



LAW ENFORCEMENT-BASED VICTIM SERVICES IN TENNESSEE: 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 Tennessee. 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 - Tennessee*.

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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 with victims in advance of information disclosure. To do otherwise may provide victim-clients with a false sense of security regarding their privacy and inflict further harm if their personal information is unexpectedly disclosed.

What are HIPAA, FERPA, 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 Tennessee?

Victims of crime in Tennessee have constitutional rights—under Article 1, section 35—that protect victims’ rights and interests and contemplate or necessitate victims’ privacy. *See* Tenn. Const. art. I, § 35(2) (recognizing the right of victims “to be free from intimidation, harassment and abuse throughout the criminal justice system”); Tenn. Const. art. I, § 35 (explaining that victims’ constitutional rights are intended “[t]o preserve and protect the rights of victims of crime to justice and due process”); Tenn. Const. art. I, § 35(3) (recognizing the right of victims “to be present at all proceedings where the defendant has the right to be present”); Tenn. Const. art. I, § 35(4) (recognizing the right of victims “to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly”). Victims have similar statutory-based privacy rights. *See* Tenn. Code Ann. § 40-38-102(a)(1)-(2) (recognizing the rights of victims to “[b]e treated with dignity and compassion” and to “[p]rotection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant’s agents or friends”); Tenn. Code Ann. § 40-38-117 (recognizing the right of “[a]ny victim of crime . . . to refuse a request by the defendant, the defendant’s attorney or any other person acting on behalf of the defendant for an interview or other communication with the victim”).

Privacy rights are protected by statute at various stages of the criminal justice process, including during production and discovery. Tennessee provides for the right of parties to seek a protective order from the court denying, restricting or deferring discovery or inspection for good cause shown. Tenn. R. Crim. P. 16(d)(3). If the court orders relief “following an ex parte submission, the court shall preserve under seal in the court records the entire text of the party’s written statement.” *Id.* Additional protections exist for children in child sex abuse image cases. Pursuant to “any criminal proceeding relating to the sexual exploitation of minors under title 39, chapter 17, part 10 that involves documents or objects discoverable pursuant to Rule 16(a)(1)(F), the court shall, on motion of the state:

(A) Deny any request by the defendant to copy or photograph any documents or objects depicting the sexual exploitation of minors under title 39, chapter 17, part 10, so long as the state shows that the documents or objects will be made reasonably available to the defendant throughout the proceeding.

(B) For the purposes of subdivision (d)(3)(A), documents or objects shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination at a state facility of the documents or objects by the defendant, the defendant’s attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial. The Court may, in its discretion, permit other individuals to have access to the documents or objects if necessary to protect the rights of the defendant.

(C) If the state fails to demonstrate that the documents or objects will be made reasonably available to the defendant throughout the proceeding, or fails to make the documents or objects reasonably available to the defendant at any time during the proceeding, the trial court may order the state to permit the defendant to copy or photograph any documents or objects subject to terms and conditions set by the court in an appropriate protective order.

Tenn. R. Crim. P. 16(3)(A)-(C).

For information about victims' privacy protections when persons attempt to access their personal information through alternate means, such as through a public records request, *see* "Select Confidentiality Laws" section below.

SELECT CONFIDENTIALITY LAWS

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

Tennessee law recognizes the confidentiality of communications between victims and certain providers of counseling and other physical and mental health support services, as well as of records related to the provision of the services. *See, e.g.*, Tenn. Code Ann. § 36-3-623(a) (providing that the records of domestic violence shelters, rape crisis centers and human trafficking service providers are to "be treated as confidential by the records custodian of such shelters, centers, or providers"); Tenn. Code Ann. § 63-23-109(a) (recognizing the confidentiality of communications between licensed social workers and clients); Tenn. Code Ann. § 63-22-114 (recognizing the confidentiality of communications between "licensed marital and family therapists, licensed professional counselors or certified clinical pastoral therapists and clients"); Tenn. Code Ann. § 24-1-204(b) (recognizing the confidentiality of communications between a crisis intervention team member or team leader and the participant in the intervention); Tenn. Code Ann. § 24-1-207(a) (recognizing the confidentiality of communications between a psychiatrist and patient).

Tennessee law also provides victims with protection from disclosure of confidential or otherwise private information pursuant to public records' requests. For example, the Address Confidentiality Program (Program) was created "to protect the confidentiality of the confidential address of a relocated victim of domestic abuse, stalking, human trafficking, rape, sexual battery, or any other sexual offense[.]" Tenn. Code Ann. § 40-38-601(1). The Program "shall provide the participant with the use of a substitute address for the participant and the participant's minor children and shall not disclose the participant's name, confidential address, phone number, or any other information contained within the program participant's file except as otherwise provided by this part."

