



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

### INTRODUCTION

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

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

### USING THIS RESOURCE

This resource is designed to enhance victim services personnel's knowledge and understanding of the law governing crime victims' rights to privacy, confidentiality and privilege in Wisconsin. 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 - Wisconsin*.

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## OVERVIEW

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

### Key Takeaways

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

### Discussion

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

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

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

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

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

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

#### **Key Takeaways**

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

and in some jurisdictions, victim advocates. Key terms in the law may be defined in a way to limit the privilege. For example, among those jurisdictions that recognize an advocate-victim privilege, the term “advocate” is often narrow (e.g., only sexual assault advocates). Disclosure of privileged communications is prohibited unless the victim consents.

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

## Discussion

### Privacy

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

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

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

### Confidentiality

*“Confidentiality” is a legal and ethical duty not to disclose the victim-client’s information learned in confidence.*

As part of accessing services, victims frequently share highly sensitive personal information with professionals. A victim’s willingness to share this information may be premised on

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

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

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

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

States Supreme Court case *Brady v. Maryland*.

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

### Privilege

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

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

### Understanding the Differences

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



**What are HIPAA, FERPA, VOCA, VAWA and FOIA, and why are these relevant to my work as an advocate?<sup>8</sup>****Key Takeaways**

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

**Discussion**

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Key Takeaways**

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

#### **Discussion**

Yes, there are ethical standards—or “principles of conduct”—that guides victim advocates in their work.<sup>20</sup> Although there is no formal regulatory board that oversees victim assistance programs, the *Model Standards for Serving Victims & Survivors of Crime (Model Standards)* was created by the National Victim Assistance Standards Consortium with guidance from experts across the nation “to promote the competency and ethical integrity of victim 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.”<sup>21</sup>

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

The third area—Ethical Standards for Serving Victims & Survivors of Crime—contains “ethical expectations” of victim 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.<sup>22</sup>

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

responsible manner.”<sup>23</sup>

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

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

**Key Takeaways**

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

### Discussion

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

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

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

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



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

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

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

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

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



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

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

#### **Key Takeaways**

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

#### **Discussion**

*Giglio v. United States*, 405 U.S. 150 (1972), is a case that was heard before the United States Supreme Court.<sup>31</sup> 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?<sup>32</sup>**

#### **Key Takeaways**

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

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

### Discussion

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

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

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

## SELECT LAWS

## SELECT PRIVACY LAWS

**What are key privacy rights and/or protections in Wisconsin?**

Crime victims in Wisconsin have a broad right to privacy under the state's constitution and victims' rights statute. *See* Wis. Const. art. I, § 9m(2)(b) (guaranteeing victims the right to privacy); Wis. Stat. Ann. § 950.04(1v)(ag) ("Victims of crimes have the [ ] right[ ] [t]o be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies.").

Wisconsin further protects victim privacy through other statutory provisions. For example, the state affords victims the right to have public officials, employees and agencies not use or disclose victims' personal identifiers, such as their names, social security numbers, phone numbers and addresses. Wis. Stat. Ann. § 950.04(1v)(dr); *see also id.* at § 85.103(1) (defining "personal identifier"). State law also protects victim privacy through evidentiary restrictions on the disclosure of a victim's locating and/or employment information. Specifically, in any action proceeding under the state's criminal code or rules of criminal procedure, "evidence of the address of an alleged crime victim or any family member of an alleged crime victim or evidence of the name and address of any place of employment of an alleged crime victim or any family member of an alleged crime victim is relevant only if it meets the criteria under s. 904.01[, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"]]. District attorneys shall make appropriate objections if they believe that evidence of this information, which is being elicited by any party, is not relevant in the action or proceeding."

Wisconsin grants victims additional privacy protections by affording them the right, where possible, to a separate, secure waiting area while awaiting court appearances. Wis. Stat. Ann. § 950.04(1v)(e); *id.* at § 967.10(2). The state also protects victim privacy by guaranteeing victims the right to refuse defense interviews, depositions and other discovery requests. Wis. Const. art. I, § 9m(2)(L); Wis. Stat. Ann. § 950.04(1v)(er); *id.* at § 971.23(6c).

Additionally, to protect victims' constitutional and statutory rights to be treated with fairness, dignity, courtesy, sensitivity, and respect for their privacy, the Wisconsin Supreme Court recently enacted a rule barring the use of any part of a crime victim's name to identify the victim in appellate briefs, petitions for review, and responses to petitions for review that the courts make available online, "unless there is good cause for non-compliance." Wis. Stat. Ann. § 809.86; *see* Wis. Jud. Council Note, S. Ct. Or. 14-01, § 6 (stating that Wis. Stat. Ann. § 809.86 "addresses victim privacy concerns that result from public access to

