NATIONAL CRIME VICTIM LAW INSTITUTE

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LAW ENFORCEMENT-BASED VICTIM SERVICES IN MASSACHUSETTS: 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 Massachusetts. 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 - Massachusetts*.

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OVERVIEW

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

Key Takeaways

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

Discussion

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

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

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

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

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

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

Key Takeaways

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

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

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

Discussion

Privacy

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

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

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

Confidentiality

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

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

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

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

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

information is shared with a mandatory reporter of elder or child abuse and if the information falls within the state's required disclosures to defendant pursuant to the United States Supreme Court case *Brady v. Maryland*.

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

Privilege

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

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

Understanding the Differences

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

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

Key Takeaways

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Key Takeaways

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

Discussion

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

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

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

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

responsible manner."[23]

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

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

Key Takeaways

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

Key Takeaways

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

Discussion

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

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

Key Takeaways

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

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

Discussion

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

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

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

SELECT LAWS

SELECT PRIVACY LAWS

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

Although Massachusetts's victims' rights laws do not expressly guarantee victims a broad right to privacy, they do offer victims a number of discrete privacy-related rights and protections. For instance, the state affords victims the right to "request confidentiality in the criminal justice system." Mass. Gen. Laws Ann. ch. 258B, § 3(h). Upon a court's decision to grant the request, various participants in the criminal justice system are barred from disclosing the victim's personal identifying information in open court. *Id.* Additionally, "[t]he court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses." *Id.*

Massachusetts also protects victim privacy by guaranteeing victims the right to decline a defense interview. Mass. Gen. Laws Ann. ch. 258B, § 3(m). Additionally, the state protects victims' privacy interests through statutory provisions that support the nondisclosure of victims' contact information. For instance, as noted above, courts have the authority to bar disclosure of certain victim information upon the victim's request and to otherwise limit the disclosure of the victim's identifying information when necessary to protect the victim's privacy and safety. Mass. Gen. Laws Ann. ch. 258B § 3(h). Likewise, when a victim is an employee of the department of youth services, "no law enforcement agency, prosecutor, defense counsel or parole, probation or corrections official shall disclose or state the residential address, telephone number or place of employment or school of the victim, a victim's family member or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses." *Id.* at 258B, § 3(w).

Massachusetts further protects victims' privacy through the safety-related rights contained in its code. For instance, the state guarantees victims the right to a separate, secure waiting area or room in a courthouse, Mass. Gen. Laws Ann. ch. 258B, § 3(i), as well as the right to protection from harm or threats of harm related to their cooperation with law enforcement and prosecution efforts, *id.* at ch. 258B, § 3(d).

Massachusetts extends heightened privacy protections to certain categories of victims. For example, courts may protect the privacy of child victims of sex offenses by excluding the public from the trials of their offenders. Mass Gen. Laws Ann. ch. 278, § 16A. The state protects sexual assault victims' privacy through its rape shield law, under which a sex crime victim's sexual history cannot be admitted into evidence, except under limited

circumstances. Mass. Gen. Laws Ann. ch. 233, § 21B. State law also protects the privacy of victims of rape, sexual assault and domestic abuse through various confidentiality protections, which are discussed below in the section "Select Confidentiality Laws". *See, e.g., id.* at ch. 41, § 97D (confidentiality of communications between victims of rape and sexual assault and police officers); *id.* at ch. 233, § 20L (confidentiality of location of domestic violence victims' programs and rape crisis centers); *id.* at ch. 265, § 24C (confidentiality of the identities of rape and sexual assault victims in court or police records).

Additionally, the privacy interests of victims of domestic abuse, sexual assault and stalking can be protected through participation in the state's address confidentiality program, Mass. Gen. Laws Ann. ch. 9A, §§ 1 to 7, which is discussed more fully in the section "Select Confidentiality Laws."