Tenn. Code Ann. § 40-38-602(b). "Whenever a program participant is required by law to swear to or affirm the participant's address, the participant may use the participant's substitute address. Wherever a program participant is required by law to establish

residency, the participant may present evidence of program participation and use the participant's substitute address." Tenn. Code Ann. § 40-38-602(c). The confidential addresses of victim-participants in the Program—along with "any other information contained within [their] file[s]"—"is not a public record." Tenn. Code Ann. § 40-38-602(f). Lastly, "state, local, or nonprofit agenc[ies] or application assistant[s] that provide[] counseling, shelter, or any other services to a [Address Confidentiality] program participant shall not be required to disclose the confidential address or any other information concerning the program participant for any reason." Tenn. Code Ann. § 40-38-611(b).

Crime victims in Tennessee have other statutory-based confidentiality protections with respect to public records. For example, Tennessee law provides that "identifying information compiled and maintained by a utility service provider concerning a person who has obtained a valid protection document shall be treated as confidential and not open for inspection by the public." Tenn. Code Ann. § 10-7-504(a)(15)(B).¹ Victims who have a protective order and wish to invoke these privacy protections must present a copy of the protection document "to the records custodian of the utility service provider whose records such person seeks to make confidential, and such person must request that all identifying information about such person be maintained as confidential." Tenn. Code Ann. § 10-7-504(a)(15)(C). Similarly, if a victim provides a copy of the protection order to "governmental entit[ies]"—defined to mean the state of Tennessee and any county, municipality, city or other political subdivision of the state of Tennessee—those entities must also treat all "identifying information compiled and maintained by [the] governmental entity concerning a person who has obtained a valid protection document . . . as confidential and may not [] open [it] for inspection by the public." Tenn. Code Ann. § 10-7-504(a)(16)(A)(i); Tenn. Code Ann. § 10-7-504(a)(16)(B).

In addition, Tennessee law requires that the following victim-related information be treated as confidential and exempted from public records' requests: (1) "[t]he telephone number, address, and any other information which could be used to locate the whereabouts of a domestic violence shelter, family safety center, rape crisis center, or human trafficking service provider, as defined in § 36-3-623 . . . upon the director of the shelter, family safety center, crisis center, or human trafficking service provider giving written notice to the records custodian of the appropriate entity or utility that such shelter, family safety center, crisis center, or human trafficking service provider desires that such identifying information be maintained as confidential[,]" Tenn. Code Ann. § 10-7-504(a)(17); (2) specific information about victims who apply for state compensation under the Criminal Injuries Compensation Act, including their address, phone numbers, social security number, and the criminal offense at issue, Tenn. Code Ann. § 10-7-504(k)(1)-(4); (3) "[a]ll memoranda, work notes or products, or case files of [victim-offender mediation] centers . . . are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent proceeding[,]" Tenn. Code Ann. § 16-20-103(a); (4) "identifying information" in forms submitted by a victim of violent crime involving serious bodily injury or death of a relative to ensure notice upon release of the offender from jail or detention

¹ The version of the text cited for Tenn. Code Ann. § 10-7-504 is effective January 1, 2020.

facility prior to trial is confidential, Tenn. Code Ann. § 40-38-103(b); and (5) written victim impact statements submitted to the parole board “shall not be made available to the public and shall be considered confidential[,]” Tenn. Code Ann. § 40-28-504(a)-(b).

Child-victims and victims of sexual offense crimes have additional privacy protections. For example, in cases “[w]here a defendant has plead guilty to, or has been convicted of, and has been sentenced for a sexual offense or violent sexual offense specified in [section] 40-39-202, the following information regarding the victim of the offense shall be treated as confidential and shall not be open for inspection by members of the public: (A) [n]ame, unless waived pursuant to subdivision (q)(2); (B) [h]ome, work and electronic mail addresses; (C) [t]elephone numbers; (D) [s]ocial security number; and (E) [a]ny photographic or video depiction of the victim.” Tenn. Code Ann. § 10-7-504(q)(1)(A)-(E). In cases involving child-victims, the following information “shall be treated as confidential and shall not be open for inspection by members of the public: (A) [n]ame, unless waived pursuant to subdivision (t)(2); (B) [h]ome, work, and electronic mail addresses; (C) [t]elephone numbers; (D) [s]ocial security number; (E) [a]ny photographic or video depiction of the minor victim; and (F) [w]hether the defendant is related to the victim unless the relationship is an essential element of the offense.” Tenn. Code Ann. § 10-7-504(t)(1)(A)-(F).