searchable documents posted on the Wisconsin Supreme Court and Court of Appeals access website” and noting that “the proposed rule is intended to protect victims’ constitutional and statutory rights to be treated with fairness, dignity, courtesy, sensitivity, and respect for their privacy”); *see also* Wis. Const. art. I, § 9m(2)(a) (affording victims the right “[t]o be treated with dignity, respect, courtesy, sensitivity, and fairness”); *id.* at § 9m(2)(b) (affording victims the right to privacy); Wis. Stat. Ann. § 950.04(1v)(ag) (“Victims of crimes have the [ ] right [ ] [t]o be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies.”). Under this statute, victims are to instead be identified “by one or more initials or other appropriate pseudonym or designation.” *Id.* at § 809.86(4); *see also* Wis. Jud. Council Note, S. Ct. Or. 14-01, § 6 (“Subsection (4) does not prescribe or limit the use of other pseudonyms for victims, as long as they maintain sensitivity and respect for victims.”). Notably, the privacy protections available under this statute are limited to living victims. *See id.* at § 809.86(3) (defining “victim” to mean “a natural person against whom a crime, other than a homicide, has been committed or alleged to have been committed in the appeal or proceeding”); *see* Wis. Jud. Council Note, S. Ct. Or. 14-01, § 6. (“The privacy issues addressed by the rule do not extend to a deceased victim in the same manner. Therefore, subsection (3) permits the victim of a homicide to be recognized in an appellate brief.”). Under this statute, the court also may, for good cause, issue any protective order “necessary to protect the identity of a victim or other person, or to excuse compliance with this section.” *Id.* at § 809.86(5). In its note regarding this statute, the judicial counsel stated that the rule created by this statute is not one “of confidentiality or privilege.” Wis. Jud. Council Note, S. Ct. Or. 14-01, § 6.

Wisconsin protects victims’ privacy interests through other procedural rules related to the inclusion of identifying and other personal information in criminal court filings. For instance, statutorily “protected information”—including social security, employer or taxpayer identification, financial account, driver license and passport numbers—must be omitted or redacted from court filings. Wis. Stat. Ann. § 809.19(2); *see id.* at § 971.027 (Wis. Stat. Ann. § 809.19 is applicable in criminal cases); *see also id.* at § 809.19(4) (transcript redaction). Where a victim’s protected information was disclosed in court filings prior to the 2016 effective date of this procedural protection, the victim may move to have the information redacted. *Id.* at § 809.19(3). State law also establishes a procedure for filing information and documents that are otherwise confidential. *Id.* at § 809.20; *see id.* at § 971.027 (Wis. Stat. Ann. § 809.20 is applicable in criminal cases). Certain commonly-filed documents made confidential by statutes, court rules and case law are automatically treated as confidential. *Id.* at § 809.20(1). To protect other court records, a motion to seal must be filed. *Id.*; *see also id.* at § 801.21 (motions to seal).

Wisconsin also recognizes enhanced privacy protections for certain categories of victims, such as child victims or victims of sexual offenses. For instance, after concluding that “it is necessary to provide child victims and witnesses with additional consideration and different treatment than that usually afforded to adults,” the Wisconsin legislature, “urge[d] the news media to use restraint in revealing the identity of child victims or witnesses, especially in sensitive cases.” Wis. Stat. Ann. § 950.055. Additionally, in certain situations,

child victims may use audiovisual recordings in lieu of a live statement at a preliminary hearing. *Id.* at § 970.03(14).

The enhanced privacy protections that Wisconsin offers adult and child sex offense victims include requiring courts to consider victims' interests when deciding whether to exclude persons from a preliminary hearing. Wis. Stat. Ann. § 950.04(1v)(em); *id.* at § 970.03(4). When making this determination, "[t]he court may consider as a compelling interest, among others, the need to protect a complainant from undue embarrassment and emotional trauma." *Id.* at § 970.03(4)(a). When setting forth the specific findings to support a closure order, the court must give substantial weight to the victim's desires and may consider the victim's age, psychological maturity and understanding, the nature of the crime, and the desires of the victim's family. *Id.* at § 970.03(4)(b). The privacy interests of sex offense victims are also protected by Wisconsin's rape shield law, pursuant to which the victim's sexual history cannot be admitted into evidence, except under limited circumstances. *Id.* at § 972.11. Other examples of privacy protections for sex offense victims include: the right to not be subjected to a lie detector test, *id.* at § 950.04(1v)(dL), *id.* at § 968.265; and the right to not be ordered to submit to a psychological exam to assess credibility, *id.* at § 971.23(5c).

Sex offense victims also have enhanced privacy protections in the context of crime victim compensation. For instance, while all hearings related to compensation are "open to the public," they may be closed in a particular case if the examiner determines that the hearing, or a portion thereof, must be held in private to protect the interests of a sex offense victim. Wis. Stat. Ann. § 949.11(3). Hearings related to sexual assault forensic examination compensation are also generally open to the public, but may be held in private when an examiner determines that such privacy is in the victim's interest. *Id.* at § 949.31(3).

Additionally, Wisconsin protects the privacy rights and interests of victims of child abuse, domestic violence, human trafficking, sexual offenses and stalking through its Address Confidentiality Program, Wis. Stat. § 165.68, which is discussed more fully in the section "Select Confidentiality Laws."

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

## SELECT CONFIDENTIALITY LAWS

### **What are key confidentiality rights and/or protections in Wisconsin?**

Wisconsin offers a number of confidentiality protections to crime victims, many of which relate to protecting against disclosure of the victim's locating information. For example, a victim's right to notice of certain proceedings and changes in an offender's status depends upon different notification cards that victims fill out and return to various state entities,

including the department of corrections, the department of justice, and the county clerk. These cards contain victim contact information and are not subject to inspection or copying, except where necessary to comply with the state's notification of obligations. *See, e.g.*, Wis. Stat. Ann. § 301.046(4)(d); *id.* at § 302.107(4); *id.* at § 302.113(9g)(g)(3); *id.* at § 302.114(6)(e); *id.* at § 303.068(4m)(d); *id.* at § 304.06(1)(f); *id.* at § 971.17(6m)(d); *id.* at § 973.09(3m); *id.* at § 973.195(1r)(e); *id.* § 980.11(4). The home address of victims is protected as confidential in a number of other settings, such as: when a victim gives a statement regarding a parole determination, *id.* at § 304.06(1)(f); and when a victim of domestic violence, child abuse, or harassment or an individual at risk obtains a restraining order or injunction, *id.* at § 813.12(5m), *id.* at § 813.122(5g), *id.* at § 813.123(5g), *id.* at § 813.125(5m).