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

SELECT CONFIDENTIALITY LAWS

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

Massachusetts offers a number of confidentiality rights and protections to crime victims. For instance, as noted above in the section "Select Privacy Laws", state law guarantees victims the right to "request confidentiality in the criminal justice system." Mass. Gen. Laws Ann. ch. 258B, § 3(h). Once the court approves such a request, "no law enforcement agency, prosecutor, defense counsel, or parole, probation or corrections official may disclose or state in open court, except among themselves, the residential address, telephone number, or place of employment or school of the victim, a victim's family member or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses." *Id.* Where a victim is an employee of the department of youth services, similar protections exist, even in the absence of a victim's request for confidentiality. *See id.* at ch. 258B, § 3(w). Additionally, government agencies are barred from disclosing the name and personal identifying information of victims of adjudicated crimes and victims of domestic violence, regardless of whether a victim has exercised the right to request confidentiality or whether the victim is an employee of the department of youth services. *Id.* at ch. 66 § 10B.

Under Massachusetts law, victim confidentiality is also protected through a victim's right to confer with the prosecution "before any hearing on motions by the defense to obtain psychiatric or other confidential records." Mass. Gen. Laws Ann. ch. 258B, § 3(h); *see also* Mass. G. Evid. § 1108(a)(3)(iv) ("[I]f the third-party subject [of a records request] is the victim in the case, he or she has the opportunity to confer with the prosecutor prior to the

hearing.”); *see generally id.* at § 1108 (describing the procedure for pretrial access to victims’ personal, privileged and/or confidential records).

Additionally, Massachusetts protects victim confidentiality in the context of court records in certain cases. For instance, in a prosecution for the secret electronic, photo or video surveillance of full or partially nude people, the unlawfully obtained images of the victim are not open to public inspection. Mass. Gen. Laws Ann. ch. 272, § 105.

Massachusetts law offers heightened confidentiality protections to certain categories of victims. For example, the state guarantees the confidentiality of reports to police by victims of rape, sexual assault and domestic violence. Mass. Gen. Laws Ann. ch. 41, § 97D. Such reports may be accessible to the victim, the victim’s attorney, and others that the victim authorizes to obtain the information. *Id.* Additionally, the information may be accessed by victim-witness advocates, domestic violence victims’ counselors, law enforcement and prosecutors, if necessary to the performance of their duties. *Id.* Victims of rape and sexual assault are also entitled to have their identities kept confidential in court or police records, “except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted.” *Id.* at ch. 265, § 24C.

Massachusetts also protects the confidentiality of victims of domestic abuse, sexual assault and stalking through its address confidentiality program. *See generally* Mass. Gen. Laws Ann. ch. 9A, §§ 1 to 7 (address confidentiality program); 950 Mass. Code Regs. § 130.00 (administration of address confidentiality program). This program protects victims privacy and safety by allowing participants to use a substitute mailing address when interacting with government agencies. Mass. Gen. Laws Ann. ch. 9A, § 4. The records related to program participation are not public records and are exempt from disclosure. *Id.* at ch. 9A, § 6.

Massachusetts mandates additional confidentiality protections, including victim confidentiality in the context of public records requests. For instance, any “materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy” is exempt from disclosure under the state’s public records law. Mass. Gen. Laws Ann. ch. 4, § 7(26)(c). Personnel and medical files are also specifically exempt, *id.*, as are “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest,” *id.* at ch. 4, § 7(26)(f). Additionally, state law bars government agencies from disclosing the “home address, telephone number, personal email address or place of employment or education of victims of adjudicated crimes [or] victims of domestic violence.” *Id.* at ch. 66, § 10B. Also, “the name, home address, telephone number, personal email address or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.” *Id.* As noted above, records related to the state’s address confidentiality program are not public records subject to disclosure. *Id.* at ch. 9A, § 6. Likewise, the portion of a court or police record that contains the identity of the victim

of rape or sexual assault is not a public record subject to disclosure in response to a records request. *Id.* at ch. 265, § 24C.