Tennessee law also explicitly provides protections against disclosure of body-worn camera recordings under some circumstances. Records specifically designated as confidential and exempted from disclosure through public records’ requests includes “video taken by a law enforcement body camera that depicts” any of the following: “(A) [m]inors, when taken within a school that serves any grades from kindergarten through grade twelve (K-12); (B) [t]he interior of a facility licensed under title 33 or title 68; or (C) [t]he interior of a private residence that is not being investigated as a crime scene.” Tenn. Code Ann. § 10-7-504(u)(1)(A)-(C).

Lastly, additional protections from disclosure pursuant to public records’ requests exist for certain general law enforcement, medical and educational records. *See, e.g.*, Tenn. Code Ann. § 10-7-504(a)(1)(A) (“The medical records of patients in state, county, and municipal hospitals and medical facilities, and the medical records of persons receiving medical treatment, in whole or in part, at the expense of the state, county, or municipality, shall be treated as confidential and shall not be open for inspection by members of the public.”); Tenn. Code Ann. § 10-7-504(a)(2)(A) (“All investigative records of the Tennessee bureau of investigation . . . shall be treated as confidential and shall not be open to inspection by members of the public.”); Tenn. Code Ann. § 10-7-504(a)(4)(A) (“The records of students in public educational institutions shall be treated as confidential.”).

SELECT PRIVILEGE LAWS

What are key privileges in Tennessee?

Victims in Tennessee have a number of privileges they can assert to prevent disclosure of their private communications with certain victim services programs, counselors, social workers, psychiatrists and others. *See, e.g.*, Tenn. Code Ann. § 63-23-109(a) (recognizing a licensed social worker-client privilege); Tenn. Code Ann. § 24-1-207(a) (recognizing a psychiatrist-patient privilege); Tenn. Code Ann. § 63-22-114 (recognizing as privileged the communications between clients and licensed marital and family therapists, licensed professional counselors and certified clinical pastoral therapists); Tenn. Code Ann. § 24-1-204(b)-(c) (recognizing as privileged certain crisis intervention communications).

Licensed social worker-client privilege: “The confidential relations and communications between a client and licensed social worker as defined in this chapter, are placed upon the same basis as those provided by law between licensed psychologists, licensed psychological examiners, licensed senior psychological examiners, certified psychological assistants and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.” Tenn. Code Ann. § 63-23-109(a).

Client licensed marital and family therapist, licensed professional counselor or certified clinical pastoral therapist privilege: “The confidential relations and communications between licensed marital and family therapists, licensed professional counselors or certified clinical pastoral therapists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this part shall be construed to require any such privileged communication to be disclosed.” Tenn. Code Ann. § 63-22-114.

Psychologist-client privilege: “For the purpose of this chapter, the confidential relations and communications between licensed psychologist or psychological examiner or senior psychological examiner or certified psychological assistant and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.” Tenn. Code Ann. § 63-11-213.

Psychiatrist-patient privilege: “Communications between a patient and a licensed physician when practicing as a psychiatrist in the course of and in connection with a therapeutic counseling relationship regardless of whether the therapy is individual, joint, or group, are privileged in proceedings before judicial and quasi-judicial tribunals.” Tenn. Code Ann. § 24-1-207(a).

Crisis intervention communications privilege: “All communications between a team member or team leader providing, and a group participant or person participating in, a crisis intervention shall be considered confidential and no such person shall be required to disclose any such communication unless otherwise required by law or rule of court.” Tenn. Code Ann. § 24-1-204(b).

Dual-relay and interpreter privileges: “No interpreter or dual-party relay operator shall be permitted or required to disclose information obtained by virtue of facilitating any confidential communication.” Tenn. Code Ann. § 24-1-210(b).

Deaf and hearing impaired persons interpreter privilege: “Any and all information that the interpreter gathers from the deaf person pertaining to any proceeding then pending shall at all times remain confidential and privileged, or on an equal basis with the attorney-client privilege, unless such deaf person desires that such information be communicated to other persons. Tenn. Code Ann. § 24-1-211(f).

Victim-offender mediation center privilege: “All memoranda, work notes or products, or case files of centers established under this chapter are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege.” Tenn. Code Ann. § 16-20-103(a).

