books and records when, *inter alia,* they contain "personal information pertaining to a victim of crime that has been declared by law to be confidential"). This protection from disclosure of victims' personal information broadens for victims of select offenses, such as victims of select sex offenses. *See, e.g.,* Nev. Rev. Stat. Ann. § 200.3771 (emphasis added) (providing, "[e]xcept as otherwise provided in

[section 200.3771], any information which is contained in: (a) [c]ourt records, including testimony from witnesses; (b) [i]ntelligence or investigative data, reports of crime or incidents of criminal activity or other information; (c) [r]ecords of criminal history, as that term is defined in [section] 179A.070; and (d) [r]ecords in the Central Repository for Nevada Records of Criminal History, that reveals the identity of a victim of a sexual offense, an offense involving a pupil or child or sex trafficking is *confidential*, including but not limited to the victim's photograph, likeness, name, address or telephone number"; and if a court considers release of identifying information, the court is mandated to provide the victim with advance notice and an opportunity to oppose the disclosure; and to consider whether disclosure would place the victim in danger);[35] Nev. Rev. Stat. Ann. § 200.3772(5) (affording victims of select offenses confidentiality in forms requesting use of pseudonyms).

In addition to confidentiality in victims' personal information, victims have a right to confidentiality in their conversations with myriad professionals–e.g., victims' advocates, doctors, psychologists, clinical professional counselors, social workers and interpreters–and, often times, in professionals' corresponding reports, except in specified circumstances. *See, e.g.,* Nev. Rev. Stat. Ann. § 49.2547 (providing that select communication with a victim's advocate is confidential); Nev. Rev. Stat. Ann. § 49.027 (providing that select interpretations are confidential); Nev. Rev. Stat. Ann. § 49.225 (providing that select communication with a doctor is confidential); Nev. Rev. Stat. Ann. § 49.209 (providing that select communication with a psychologist is confidential); Nev. Rev. Stat. Ann. § 49.2504 (providing that select communication with a clinical professional counselor is confidential); Nev. Rev. Stat. Ann. § 49.252 (providing that select communication with a social worker is confidential).[36]

SELECT PRIVILEGE LAWS

What are key privileges in Nevada?

Victims in Nevada have a number of privileges that they can assert to prevent disclosure of their private communications barring exceptions and waivers. *See, e.g.,* Nev. Rev. Stat. Ann. § 49.2547 (recognizing a victims advocate privilege); Nev. Rev. Stat. Ann. § 49.027 (recognizing that interpreters cannot disclose privileged matters); Nev. Rev. Stat. Ann. § 49.225 (recognizing a doctor-patient privilege); Nev. Rev. Stat. Ann. § 49.209 (recognizing a psychologist-patient privilege); Nev. Rev. Stat. Ann. § 49.2504 (recognizing a clinical professional counselor privilege); Nev. Rev. Stat. Ann. § 49.252 (recognizing a social worker privilege).

Notably, any privileged communication that is disclosed based on an erroneous ruling mandating disclosure or communication that is disclosed without an "opportunity to claim the privilege" is not admissible. *See* Nev. Rev. Stat. Ann. § 49.395 (explaining that "[e]vidence of a statement or other disclosure of privileged matter is inadmissible against

the holder of the privilege if the disclosure was: 1. [c]ompelled erroneously; or 2. [m]ade without opportunity to claim the privilege").

Victim's advocate privilege: "Except as otherwise provided in [section] 49.2549, a victim who seeks advice, counseling or assistance from a victim's advocate has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications set forth in [section] 49.2546."[37] Nev. Rev. Stat. Ann. § 49.2547.

Interpreter privilege: "A person who has a privilege against the disclosure of a matter may prevent the disclosure of that matter by an interpreter to whom the matter was disclosed merely to facilitate a privileged communication of the matter." Nev. Rev. Stat. Ann. § 49.027.

Doctor-patient privilege: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among the patient, the patient's doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family."[38] Nev. Rev. Stat. Ann. § 49.225.

Psychologist-patient privilege: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between the patient and the patient's psychologist or any other person who is participating in the diagnosis or treatment under the direction of the psychologist, including a member of the patient's family."[39] Nev. Rev. Stat. Ann. § 49.209.

Clinical professional counselor privilege: "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications among the client, the client's clinical professional counselor or any other person who is participating in the diagnosis or treatment under the direction of the clinical professional counselor." Nev. Rev. Stat. Ann. § 49.2504.[40]

Social worker privilege: "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing confidential communications among the client, the client's social worker or any other person who is participating in the diagnosis or treatment under the direction of the social worker."[41] Nev. Rev. Stat. Ann. § 49.252.