Massachusetts expressly guarantees the confidentiality of communications between victims and various service providers, as well as the confidentiality of records related to the provisions of these services. *See, e.g.*, Mass. Gen. Laws Ann. ch. 112, § 129A (psychologist-patient confidentiality); *id.* at ch. 122, § 135A (social worker-client confidentiality); *id.* at ch. 112, § 172 (allied mental health and human service professionals-client confidentiality); *id.* at ch. 233, § 20J (sexual assault counselor-victim confidentiality); *id.* at ch. 233, § 20K (domestic violence counselor-victim confidentiality); *id.* at ch. 233, § 20M (human trafficking caseworker-victim confidentiality). As detailed in the section "Select Privilege Laws," Massachusetts law further protects the confidentiality of these communications through evidentiary privileges. *See, e.g.*, *id.* at ch. 112, § 135B (social worker-client privilege); *id.* at ch. 112, § 172 (allied mental health and human service professionals-client privilege); *id.* at ch. 233, § 20B (psychotherapist-client privilege); *id.* at ch. 233, § 20J (sexual assault counselor-victim privilege); *id.* at ch. 233, § 20K (domestic violence counselor-victim privilege); *id.* at ch. 233, § 20M (human trafficking caseworker-victim privilege). In the context of the criminal justice system, these privileges are subject to certain limitations. *See, e.g.*, Mass. G. Evid. § 503 (evidence guide to psychotherapist-patient privilege); *id.* at § 505 (evidence guide to domestic violence counselor-victim privilege); *id.* at § 506 (evidence guide to sexual assault counselor-victim privilege); *id.* at § 507 (evidence guide to social worker-client privilege); *id.* at § 508 (evidence guide to allied mental health-client and human services professional-client privileges).

SELECT PRIVILEGE LAWS

What are key privileges in Massachusetts?

Victims in Massachusetts have a number of privileges that they can assert to prevent disclosure of their private communications with certain professionals, including social workers, psychotherapists, domestic violence counselors, sexual assault counselors, human trafficking caseworkers and other mental health providers. *See, e.g.*, Mass. Gen. Laws Ann. ch. 112, § 135B (social worker-client privilege); *id.* at ch. 112, § 172 (allied mental health and human service professionals-client privilege); *id.* at ch. 233, § 20B (psychotherapist-client privilege); *id.* at ch. 233, § 20J (sexual assault counselor-victim privilege); *id.* at ch. 233, § 20K (domestic violence counselor-victim privilege); *id.* at ch. 233, § 20M (human trafficking caseworker-victim privilege).

The Massachusetts Guide to Evidence[36] explains that these privileges are all subject to the same limitation: in a criminal action, the confidential communications between victims and the service providers with whom they have a privileged relationship "may be subject to discovery and may be admissible as evidence, subject to applicable law." Mass. G. Evid. § 503(d)(8) (psychotherapist-patient privilege); *id.* at § 505(c) (domestic violence

<table>
<tr><td colspan="2">counselor-victim privilege); id. at § 506(c) (sexual assault counselor-victim privilege); id. at § 507(c)(9) (social worker-client privilege); id. at § 508(e) (allied mental health or human services professional-client privilege).

The Massachusetts Supreme Court established the protocol for access to and use of statutorily privileged materials in criminal cases in Commonwealth v. Dwyer, 94 N.E.3d 379, 418–19 (Mass. 2006). Mass G. Evid., Introductory Note to Article V, Privileges and Disqualifications (g). This protocol is discussed and reprinted in the Massachusetts Guide to Evidence § 1108.

For reference, the privileges discussed in this section appear below, as well as related portions of the Massachusetts Guide to Evidence. Additional information about the application of these privileges in Massachusetts criminal cases can be found in the Editor's Notes to each section of the Guide. A full copy of the Guide is available here: https://www.mass.gov/guides/massachusetts-guide-to-evidence.</td></tr>
<tr><td>Psychotherapist-Patient Privilege</td><td>Mass. Gen. Laws Ann. ch. 233 § 20B.

Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition. This privilege shall apply to patients engaged with a psychotherapist in marital therapy, family therapy, or consultation in contemplation of such therapy.

If a patient is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in his behalf under this section. A previously appointed guardian shall be authorized to so act.

Upon the exercise of the privilege granted by this section, the judge or presiding officer shall instruct the jury that no adverse inference may be drawn therefrom.