SELECT DEFINITIONS

“Victim”

Under the Tennessee Constitution, for purposes of rights recognized in Article 1, section 35, “‘Victim’ means: (i) A natural person against whom a crime was committed; (ii) If the victim is a minor, then the parent or legal guardian of the minor; or (iii) If the victim is deceased or is physically or emotionally unable to exercise the victim’s rights, then the following persons, or their designees, in the order of preference in which they are listed: (a) A family member; or (b) A person who resided with the victim[.]” Tenn. Code Ann. § 40-38-302(4)(A)(i)-(iii); *see also* Tenn. Const. art. I, § 35 (“The general assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.”); Tenn. Code Ann. § 40-38-301(c) (“If any other provision of law contains a broader definition of ‘crime,’ ‘victim’ or ‘critical stages of the criminal justice process’ for any purpose other than implementation of Article I, § 35 of the Constitution of Tennessee, the broader definition shall control for such purpose.”).

Key terms as applicable to the constitutional victims’ rights amendment.

For purposes of Tenn. Const. art. I, § 35 (Rights of victims of crimes), key terms are defined as follows:

“As used in this part, unless the context otherwise requires:

(1) ‘Crime’ means:

(A) Any offense the punishment for which is a Class A, B, C, D or E felony;

(B) First degree murder; or

(C) Assault under § 39-13-101(a)(1);

(2) ‘Critical stages of the criminal justice process’ are:

(A) Bond hearings or bond reduction hearings if hearing from the victim is deemed relevant by the appropriate district attorney general;

(B) Any hearing on a motion to dismiss or on a plea agreement requiring approval by the trial court;

(C) The defendant’s sentencing hearing;

(D) Any hearing at which the issue of whether the defendant should pay restitution or the amount of restitution that should be paid is discussed;

(E) Any parole hearing at which the defendant’s release on parole will be discussed or determined; and

(F) Any other hearing that proposes a final disposition of the case;

(3) ‘Family member’ means the victim’s spouse, natural parent, child, adopted child, grandparent, grandchild, stepparent, adoptive parent, or brother or sister of the whole or half-blood or by adoption. If a ‘family member’ is a minor, the minor may be represented by a guardian where appropriate[.]” Tenn. Code Ann. § 40-38-302(1)-(3).

“Human trafficking service providers” in the context of the statute providing for the confidentiality of records kept by domestic violence shelters, rape crisis centers and human trafficking service providers.

For purposes of the protections in Tenn. Code Ann. § 36-3-623, “‘human trafficking service providers’ means agencies or groups that are incorporated as a not-for-profit organization for at least six (6) months, are tax-exempt under § 501 of the Internal Revenue Code (26 U.S.C. § 501), and that have provided services to victims of human trafficking.” Tenn. Code Ann. § 36-3-623(b).

Key terms—including “victim”— in the context of the Address Confidentiality Program.

“(1) ‘Address confidentiality program’ or ‘program’ means the program created under this part to protect the confidentiality of the confidential address of a relocated victim of domestic abuse, stalking, human trafficking, rape, sexual battery, or any other sexual offense;

(2) ‘Administrator of elections’ means the chief county election administrative officer appointed by the county election commission;

- (3) ‘Application’ means the form or forms submitted, in the manner prescribed by the secretary of state, by an individual requesting certification for the address confidentiality program;
- (4) ‘Application assistant’ means an employee or volunteer at an agency or organization that serves victims of domestic abuse, stalking, human trafficking, rape, sexual battery, or any other sexual offense, who has received training and certification from the secretary of state to help individuals complete applications to be program participants;
- (5) ‘Confidential address’ means the actual address of a program participant’s residence, school, institution of higher education, business, or place of employment, as specified on an application to be a program participant or on a notice of change of address filed under this part;
- (6) ‘Coordinator of elections’ means the official appointed by the secretary of state in accordance with § 2-11-201 as the chief administrative election officer of the state and such official’s designee or designees;
- (7) ‘Domestic abuse’ has the same meaning as defined in § 36-3-601;
- (8) ‘Domestic abuse victim’ has the same meaning as defined in § 36-3-601;
- (9) ‘Fiduciary’ has the same meaning as defined in § 34-1-101;
- (10) ‘Governmental entity’ means the state, a political subdivision of the state, or any department, agency, board, commission, or other instrumentality of the state or a political subdivision of the state;
- (11) ‘Human trafficking’ has the same meaning as used in § 39-13-314;
- (12) ‘Minor’ has the same meaning as defined in § 34-1-101;
- (13) ‘Parent’ includes biological and adoptive parents, as defined in § 36-1-102;
- (14) ‘Person with a disability’ has the same meaning as defined in § 34-1-101;
- (15) ‘Process’ means judicial process and all orders, demands, notices, or other papers required or permitted by law to be served on a program participant;
- (16) ‘Program participant’ means a person who is certified by the secretary of state as a program participant;
- (17) ‘Secretary of state’ or ‘secretary’ means the secretary of state of Tennessee and any designee of the secretary;
- (18) ‘Sexual offender’ has the same meaning as defined in § 40-39-202;
- (19) ‘Sexual offense’ means a sexual offense or violent sexual offense as defined in § 40-39-202;
- (20) ‘Stalking’ has the same meaning as defined in § 39-17-315; and
- (21) ‘Substitute address’ means an address designated by the secretary of state under the address confidentiality program that is used instead of a confidential address as set forth by this part.” Tenn. Code Ann. § 40-38-601.