Wisconsin also protects victim confidentiality in the context of complaints filed with the department of justice regarding victim mistreatment by public officials, employees or agencies or under crime victims assistance programs; such a complaint is confidential, unless the victim waives confidentiality. Wis. Stat. Ann. § 950.095(1)(a).

Additionally, as noted above, Wisconsin's procedural rules governing criminal court filings protect victim confidentiality. For example, statutorily "protected information"—including social security, employer or taxpayer identification, financial account, driver license and passport numbers—must be omitted or redacted from court filings. Wis. Stat. Ann. § 809.19(2); *see id.* at § 971.027 (Wis. Stat. Ann. § 809.19 is applicable in criminal cases); *see also id.* at § 809.19(4) (transcript redaction). Where a victim's protected information was disclosed in court filings prior to the 2016 effective date of this procedural protection, the victim may move to have the information redacted. *Id.* at § 809.19(3). State law also establishes a procedure for filing information and documents that are otherwise confidential. *Id.* at § 809.20; *see id.* at § 971.027 (Wis. Stat. Ann. § 809.20 is applicable in criminal cases). Certain commonly-filed documents made confidential by statutes, court rules and case law are automatically treated as confidential. *Id.* at § 809.20(1). To protect other court records, a motion to seal must be filed. *Id.*; *see also id.* at § 801.21 (motions to seal). For a list of commonly-filed documents that need not be accompanied by a motion to seal, *see* <https://www.wicourts.gov/services/attorney/redact/conf.htm>. Any documents that are sealed at the trial level remain protected when the case is appealed. Wis. Stat. Ann. § 809.21(9).

Victims who apply for crime victim compensation are also entitled to limited confidentiality protections. In general, records related to crime victim compensation proceedings are public, but where a record or report relied upon in the compensation process is otherwise confidential, it remains confidential. Wis. Stat. Ann. § 949.16. On the other hand, as discussed more in the following section, the only evidentiary privilege that applies in the compensation context is that protecting the attorney-client relationship. *Id.* at § 949.12; *id.* at § 949.32. When a health care provider seeks compensation for a sexual assault forensic examination, "any personally identifiable information, as defined in s. 19.62(5), of the victim who received the examination shall remain confidential unless written consent for



the release of any personally identifiable information is provided by” the victim or the victim’s guardian. *Id.* at § 949.36.

Wisconsin also protects victim confidentiality in the context of public records requests. In general, records in Wisconsin are open to any person for inspection, copying or mechanical reproduction. When a person makes a general request for records, statutory and common law exceptions may bar disclosure. Wis. Stat. Ann. § 19.35(1)(a). Even in the absence of such exceptions, the custodian of records may deny access to records, if the public policy in favor of nondisclosure outweighs the strong presumption in favor of access. *Id.*

In situations where the disclosure request seeks records containing personally identifiable information, the requestor is entitled to inspect the records unless one or more statutory exceptions apply. *Id.* at § 19.35(1)(am). One such statutory exception exists for records “collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.” *Id.* at § 19.35(1)(am)(1); *see also id.* at § 905.09 (law enforcement “privilege to refuse to disclose investigatory files, reports and returns for law enforcement purposes except to the extent available by law to a person other than the federal government, a state or subdivision thereof”). Another statutory exception relevant to crime victims is one barring disclosure of records containing personally identifiable information that, if disclosed, would endanger a person’s life or safety. *Id.* at § 19.35(1)(am)(2)(a). Additionally, Section 19.35 provides an express exception for records containing the actual address of a victim participating in the state’s address confidentiality program. *Id.* at § 19.35(1)(am)(2m).

Many statutes related to victim records also expressly state that the records at issue are not subject to public disclosure under § 19.35(1). For example, the Wisconsin statute governing sexual exploitation by a therapist provides that all records related to a report of sexual exploitation of a patient by a therapist are confidential and exempt from disclosure under § 19.35(1). Wis. Stat. Ann. § 940.22(4). Likewise, as noted above, Wisconsin law contains multiple statutory provisions that specify that the public right of access to public records under § 19.35 does not apply to information related to a crime victim’s mailing address where that information is contained in a card on file with a state agency for the purposes of affording victims their notification rights. *See, e.g., id.* at § 301.046(4)(d); *id.* at § 302.107(4); *id.* at § 302.113(9g)(g)(3); *id.* at § 302.114(6)(e); *id.* at § 303.068(4m)(d); *id.* at § 304.06(1)(f); *id.* at § 971.17(6m)(d); *id.* at § 973.09(3m); *id.* at § 973.195(1r)(e); *id.* § 980.11(4). The state statute governing law enforcement’s use of body cameras also provides an express victim-related exemption to disclosure under § 19.35(1). Under Wis. Stat. Ann. § 165.87(3), data from a body camera on a law enforcement officer is subject to inspection and copying under the state’s open records law, except that “[i]t shall be the public policy of this state to maintain the privacy of a record subject who is a victim of a sensitive or violent crime or who is a minor and that access to data from a body camera used on a law enforcement officer that record such a record subject shall be provided only if the public interest in allowing access is so great as to outweigh that public policy.” *Id.* at



§ 165.87(3)(c)(1). If the public interest is found to be so great as to call for disclosure, “the record subject’s face and anything else that would allow the record subject to be identified may be redacted using pixelization or another method of redaction.” *Id.* Notably, the presumption of privacy for victims under this provision does not apply if the victim or the victim’s representative does not object to granting access to the data.