DEFINITIONS

"Victim"

Under the Nevada Constitution, "victim" is defined as "any person directly and proximately harmed by the commission of a criminal offense under any law of this State. If the victim is less than 18 years of age, incompetent, incapacitated or deceased, the term includes the legal guardian of the victim or a representative of the victim's estate, member of the victim's family or any other person who is appointed by the court to act on the victim's behalf, except that the court shall not appoint the defendant as such a person." Nev. Const. art. I, § 8A(7).

Under Nevada Statutes, sections 178.569 through 178.5698, "inclusive, unless the context otherwise[,]" "victim" and "victim of a crime" "include[] a relative of a person: (a) [a]gainst whom a crime has been committed; or (b) [w]ho has been injured or killed as a direct result of the commission of a crime." Nev. Rev. Stat. Ann. § 178.569(2).

Under the Victim's Advocate and Victim Component of Chapter 49. Privileges, "victim" is defined as "a person who alleges that an act of domestic violence, human trafficking or sexual assault has been committed against the person." Nev. Rev. Stat. Ann. § 49.2544.

For purposes of Nevada Statute, section 176.015, "victim" is includes "(1) A person, including a governmental entity, against whom a crime has been committed; (2) A person who has been injured or killed as a direct result of the commission of a crime; and (3) A relative of a person described in subparagraph (1) or (2)." Nev. Rev. Stat. Ann. § 176.015(5)(d).

"Victim's advocate"

Under the Victim's Advocate and Victim Component of Chapter 49 (Privileges), "victim's advocate" is defined as "a person who works for a nonprofit program, program of a university, state college or community college within the Nevada System of Higher Education or a program of a tribal organization which provides assistance to victims with or without compensation and who has received at least 20 hours of relevant training." Nev. Rev. Stat. Ann. § 49.2545.

How does Nevada define "client" in the context of the clinical professional counselor privilege?

Under Nevada Statutes, sections 49.2502 through 49.2508, "inclusive, unless the context otherwise requires[,]" "client" is defined as "a person who consults or is interviewed by a

clinical professional counselor for the purpose of diagnosis or treatment." Nev. Rev. Stat. Ann. § 49.2502(1).

How does Nevada define "client" in the context of the social worker privilege?

Under Nevada Statutes, sections 49.251 through 49.254, "inclusive, unless the context otherwise requires[,]" "client" is defined as "a person who consults or is interviewed by a social worker for the purpose of diagnosis or treatment." Nev. Rev. Stat. Ann. § 49.251(1).

"Clinical professional counselor"

Under Nevada Statutes, sections 49.2502 through 49.2508, "inclusive, unless the context otherwise requires[,]" "clinical professional counselor" "has the meaning ascribed to it in [section] 641A.031 and includes a clinical professional counselor intern." Nev. Rev. Stat. Ann. § 49.2502(2).

How does Nevada determine which communication is confidential under the psychologist-patient privilege?

Under Nevada Statute, sections 49.207 through 49.213, inclusive, unless the context otherwise requires, "confidential communication" is defined as communication "not intended to be disclosed to third persons other than: (a) [t]hose present to further the interest of the patient in the consultation, examination or interview; (b) [p]ersons reasonably necessary for the transmission of the communication; or (c) [p]ersons who are participating in the diagnosis and treatment under the direction of the psychologist, including members of the patient's family." Nev. Rev. Stat. Ann. § 49.207(1).

How does Nevada determine which communication is confidential under the clinical professional counselor privilege?

Under Nevada Statutes, sections 49.2502 through 49.2508, "inclusive, unless the context otherwise requires[,]" "confidential communication" is defined as communication that "is not intended to be disclosed to any third person other than a person: (a) [p]resent during the consultation or interview to further the interest of the client; (b) [r]easonably necessary for the transmission of the communication; or (c) [p]articipating in the diagnosis or treatment under the direction of the clinical professional counselor, including a member of the client's family." Nev. Rev. Stat. Ann. § 49.2502(3).

How does Nevada determine which communication is confidential under the social worker privilege?

Under Nevada Statutes, sections 49.251 through 49.254, "inclusive, unless the context otherwise requires[,]" "confidential communication" is communication that "is not intended to be disclosed to any third person other than a person: (a) [p]resent during the consultation or interview to further the interest of the client; (b) [r]easonably necessary for the transmission of the communication; or (c) [p]articipating in the diagnosis or treatment under the direction of the social worker, including a member of the client's family." Nev. Rev. Stat. Ann. § 49.251(2).

How does Nevada define "communication" under the victim's advocate privilege?