Key terms in the context of protections from disclosure of identifying information in protective orders.

For purposes of the protections in Tenn. Code Ann. § 10-7-504(a)(15)(B), key terms are defined as follows:

“(15)(A) As used in this subdivision (a)(15), unless the context otherwise requires:

- (i) ‘Identifying information’ means the home and work addresses and telephone numbers, social security number, and any other information that could reasonably be used to locate the whereabouts of an individual;
- (ii) ‘Protection document’ means:
 - (a) An order of protection issued pursuant to title 36, chapter 3, part 6, that has been granted after proper notice and an opportunity to be heard;
 - (b) A similar order of protection issued by the court of another jurisdiction;
 - (c) An extension of an ex parte order of protection granted pursuant to § 36-3-605(a);
 - (d) A similar extension of an ex parte order of protection granted by a court of competent jurisdiction in another jurisdiction;
 - (e) A restraining order issued by a court of competent jurisdiction prohibiting violence against the person to whom it is issued;
 - (f) A court order protecting the confidentiality of certain information issued upon the request of a district attorney general to a victim or witness in a criminal case, whether pending or completed; and
 - (g) An affidavit from the director of a rape crisis center, domestic violence shelter, or human trafficking service provider, as defined in § 36-3-623, certifying that an individual is a victim in need of protection; provided, that such affidavit is on a standardized form to be developed and distributed to such centers, shelters, and providers by the Tennessee task force against domestic violence; and
- (iii) ‘Utility service provider’ means any entity, whether public or private, that provides electricity, natural gas, water, or telephone service to customers on a subscription basis, whether or not regulated by the Tennessee public utility commission.” Tenn. Code Ann. § 10-7-504(a)(15)(A)(i)-(iii).

For purposes of the protections in Tenn. Code Ann. § 10-7-504(a)(16)(B), key terms are defined as follows:

“(16)(A) As used in this subdivision (a)(16), unless the context otherwise requires:

- (i) ‘Governmental entity’ means the state of Tennessee and any county, municipality, city or other political subdivision of the state of Tennessee;
- (ii) ‘Identifying information’ means the home and work addresses and telephone numbers, social security number, and any other information that could reasonably be used to locate the whereabouts of an individual;
- (iii) ‘Protection document’ means:
 - (a) An order of protection issued pursuant to title 36, chapter 3, part 6, that has been granted after proper notice and an opportunity to be heard;
 - (b) A similar order of protection issued by the court of another jurisdiction;
 - (c) An extension of an ex parte order of protection granted pursuant to § 36-3-605(a);
 - (d) A similar extension of an ex parte order of protection granted by a court of competent jurisdiction in another jurisdiction;
 - (e) A restraining order issued by a court of competent jurisdiction prohibiting violence against the person to whom it is issued;
 - (f) A court order protecting the confidentiality of certain information issued upon the request of a district attorney general to a victim or witness in a criminal case, whether pending or completed; and

(g) An affidavit from the director of a rape crisis center or domestic violence shelter certifying that an individual is a victim in need of protection; provided, that such affidavit is on a standardized form to be developed and distributed to such centers and shelters by the Tennessee task force against domestic violence.” Tenn. Code Ann. § 10-7-504(a)(16)(A)(i)-(iii).

“Identifying information” in the context of confidentiality protections for information in victims’ requests for notice.

For purposes of the protections in Tenn. Code Ann. § 40-38-103(b), “‘identifying information’ means the name, home and work addresses, telephone numbers, email address, and social security number of the person being notified or requesting that notification be provided.” Tenn. Code Ann. § 40-38-103(b).