Wisconsin protects the confidentiality of the communications and related records between victims and certain service providers. For example, like all residents of Wisconsin, a victim’s medical records are confidential under state law and may only be released to statutorily designated persons or others with the informed consent of the victim-patient or a person authorized by the victim-patient. Wis. Stat. Ann. § 146.82(1). One exception to this general rule of confidentiality is that “a health care provider may release a portion, but not a copy, of a patient health care record” to a victim advocate who is accompanying a victim of sexual assault, human trafficking or child sexual abuse, pursuant to Wis. Stat. Ann. § 50.378(2), the statutory provision granting such victims the right to have a victim advocate accompany them to a hospital examination or consultation performed as a result of the crime committed against them. *Id.* at § 146.82(1)(b)(3).

As detailed in the following section, “Select Privilege Laws,” Wisconsin relies upon evidentiary privileges to protect the confidentiality of communications between victims and certain providers of counseling and other support services, as well as the confidentiality of records related to the provision of these services. *See, e.g.*, Wis. Stat. Ann. § 905.045 (domestic violence or sexual assault advocate-victim privilege); *id.* at § 905.04 (physician-patient, registered nurse-patient, chiropractor-patient, psychologist-patient, social worker-patient, marriage and family therapist-patient, podiatrist-patient and professional counselor-patient privilege); *id.* at § 905.015 (interpreter privilege); *id.* at § 905.03 (lawyer-client privilege); *id.* at § 905.06 (clergy privilege).

Wisconsin offers additional confidentiality protections for victims of child abuse, domestic violence, human trafficking, sex offenses and stalking through Safe at Home, the state’s address confidentiality program. Under this program, victims can request a substitute address to use to receive first class mail and for other public and private purposes. Wis. Stat. Ann. § 165.68(5). All state and local government agencies must accept the substitute address, absent statutory duties to the contrary. *Id.* Victims may participate in this program regardless of whether criminal charges have been sought against the offender or whether the victim has sought a restraining order or injunction related to the offender’s conduct. For more information about Wisconsin’s Safe at Home program, *see* <https://www.doj.state.wi.us/ocvs/safe-home>.

## SELECT PRIVILEGE LAWS

**What are key privileges in Wisconsin?**

Victims in Wisconsin have a number of privileges that they can assert to prevent disclosure of their private communications with certain individuals, including certain victim advocates, physicians, mental health providers, social workers, interpreters, attorneys and clergy. *See, e.g.*, Wis. Stat. Ann. § 905.045 (domestic violence or sexual assault advocate-victim privilege); *id.* at § 905.04 (physician-patient, registered nurse-patient, chiropractor-patient, psychologist-patient, social worker-patient, marriage and family therapist-patient, podiatrist-patient and professional counselor-patient privilege); *id.* at § 905.015 (interpreter privilege); *id.* at § 905.03 (lawyer-client privilege); *id.* at § 905.06 (clergy privilege); *see also id.* at § 885.205 (institution of higher education dean- and psychologist-student privilege, except where dean subpoenaed to testify in a criminal case). Privilege holders may waive their privileges through voluntary or consented to disclosure. *Id.* at § 905.11. Where a disclosure itself is a privileged communication, waiver does not occur. *Id.*

Some of these privileges are subject to express limitations with respect to crime victims. For instance, the privileges governing communications between victims and medical and mental health care providers, victim advocates and clergy specifically do not apply to information contained in a mandatory report of child abuse or neglect under Wis. Stat. Ann. § 48.981(3). *Id.* at § 905.04(4)(e); *id.* at § 905.045(4); *id.* at § 905.06(4). Additionally, the privilege regarding medical and mental health care providers does not apply in trial for homicide “when the disclosure relates directly to the facts or immediate circumstances of the homicide.” *Id.* at § 905.04(4)(d).

The victim advocate-victim privilege applies to confidential communications and information communicated between victim advocates and victims of child abuse, domestic violence, sexual offenses, human trafficking and child sexual abuse. Wis. Stat. Ann. § 905.045(1)(a). For the purposes of this privilege, a “victim advocate” is “an individual who is an employee of or a volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim.” *Id.* at § 905.045(1)(e). The statute does not specify whether system-based victim advocates necessarily fall within this definition and Wisconsin courts have yet to address the issue.

The victim advocate-victim privilege protects from disclosure communications and information if the “communication was made or the information was obtained or disseminated for the purpose of providing counseling, assistance, or support services to the victim.” *Id.* at § 905.045(2). A communication or information is “confidential” for the purposes of this privilege if it is “not intended to be disclosed to 3rd persons other than persons present to further the interest of the person receiving counseling, assistance, or support services, persons reasonably necessary for the transmission of the communication or information, and persons who are participating in providing counseling, assistance, or support services under the direction of a victim advocate, including family members of the

person receiving counseling, assistance, or support services and members of any group of individuals with whom the person receives counseling, assistance, or support services.” *Id.* § 905.045(1)(e).