Under Nevada Statutes, section 49.2546, "communication" "includes, without limitation, all records concerning the victim and the services provided to the victim which are within the possession of: (a) [t]he victim's advocate; or (b) [t]he nonprofit program, the program of a university, state college or community college within the Nevada System of Higher Education, or the program of a tribal organization for whom the victim's advocate works." Nev. Rev. Stat. Ann. § 49.2546(2).

How does Nevada determine which communication is confidential under the victim's advocate privilege?

Under Nevada Statutes, section 49.2546, "confidential communication" is communication between a victim and a victim's advocate and is not intended to be disclosed to third persons other than: (a) [a] person who is present to further the interest of the victim; (b) [a] person reasonably necessary for the transmission of the communication; or (c) [a] person who is participating in the advice, counseling or assistance of the victim, including, without limitation, a member of the victim's family." Nev. Rev. Stat. Ann. § 49.2546(1).

How does Nevada determine which communication is confidential under the doctor-patient privilege?

Under Nevada Statute, sections 49.215 through 49.245, inclusive, "confidential communication" is communication that "is not intended to be disclosed to third persons other than: (a) [t]hose present to further the interest of the patient in the consultation, examination or interview; (b) [p]ersons reasonably necessary for the transmission of the communication; or (c) [p]ersons who are participating in the diagnosis and treatment under the direction of the doctor, including members of the patient's family." Nev. Rev. Stat. Ann. § 49.215(1).

"Doctor"

Under Nevada Statute, sections 49.215 through 49.245, inclusive, "doctor" is defined as "a person licensed to practice medicine, dentistry or osteopathic medicine in any state or nation, or a person who is reasonably believed by the patient to be so licensed, and in addition includes a person employed by a public or private agency as a psychiatric social worker, or someone under his or her guidance, direction or control, while engaged in the examination, diagnosis or treatment of a patient for a mental condition." Nev. Rev. Stat. Ann. § 49.215(2).

How does Nevada define "patient" under the psychologist-patient privilege?

Under Nevada Statute, sections 49.207 through 49.213, inclusive, unless the context otherwise requires, "patient" "has the meaning ascribed to it in [section] 641.0245." Nev. Rev. Stat. Ann. § 49.207(2). Section 641.0245 defines "patient" as "a person who consults or is examined or interviewed by a psychologist for purposes of diagnosis or treatment." Nev. Rev. Stat. Ann. § 641.0245.

How does Nevada define "patient" under the doctor-patient privilege?

Under Nevada Statute, sections 49.215 through 49.245, inclusive, is "patient" is defined as "a person who consults or is examined or interviewed by a doctor for purposes of diagnosis or treatment." Nev. Rev. Stat. Ann. § 49.215(3).

"Psychologist"

Under Nevada Statute, sections 49.207 through 49.213, inclusive, unless the context otherwise requires, "psychologist" "has the meaning ascribed to it in [section] 641.027." Nev. Rev. Stat. Ann. § 49.207(3). Section 641.027 defines "psychologist" as "a person who: 1. [i]s a graduate of an academic program approved by the Board and is qualified to practice psychology by reason of education, practical training and experience determined by the Board to be satisfactory; and 2. [h]as received from the Board a license to practice psychology." Nev. Rev. Stat. Ann. § 641.027.

"Relative"

Under Nevada Statutes, sections 178.569 through 178.5698, "inclusive, unless the context otherwise, "relative" is defined as "has the meaning ascribed to it in [section] 217.060." Nev. Rev. Stat. Ann. § 178.569(1). Section 217.060 defines "relative" as "include[ing]:

1. A spouse, parent, grandparent or stepparent; 2. A natural born, step or adopted child; 3. A grandchild, brother, sister, half brother or half sister; or 4. A parent of a spouse." Nev. Rev. Stat. Ann. § 217.060.
"Social worker" Under Nevada Statutes, sections 49.251 through 49.254, "inclusive, unless the context otherwise requires[,]" "social worker" is defined as "any person licensed under [C]hapter 641B of [Nevada revised Statutes]" titled "Social Workers." Nev. Rev. Stat. Ann. § 49.251(3).

[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).

[35] For more information on this protection and related exceptions, *see* Nev. Rev. Stat. Ann. § 200.3771.

[36] For additional information, see the "Select Privilege Laws" of this document.

[37] For exceptions, *see* Nev. Rev. Stat. Ann. § 49.2549.

[38] For exceptions, *see* Nev. Rev. Stat. Ann. § 49.245.

[39] For exceptions, *see* Nev. Rev. Stat. Ann. § 49.213.

[40] For exceptions, *see* Nev. Rev. Stat. Ann. § 49.2508.

[41] For exceptions, *see* Nev. Rev. Stat. Ann. § 49.254.