Key terms in the context of privileges.

For purposes of Tenn. Code Ann. § 24-1-204 (crisis intervention communications privilege), key terms are defined as follows:

“(a) As used in this section:

- (1) ‘Crisis intervention’ means a session at which crisis response services are rendered by a critical incident stress management team member or leader during or after a crisis or disaster;
- (2) ‘Crisis response services’ means consultation, risk assessment, referral and crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster;
- (3) ‘Critical incident stress management team member or team leader,’ referred to also as ‘team member,’ or ‘team leader,’ means an individual specially trained to provide crisis response services as a member or leader of an organized community or local crisis response team that holds membership in a registered critical incident stress management team;
- (4) ‘Registered team’ means a team formally registered with a recognized training agency. A recognized training agency shall include the International Critical Incident Stress Foundation, the National Organization for Victim Assistance, the American Red Cross, the Tennessee Public Safety Network and other such organizations;
- (5) ‘Training session’ means a session providing crisis response training by a qualified trained trainer utilizing the standards established by the accrediting agencies set out in subdivision (a)(4); and
- (6) ‘Volunteer’ means a person who serves and receives no remuneration for services except reimbursement for actual expenses.” Tenn. Code Ann. § 24-1-204(a).

For purposes of Tenn. Code Ann. § 24-1-210 (dual relay and interpreter privilege), key terms are defined as follows:

“(a) As used in this section, unless the context otherwise requires:

- (1) ‘Dual party relay operator’ means a person who facilitates communication over the telephone between persons, one (1) of whom depends on the use of a special device for transmitting text rather than the spoken voice through the telephone line; and

(2) ‘Interpreter’ means a person who facilitates communication between persons who are unable to communicate with one another directly without such facilitation.” Tenn. Code Ann. § 24-1-210(a)(1)-(2).

For purposes of Tenn. Code Ann. § 24-1-211 (deaf and hearing-impaired persons interpreter privilege dual relay and interpreter privilege), key terms are defined as follows:

“(a) As used in this section:

(1) ‘Deaf person’ means a person with a hearing loss so great as to prevent such person from understanding language spoken in a normal tone. ‘Deaf person’ further includes, but is not limited to, a person who is mute and a person who is both deaf and mute. The archaic term ‘dumb’ that formerly related to deaf people shall hereafter be struck from all future state publications that in any way refer to the deaf;

(2) ‘Oral interpreter’ means a person who interprets language through facial and lip movements only and who does not use manual communication. An oral interpreter shall be provided upon the request of a deaf person who does not communicate in sign language. The right of a deaf person to an interpreter may not be waived except by a deaf person who does not use sign language and who initiates such request for waiver in writing. Such waiver is subject to approval of counsel to such deaf person, if existent, and is subject to approval of the appointing authority; and

(3) ‘Qualified interpreter’ means an interpreter certified by the National Registry of Interpreters for the Deaf, Tennessee Registry of Interpreters for the Deaf, or, in the event an interpreter so certified is not available, an interpreter whose qualifications are otherwise determined. Efforts to obtain the services of a qualified interpreter certified with a Legal Skills Certificate or a Comprehensive Skills Certificate will be made prior to accepting services of an interpreter with lesser certification. No ‘qualified interpreter’ shall be appointed unless the appointing authority and the deaf person make a preliminary determination that the interpreter is able to readily communicate with the deaf person and is able to accurately interpret the statements of the deaf person and interpret the proceedings in which a deaf person may be involved.” Tenn. Code Ann. § 24-1-211(a)(1)-(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.
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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. Sexton*, 592 F. App’x 422, 429 (6th Cir. 2014) (finding that “contrary to the district court’s conclusion that the [state] prosecutor was not responsible for failing to disclose the Victim–Advocate report because the Advocate was located ‘in a separate part of the District Attorney’s office,’ the prosecutor is in fact responsible for disclosing all *Brady* information in the possession of that office, such as the Victim–Advocate report, even if the prosecutor was unaware of the evidence prior to trial”); *Commonwealth v. Liang*, 747 N.E.2d 112, 114 (Mass. 2001) (concluding that “the notes of [prosecution-based] advocates are subject to the same discovery rules as the notes of prosecutors[,]” and “[t]o the extent that the notes contain material, exculpatory information . . . or relevant ‘statements’ of a victim or witness . . . the Commonwealth must disclose such information or statements to the defendant, in accordance with due process and the rules of criminal procedure”).

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).