As noted above, Wisconsin’s victim advocate-victim privilege does not apply to mandatory reports of child abuse under Wis. Stat. Ann. § 48.981. *Id.* at § 905.045(4). It also does not apply to any report concerning a threat of violence in or targeted at a school that a victim advocate is required to make under § 175.32. When a communication or information that is privileged under the victim advocate-victim privilege is also protected by the medical and mental health care provider privilege of § 905.04, the provisions of § 905.04 supersede the provisions of § 905.045. *Id.* at § 905.045(5).

In the context of crime victim compensation claims, no evidentiary privilege other than the attorney-client privilege protects communications or records relevant to an issue of the victim’s physical, mental or emotional condition in a proceeding in which that condition is an element. Wis. Stat. Ann. § 949.12; *id.* at § 905.14. In the context of sexual assault forensic examination compensation, there is similarly “no privilege, except privileges arising from the attorney-client relationship, as to communications or records relevant to an issue of the physical condition of the victim in a [sexual assault forensic examination compensation] proceeding . . . in which that condition is an element.” *Id.* at § 949.32.

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

Interpreter Privilege  
for Persons with  
Language Difficulty,  
Limited English  
Proficiency or a  
Hearing or Speaking  
Impairment

Wis. Stat. Ann. § 905.015.

(1) If an interpreter for a person with a language difficulty, limited English proficiency, as defined in s. 885.38(1)(b), or a hearing or speaking impairment interprets as an aid to a communication which is privileged by statute, rules adopted by the supreme court, or the U.S. or state constitution, the interpreter may be prevented from disclosing the communication by any person who has a right to claim the privilege. The interpreter may claim the privilege but only on behalf of the person who has the right. The authority of the interpreter to do so is presumed in the absence of evidence to the contrary.

(2) In addition to the privilege under sub. (1), a person who is licensed as an interpreter under s. 440.032(3) may not disclose any aspect of a confidential communication facilitated by the interpreter unless one of the following conditions applies:

- (a) All parties to the confidential communication consent to the disclosure.
- (b) A court determines that the disclosure is necessary for the proper administration of justice.

<p>Lawyer-Client Privilege</p>	<p>Wis. Stat. Ann. § 905.03(2)–(5).</p> <p>(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client’s representative and the client’s lawyer or the lawyer’s representative; or between the client’s lawyer and the lawyer’s representative; or by the client or the client’s lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.</p> <p>(3) Who may claim the privilege. The privilege may be claimed by the client, the client’s guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer’s authority to do so is presumed in the absence of evidence to the contrary.</p> <p>(4) Exceptions. There is no privilege under this rule:</p> <p>(a) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or</p> <p>(b) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or</p> <p>(c) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer’s client or by the client to the client’s lawyer; or</p> <p>(d) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or</p> <p>(e) Joint clients. As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.</p>

	<p>(5) Forfeiture of Privilege. (a) Effect of inadvertent disclosure. A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture if all of the following apply:</p> <ol style="list-style-type: none"> <li>1. The disclosure is inadvertent.</li> <li>2. The holder of the privilege or protection took reasonable steps to prevent disclosure.</li> <li>3. The holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01(7).</li> </ol> <p>(b) Scope of forfeiture. A disclosure that constitutes a forfeiture under par. (a) extends to an undisclosed communication only if all of the following apply:</p> <ol style="list-style-type: none"> <li>1. The disclosure is not inadvertent.</li> <li>2. The disclosed and undisclosed communications concern the same subject matter.</li> <li>3. The disclosed and undisclosed communications ought in fairness to be considered together.</li> </ol>
<p>Physician-Patient, Registered Nurse- Patient, Chiropractor- Patient, Psychologist- Patient, Social Worker-Patient, Marriage and Family Therapist-Patient, Podiatrist-Patient and Professional Counselor-Patient Privilege</p>	<p>Wis. Stat. Ann. § 905.04(2)–(4).</p> <p>(2) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's podiatrist, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.</p> <p>(3) Who may claim the privilege. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor may claim the privilege but only on behalf of the patient. The authority so to do is presumed in the absence of evidence to the contrary.</p>