The privilege granted hereunder shall not apply to any of the following communications:
(a) If a psychotherapist, in the course of his diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining</td></tr>
</table>

	the patient in such hospital, provided however that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities. (b) If a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of a psychiatric examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt. (c) In any proceeding, except one involving child custody, adoption or adoption consent, in which the patient introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected. (d) In any proceeding after the death of a patient in which his mental or emotional condition is introduced by any party claiming or defending through or as a beneficiary of the patient as an element of the claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected. (e) In any case involving child custody, adoption or the dispensing with the need for consent to adoption in which, upon a hearing in chambers, the judge, in the exercise of his discretion, determines that the psychotherapist has evidence bearing significantly on the patient's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between patient and psychotherapist be protected; provided, however, that in such cases of adoption or the dispensing with the need for consent to adoption, a judge shall determine that the patient has been informed that such communication would not be privileged. (f) In any proceeding brought by the patient against the psychotherapist, and in any malpractice, criminal or license revocation proceeding, in which disclosure is necessary or relevant to the claim or defense of the psychotherapist. The provision of information acquired by a psychotherapist relative to the diagnosis or treatment of a patient's emotional condition, to any insurance company, nonprofit hospital service corporation, medical service corporation, or health maintenance organization, or to a board established pursuant to section twelve of chapter one

	hundred and seventy-six B, pertaining to the administration or provision of benefits, including utilization review or peer review, for expenses arising from the out-patient diagnosis or treatment, or both, of mental or nervous conditions, shall not constitute a waiver or breach of any right to which said patient is otherwise entitled under this section and section thirty-six B of chapter one hundred and twenty-three. **Guide to Psychotherapist-Patient Privilege** (Mass. G. Evid. § 503(b)–(e)). (b) Privilege. Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto, and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition. This privilege shall also apply to patients engaged with a psychotherapist in marital therapy, family therapy, or consultation in contemplation of such therapy. If a patient is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in his or her behalf under this section. A previously appointed guardian shall be authorized to so act. (c) Effect of Exercise of Privilege. Upon the exercise of the privilege granted by this section, the judge or presiding officer shall instruct the jury that no adverse inference may be drawn therefrom. (d) Exceptions. The privilege granted hereunder shall not apply to any of the following communications: (1) Disclosure to Establish Need for Hospitalization or Imminently Dangerous Activity. A disclosure made by a psychotherapist who, in the course of diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or herself or another

	person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital, provided, however, that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities; (2) Court-Ordered Psychiatric Exam. A disclosure made to a psychotherapist in the course of a psychiatric examination ordered by the court, provided that such disclosure was made after the patient was informed that the communication would not be privileged, and provided further that such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt; (3) Patient Raises the Issue of Own Mental or Emotional Condition as an Element of Claim or Defense. A disclosure in any proceeding, except one involving child custody, adoption, or adoption consent, in which the patient introduces the patient's mental or emotional condition as an element of a claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected; (4) Party Through Deceased Patient Raises Issue of Decedent's Mental or Emotional Condition as Element of Claim or Defense. A disclosure in any proceeding after the death of a patient in which the patient's mental or emotional condition is introduced by any party claiming or defending through, or as a beneficiary of, the patient as an element of the claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected; (5) Child Custody and Adoption Cases. A disclosure in any case involving child custody, adoption, or the dispensing with the need for consent to adoption in which, upon a hearing in