	<p>(4) Exceptions. (a) Proceedings for commitment, guardianship, protective services, or protective placement or for control, care, or treatment of a sexually violent person. There is no privilege under this rule as to communications and information relevant to an issue in probable cause or final proceedings to commit the patient for mental illness under s. 51.20, to appoint a guardian in this state, for court-ordered protective services or protective placement, for review of guardianship, protective services, or protective placement orders, or for control, care, or treatment of a sexually violent person under ch. 980, if the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist, or professional counselor in the course of diagnosis or treatment has determined that the patient is in need of commitment, guardianship, protective services, or protective placement or control, care, and treatment as a sexually violent person.</p> <p>(am) Proceedings for guardianship. There is no privilege under this rule as to information contained in a statement concerning the mental condition of the patient furnished to the court by a physician or psychologist under s. 54.36(1) or s. 880.33(1), 2003 stats.</p> <p>(b) Examination by order of judge. If the judge orders an examination of the physical, mental or emotional condition of the patient, or evaluation of the patient for purposes of guardianship, protective services or protective placement, communications made and treatment records reviewed in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.</p> <p>(c) Condition an element of claim or defense. There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.</p> <p>(d) Homicide trials. There is no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide.</p> <p>(e) Abused or neglected child or abused unborn child. 2m. There is no privilege for information contained in a report of child abuse or neglect that is provided under s. 48.981(3).</p> <p>3. There is no privilege in situations where the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family</p>
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	<p>therapist or professional counselor that the physical injury inflicted on the unborn child was caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.</p> <p>(em) School violence. There is no privilege for information contained in a report of a threat of violence in or targeted at a school that is provided under s. 175.32(3).</p> <p>(f) Tests for intoxication. There is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or alcohol concentration, as defined in s. 340.01(1v).</p> <p>(g) Paternity proceedings. There is no privilege concerning testimony about the medical circumstances of a pregnancy or the condition and characteristics of a child in a proceeding to determine the paternity of that child under subch. IX of ch. 767.</p> <p>(h) Reporting wounds and burn injuries. There is no privilege regarding information contained in a report under s. 255.40 pertaining to a patient's name and type of wound or burn injury.</p> <p>(i) Providing services to court in juvenile matters. There is no privilege regarding information obtained by an intake worker or dispositional staff in the provision of services under s. 48.067, 48.069, 938.067 or 938.069. An intake worker or dispositional staff member may disclose information obtained while providing services under s. 48.067 or 48.069 only as provided in s. 48.78 and may disclose information obtained while providing services under s. 938.067 or 938.069 only as provided in s. 938.78.</p>
Domestic Violence or Sexual Assault Advocate-Victim Privilege	<p>Wis. Stat. Ann. § 905.045(2)–(5).</p> <p>(2) General rule of privilege. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated among the victim, a victim advocate who is acting in the scope of his or her duties as a victim advocate, and persons who are participating in providing counseling, assistance, or support services under the direction of a victim advocate, if the communication was made or the information was obtained or disseminated for the purpose of providing counseling, assistance, or support services to the victim.</p> <p>(3) Who may claim the privilege. The privilege may be claimed by the victim, by the victim's guardian or conservator, or by the victim's personal representative if the victim is deceased. The victim advocate may claim the privilege on behalf of the victim.</p>



	<p>The victim advocate's authority to do so is presumed in the absence of evidence to the contrary.</p> <p>(4) Exceptions. Subsection (2) does not apply to any report concerning child abuse that a victim advocate is required to make under s. 48.981 or concerning a threat of violence in or targeted at a school that a victim advocate is required to make under s. 175.32.</p> <p>(5) Relationship to s. 905.04. If a communication or information that is privileged under sub. (2) is also a communication or information that is privileged under s. 905.04(2), the provisions of s. 905.04 supersede this section with respect to that communication or information.</p>
Clergy Privilege	<p>Wis. Stat. Ann. § 905.06(2)–(4).</p> <p>(2) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member's professional character as a spiritual adviser.</p> <p>(3) Who may claim the privilege. The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The member of the clergy's authority so to do is presumed in the absence of evidence to the contrary.</p> <p>(4) Exceptions. There is no privilege under this section concerning observations or information that a member of the clergy, as defined in s. 48.981(1)(cx), is required to report as suspected or threatened child abuse under s. 48.981(2)(bm) or as a threat of violence in or targeted at a school under s. 175.32.</p>

## SELECT DEFINITIONS

Definitions of the terms used in the above-referenced privileges are included here, when available.

## Victim Definitions

Wis. Const. art. I, § 9m(1).

(a) In this section, notwithstanding any statutory right, privilege, or protection, “victim” means any of the following:

1. A person against whom an act is committed that would constitute a crime if committed by a competent adult.
2. If the person under subd. 1. is deceased or is physically or emotionally unable to exercise his or her rights under this section, the person’s spouse, parent or legal guardian, sibling, child, person who resided with the deceased at the time of death, or other lawful representative.
3. If the person under subd. 1. is a minor, the person’s parent, legal guardian or custodian, or other lawful representative.
4. If the person under subd. 1. is adjudicated incompetent, the person’s legal guardian or other lawful representative.

(b) “Victim” does not include the accused or a person who the court finds would not act in the best interests of a victim who is deceased, incompetent, a minor, or physically or emotionally unable to exercise his or her rights under this section.

Wis. Stat. Ann. § 950.02(4).

“Victim” means any of the following:

1. A person against whom a crime has been committed.
2. If the person specified in subd. 1. is a child, a parent, guardian or legal custodian of the child.
3. If a person specified in subd. 1. is physically or emotionally unable to exercise the rights granted under s. 950.04 or article I, section 9m, of the Wisconsin constitution, a person designated by the person specified in subd. 1. or a family member of the person specified in subd. 1.
4. If a person specified in subd. 1. is deceased, any of the following:
  - a. A family member of the person who is deceased.
  - b. A person who resided with the person who is deceased.
5. If a person specified in subd. 1. has been adjudicated incompetent in this state, the guardian of the person appointed for him or her.