	chambers, the judge, in the exercise of his or her discretion, determines that the psychotherapist has evidence bearing significantly on the patient's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between patient and psychotherapist be protected; provided, however, that in such cases of adoption or the dispensing with the need for consent to adoption, a judge shall first determine that the patient has been informed that such communication would not be privileged; (6) Claim Against Psychotherapist. A disclosure in any proceeding brought by the patient against the psychotherapist, and in any malpractice, criminal, or license revocation proceeding, in which disclosure is necessary or relevant to the claim or defense of the psychotherapist; or (7) Child Abuse or Neglect. A report to the Department of Children and Families of reasonable cause to believe that a child under the age of eighteen has suffered serious physical or emotional injury resulting from sexual abuse, pursuant to G. L. c. 119, § 51A. (8) Exception. In criminal actions, such confidential communications may be subject to discovery and may be admissible as evidence, subject to applicable law.
Sexual Assault Counselor-Victim Privilege	Mass. Gen. Laws Ann. ch. 233 § 20J. A sexual assault counsellor shall not disclose such confidential communication, without the prior written consent of the victim; provided, however, that nothing in this chapter shall be construed to limit the defendant's right of cross-examination of such counsellor in a civil or criminal proceeding if such counsellor testifies with such written consent. Such confidential communications shall not be subject to discovery and shall be inadmissible in any criminal or civil proceeding without the prior written consent of the victim to whom the report, record, working paper or memorandum relates.

	Guide to Sexual Assault Counselor-Victim (Mass. G. Evid. § 506(b)–(c)). (b) Privilege. A confidential communication as defined in Subsection (a)(4) shall not be disclosed by a sexual assault counselor, is not subject to discovery, and is inadmissible in any criminal or civil proceeding without the prior written consent of the victim to whom the report, record, working paper, or memorandum relates. Nothing in this section shall be construed to limit the defendant's right of cross-examination of such counselor in a civil or criminal proceeding if such counselor testifies with such written consent. (c) Exception. In criminal actions, such confidential communications may be subject to discovery and may be admissible as evidence, subject to applicable law.
Domestic Violence Counselor-Victim Privilege	Mass. Gen. Laws Ann. ch. 233 § 20K. A domestic violence victims' counselor shall not disclose such confidential communication without the prior written consent of the victim, except as hereinafter provided. Such confidential communication shall not be subject to discovery in any civil, legislative or administrative proceeding without the prior written consent of the victim to whom such confidential communication relates. In criminal actions such confidential communication shall be subject to discovery and shall be admissible as evidence but only to the extent of information contained therein which is exculpatory in relation to the defendant; provided, however, that the court shall first examine such confidential communication and shall determine whether or not such exculpatory information is therein contained before allowing such discovery or the introduction of such evidence. **Guide to Domestic Violence Counselor-Client Privilege** (Mass. G. Evid. § 505(b)–(c)). (b) Privilege. A domestic violence victims' counselor shall not disclose confidential communications between the counselor and the victim of domestic violence without the prior

	written consent of the victim. Such confidential communication shall not be subject to discovery in any civil, legislative, or administrative proceeding without the prior written consent of the victim to whom such confidential communication relates, except as provided in Subsection (c). (c) Exception. In criminal actions, such confidential communications may be subject to discovery and may be admissible as evidence, subject to applicable law.
Human Trafficking Caseworker-Victim Privilege	Mass. Gen. Laws Ann. ch. 233 § 20M(b)–(c). (b) A human trafficking victims' caseworker shall not disclose any confidential communication without the prior written consent of the victim, or the victim's guardian in the case of a child, except as hereinafter provided. Such confidential communication shall not be subject to discovery in any civil, legislative or administrative proceeding without the prior written consent of the victim, or victim's guardian in the case of a child, to whom such confidential communication relates. In criminal actions such confidential communication shall be subject to discovery and shall be admissible as evidence but only to the extent of information contained therein which is exculpatory in relation to the defendant; provided, however, that the court shall first examine such confidential communication and shall determine whether or not such exculpatory information is contained in the communication before allowing such discovery or the introduction of such evidence. (c) During the initial meeting between a caseworker and victim, the caseworker shall inform the human trafficking victim and any guardian thereof of the confidentiality of communications between a caseworker and victim and the limitations thereto.
Social Worker-Client Privilege	Mass. Gen. Laws. Ann. ch. 112, § 135B. Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a client shall have the privilege of refusing to disclose and of preventing a witness from disclosing, any communication, wherever made, between said client and a

	social worker licensed pursuant to the provisions of section one hundred and thirty-two of chapter one hundred and twelve, or a social worker employed in a state, county or municipal governmental agency, relative to the diagnosis or treatment of the client's mental or emotional condition. If a client is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in the client's behalf under this section. A previously appointed guardian shall be authorized to so act. Upon the exercise of the privilege granted by this section, the judge or presiding officer shall instruct the jury that no adverse inference may be drawn therefrom. The privilege granted hereunder shall not apply to any of the following communications: (a) If a social worker, in the course of making a diagnosis or treating the client, determines that the client is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the client against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the client in such hospital; provided, however, that the provisions of this section shall continue in effect after the client is in said hospital, or placing the client under arrest or under the supervision of law enforcement authorities; (b) If a judge finds that the client, after having been informed that the communications would not be privileged, has made communications to a social worker in the course of a psychiatric examination ordered by the court; provided, however, that such communications shall be admissible only on issues involving the client's mental or emotional condition but not as a confession or admission of guilt; (c) In any proceeding, except one involving child custody, adoption or adoption consent, in which the client introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between the client and the social worker be protected; (d) In any proceeding after the death of a client in which his mental or emotional condition is introduced by any party claiming or defending through or as a beneficiary of the client as an element of the claim or defense, and the judge or presiding officer finds that it

	is more important to the interests of justice that the communication be disclosed than that the relationship between client and social worker be protected; (e) In the initiation of proceedings under paragraph C of section twenty-three or under section twenty-four of chapter one hundred and nineteen, or section three of chapter two hundred and ten or to give testimony in connection therewith; (f) In any proceeding whereby the social worker has acquired the information while conducting an investigation pursuant to section fifty-one B of chapter one hundred and nineteen; (g) In any other case involving child custody, adoption or the dispensing with the need for consent to adoption in which, upon a hearing in chambers, the judge, in the exercise of his discretion, determines that the social worker has evidence bearing significantly on the client's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between client and social worker be protected; provided, however, that in such case of adoption or the dispensing with the need for consent to adoption, a judge shall determine that the client has been informed that such communication would not be privileged; or (h) In any proceeding brought by the client against the social worker and in any malpractice, criminal or license revocation proceeding in which disclosure is necessary or relevant to the claim or defense of the social worker. **Guide to Social Worker-Client Privilege** (Mass. G. Evid. § 507(b)–(c)). (b) Privilege. A client shall have the privilege of refusing to disclose and of preventing a witness from disclosing any communication, wherever made, between said client and a social worker relative to the diagnosis or treatment of the client's mental or emotional condition. If a client is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in the client's behalf under this section. A previously appointed guardian shall be authorized to so act. (c) Exceptions. The privilege in Subsection (b) shall not apply to any of the following communications: (1) if a social worker, in the course of making a diagnosis or treating the client, determines that the

	client is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the client against the client or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the client in such hospital; provided, however, that the provisions of this section shall continue in effect after the client is in said hospital, or placing the client under arrest or under the supervision of law enforcement authorities; (2) if a judge finds that the client, after having been informed that the communications would not be privileged, has made communications to a social worker in the course of a psychiatric examination ordered by the court; provided, however, that such communications shall be admissible only on issues involving the client's mental or emotional condition and not as a confession or admission of guilt; (3) in any proceeding, except one involving child custody, adoption, or adoption consent, in which the client introduces his or her mental or emotional condition as an element of a claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and social worker be protected; (4) in any proceeding after the death of a client in which the client's mental or emotional condition is introduced by any party claiming or defending through or as a beneficiary of the client as an element of the claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and social worker be protected; (5) in the initiation of proceedings under G. L. c. 119, §§ 23(a)(3) and 24, or G. L. c. 210, § 3, or to give testimony in connection therewith; (6) in any proceeding whereby the social worker has acquired the information while conducting an investigation pursuant to G. L. c. 119, § 51B; (7) in any other case involving child custody,