	(b) “Victim” does not include the person charged with or alleged to have committed the crime.
Address Confidentiality Program Definitions	<p>Wis. Stat. Ann. § 165.68(1).</p> <p>In this section:</p> <p>(a) “Abuse” means an act or threat of any of the following:</p> <ol style="list-style-type: none"> <li>1. Child abuse under ss. 813.122(1)(a) or 948.02 to 948.11.</li> <li>2. Domestic abuse, as defined in s. 813.12(1)(am).</li> <li>3. Sexual abuse, as defined in s. 103.10(1m)(b)6.</li> <li>4. Stalking under s. 940.32.</li> <li>5. Trafficking under s. 940.302.</li> </ol> <p>(b) “Actual address” means the residential street address, school address, or work address, or any portion thereof, of a program participant.</p> <p>(c) “Assigned address” means an address designated by the department and assigned to a program participant.</p> <p>(d) “Department” means the department of justice.</p> <p>(e) “Mail” means first class letters and flats delivered by the United States Postal Service, including priority, express, and certified mail. “Mail” does not include a package, parcel, periodical, or catalogue unless it is clearly identifiable as being sent by a state or local agency or unit of government or is clearly identifiable as containing a pharmaceutical or medical item.</p> <p>(f) “Program assistant” means an individual designated by the department to assist a program participant. The department may designate as a program assistant an employee of the department or of a state or local agency that provides counseling, assistance, or support services to victims, or an employee of or a volunteer for an organization that provides counseling, assistance, or support services free of charge to victims.</p> <p>(g) “Program participant” means a person who is certified by the department to participate in the confidentiality program established in this section.</p>

<p>Lawyer-Client Privilege Definitions</p>	<p>Wis. Stat. Ann. § 905.03(1).</p> <p>As used in this section:</p> <p>(a) A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.</p> <p>(b) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.</p> <p>(c) A “representative of the lawyer” is one employed to assist the lawyer in the rendition of professional legal services.</p> <p>(d) A communication is “confidential” if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.</p>
<p>Physician-Patient, Registered Nurse- Patient, Chiropractor- Patient, Psychologist- Patient, Social Worker-Patient, Marriage and Family Therapist-Patient, Podiatrist-Patient and Professional Counselor-Patient Privilege Definitions</p>	<p>Wis. Stat. Ann. § 905.04.</p> <p>In this section:</p> <p>(a) “Chiropractor” means a person licensed under s. 446.02, or a person reasonably believed by the patient to be a chiropractor.</p> <p>(b) A communication or information is “confidential” if not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview, to persons reasonably necessary for the transmission of the communication or information, or to persons who are participating in the diagnosis and treatment under the direction of the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor, including the members of the patient’s family.</p> <p>(bm) “Marriage and family therapist” means an individual who is licensed as a marriage and family therapist under ch. 457 or an individual reasonably believed by the patient to be a marriage and family therapist.</p>

	<p>(c) “Patient” means an individual, couple, family or group of individuals who consults with or is examined or interviewed by a physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.</p> <p>(d) “Physician” means a person as defined in s. 990.01(28), or reasonably believed by the patient so to be.</p> <p>(dg) “Podiatrist” means a person licensed under s. 448.63 or a person reasonably believed by the patient to be a podiatrist.</p> <p>(dm) “Professional counselor” means an individual who is licensed as a professional counselor under ch. 457 or an individual reasonably believed by the patient to be a professional counselor.</p> <p>(e) “Psychologist” means a licensed psychologist, as that term is defined in s. 455.01(4), or a person reasonably believed by the patient to be a psychologist.</p> <p>(f) “Registered nurse” means a registered nurse who is licensed under s. 441.06 or who holds a multistate license, as defined in s. 441.51(2)(h), issued in a party state, as defined in s. 441.51(2)(k), or a person reasonably believed by the patient to be a registered nurse.</p> <p>(g) “Social worker” means an individual who is certified or licensed as a social worker, advanced practice social worker, independent social worker, or clinical social worker under ch. 457 or an individual reasonably believed by the patient to be a social worker, advanced practice social worker, independent social worker, or clinical social worker.</p>
Domestic Violence or Sexual Assault Advocate-Victim Privilege Definitions	<p>Wis. Stat. Ann. § 905.045(1).</p> <p>In this section:</p> <p>(a) “Abusive conduct” means abuse, as defined in s. 813.122(1)(a), of a child, as defined in s. 813.122(1)(b), interspousal battery, as described under s. 940.19 or 940.20(1m), domestic abuse, as defined in s. 813.12(1)(am), sexual exploitation by a therapist under s. 940.22, sexual assault under s. 940.225, human trafficking involving a commercial sex act under s. 940.302, or child sexual abuse under s. 948.02, 948.025, or 948.05 to 948.11.</p>

	<p>(c) A communication or information is “confidential” if not intended to be disclosed to 3rd persons other than persons present to further the interest of the person receiving counseling, assistance, or support services, persons reasonably necessary for the transmission of the communication or information, and persons who are participating in providing counseling, assistance, or support services under the direction of a victim advocate, including family members of the person receiving counseling, assistance, or support services and members of any group of individuals with whom the person receives counseling, assistance, or support services.</p> <p>(d) “Victim” means an individual who has been the subject of abusive conduct or who alleges that he or she has been the subject of abusive conduct. It is immaterial that the abusive conduct has not been reported to any government agency.</p> <p>(e) “Victim advocate” means an individual who is an employee of or a volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim.</p>
Clergy Privilege Definitions	<p>Wis. Stat. Ann. § 905.06(1).</p> <p>As used in this section:</p> <p>(a) A “member of the clergy” is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.</p> <p>(b) A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.</p>

<sup>1</sup> See *Office for Victims of Crime, Ethical Standards, Section I: Scope of Services*, [https://www.ovc.gov/model-standards/ethical\\_standards\\_1.html](https://www.ovc.gov/model-standards/ethical_standards_1.html).

<sup>2</sup> Additional examples of system-based advocate titles include: district attorney’s office/state attorney’s office advocates or victim-witness coordinators; law enforcement advocates; FBI victim specialists; U.S. attorney’s office victim-witness coordinators; board of parole and post-prison supervision advocates; and post-conviction advocates.

<sup>3</sup> Examples of community-based advocates include: crisis hotline or helpline staff; rape crisis center staff; domestic violence shelter staff; campus advocates; and homicide support program staff.

<sup>4</sup> See Nat’l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, NCVLI Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, Or.), June 2011, at 3 n.30 (listing victims’ constitutional and statutory rights to privacy and to dignity, respect or fairness).

<sup>5</sup> See, e.g., *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (recognizing that the United States Constitution provides a right of personal privacy, which includes an “individual interest in avoiding disclosure of personal matters”); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (“[A] right to personal privacy . . . does exist under the Constitution.”).

<sup>6</sup> There are different levels of privileges: absolute, absolute diluted and qualified. When an absolute privilege attaches, only a victim has the right to authorize disclosure of that information and the court can never order the information to be disclosed without the victim’s consent. Absolute privileges are rare, however, because privileges are seen to run contrary to the truth finding function of courts.

<sup>7</sup> See, e.g., Ala. R. Evid. 503A(a)(7) (“‘Victim counselor’ means any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or prosecutor’s office and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence.”); Alaska Stat. Ann. § 18.66.250(5)(B) (“‘[V]ictim counseling center’ means a private organization, an organization operated by or contracted by a branch of the armed forces of the United States, or a local government agency that . . . is not affiliated with a law enforcement agency or a prosecutor’s office[.]”); Haw. Rev. Stat. Ann. § 626-1, Rule 505.5(a)(6) (“A ‘victim counseling program’ is any activity of a domestic violence victims’ program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor’s office, or the department of human services.”); Ind. Code Ann. § 35-37-6-5(2) (“‘[V]ictim service provider’ means a person . . . that is not affiliated with a law enforcement agency[.]”); Neb. Rev. Stat. Ann. § 29-4302(1) (“Advocate means any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor’s office whose primary purpose is assisting domestic violence and sexual assault victims[.]”); N.M. Stat. Ann. § 31-25-2(E) (“‘[V]ictim counselor’ means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney[.]”).

<sup>8</sup> Terms that inform the intersection of victim services and HIPAA, 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).

<sup>9</sup> *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)*, [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/SRO\\_FAQs\\_2-5-19\\_0.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Are law enforcement records considered education records?*, <https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records>.

<sup>14</sup> *Id.*

<sup>15</sup> *Office for Victims of Crime, Crime Victims Fund*, <https://www.ovc.gov/pubs/crimevictimsfundfs/intro.html#VictimAssist>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Department of Justice Guide to the Freedom of Information Act, at 1, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> *Ethic*, Merriam-webster.com, <https://www.merriam-webster.com/dictionary/ethics> (last visited July 31, 2019).

<sup>21</sup> *Office for Victims of Crime, Purpose & Scope of The Standards*, [https://www.ovc.gov/model-standards/purpose\\_and\\_scope.html](https://www.ovc.gov/model-standards/purpose_and_scope.html).

<sup>22</sup> *Id.* Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For “Scope of Services,” the ethical standards and their corresponding commentaries can be located at



[https://www.ovc.gov/model-standards/ethical\\_standards\\_1.html](https://www.ovc.gov/model-standards/ethical_standards_1.html). For “Coordinating within the Community,” the ethical standards and their corresponding commentaries can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_2.html](https://www.ovc.gov/model-standards/ethical_standards_2.html). For “Direct Services,” the ethical standards and their corresponding commentaries can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_3.html](https://www.ovc.gov/model-standards/ethical_standards_3.html). For “Privacy, Confidentiality, Data Security and Assistive Technology,” the ethical standards and their corresponding commentaries can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_4.html](https://www.ovc.gov/model-standards/ethical_standards_4.html). For “Administration and Evaluation,” the ethical standard and the corresponding commentary can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_5.html](https://www.ovc.gov/model-standards/ethical_standards_5.html).

<sup>23</sup> *Office for Victims of Crime, Ethical Standards for Serving Victims & Survivors of Crime*, [https://www.ovc.gov/model-standards/ethical\\_standards.html](https://www.ovc.gov/model-standards/ethical_standards.html).

<sup>24</sup> For a sample law enforcement-based victim services code of ethics drafted by the International Association of Chiefs of Police, see [Law Enforcement-Based Victim Services – Template Package I: Getting Started](#), [https://www.theiacp.org/sites/default/files/LEV/Publications/Template%20Package%20I%2C%20final\\_11.02.20.pdf](https://www.theiacp.org/sites/default/files/LEV/Publications/Template%20Package%20I%2C%20final_11.02.20.pdf).

<sup>25</sup> See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

<sup>26</sup> See *United States v. Agurs*, 427 U.S. 97, 106–07 (1976).

<sup>27</sup> *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

<sup>28</sup> *Id.*

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

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

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

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

<sup>33</sup> Terminology for subpoenas varies from jurisdiction-to-jurisdiction. Common examples of subpoenas include: “subpoenas”; “subpoenas duces tecum”; “deposition subpoenas”; and “subpoenas ad testificandum.” See *Subpoena*, Black’s Law Dictionary (8th ed. 2004).

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

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

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