	adoption, or the dispensing with the need for consent to adoption in which, upon a hearing in chambers, the judge, in the exercise of his or her discretion, determines that the social worker has evidence bearing significantly on the client's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between client and social worker be protected; provided, however, that in such case of adoption or the dispensing with the need for consent to adoption, a judge shall determine that the client has been informed that such communication would not be privileged; (8) in any proceeding brought by the client against the social worker and in any malpractice, criminal, or license revocation proceeding in which disclosure is necessary or relevant to the claim or defense of the social worker; or (9) in criminal actions, such privileged communications may be subject to discovery and may be admissible as evidence, subject to applicable law.
Allied Mental Health or Human Services Professional-Client Privilege	Mass. Gen. Laws Ann. ch. 112, § 172A. (a) Except as hereinafter provided, in a court proceeding, in a proceeding preliminary thereto or in a legislative or administrative proceeding, a client of a mental health counselor who is licensed pursuant to the provisions of section 165 or employed in a state, county or municipal government agency shall have the privilege of refusing to disclose and of preventing a witness from disclosing any communication relative to the diagnosis or treatment of the client's mental or emotional condition, wherever made, between the client and the mental health counselor. (b) If a client is incompetent to exercise or waive the privilege, a guardian shall be appointed to act on the client's behalf under this section. A previously appointed guardian shall be authorized to so act. Upon the exercise of the privilege granted by this section, the judge or presiding officer shall instruct the jury that no adverse inference may be drawn therefrom. (c) The privilege granted by this section shall not apply to the

	following communications: (1) if a mental health counselor, in the course of his diagnosis or treatment of the client, determines that the client is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person and, on the basis of that determination, discloses the communication either for the purpose of placing or retaining the client in the hospital; but, this section shall continue in effect after the patient is in the hospital or placed under arrest or under the supervision of law enforcement authorities; (2) if a judge finds that the client, after having been informed that a communication would not be privileged, has made a communication to a mental health counselor in the course of a psychiatric examination ordered by the court; but, the communication shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt; (3) in a proceeding, except one involving child custody, in which the client introduces his mental or emotional condition as an element of his claim or defense and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and mental health counselor be protected; (4) in a proceeding after the death of a client in which his mental or emotional condition is introduced by any party claiming or defending through or as beneficiary of the patient as an element of the claim or the defense and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and mental health counselor be protected; (5) in the initiation of proceedings under paragraph C of section 23 of chapter 119 or under section 24 of said chapter 119 or section 3 of chapter 210 or to give testimony in connection therewith; (6) in a proceeding whereby the mental health counselor has acquired the information while conducting an investigation pursuant to section 51B of chapter 119; (7) in a case involving child custody, adoption or the dispensing with the need for consent to adoption where, upon hearing in chambers, the judge exercises his discretion to determine that the mental health counselor has evidence bearing significantly on the client's ability to provide suitable care or custody and it is more important to the welfare of the child that the communication be disclosed than that the relationship between the client and the mental health counselor be protected; but, in the case of adoption or the dispensing with the need for consent to adoption, a judge

	shall determine that the client has been informed that the communication should not be privileged; or (8) if in a proceeding brought by the client against the mental health counselor, and in any malpractice, criminal or license revocation proceeding, in which disclosure is necessary or relevant to the claim or defense of the mental health counselor. **Guide to Allied Mental Health or Human Services Professional-Client Privilege** (Mass. G. Evid. § 508(b)–(e)). (b) Privilege. Any communication between an allied mental health or human services professional and a client shall be deemed to be confidential and privileged. (c) Waiver. This privilege shall be subject to waiver only in the following circumstances: (1) where the allied mental health and human services professional is a party defendant to a civil, criminal, or disciplinary action arising from such practice in which case the waiver shall be limited to that action; (2) where the client is a defendant in a criminal proceeding and the use of the privilege would violate the defendant's right to compulsory process and right to present testimony and witnesses in his or her behalf; (3) when the communication reveals the contemplation or commission of a crime or a harmful act; and (4) where a client agrees to the waiver, or in circumstances where more than one person in a family is receiving therapy, where each such family member agrees to the waiver. (d) Mental Health Counselor Exception. With respect to a mental health counselor, the privilege does not apply to the following communications: (1) if a mental health counselor, in the course of diagnosis or treatment of the client, determines that the client is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or herself or another person and, on

	the basis of the determination, discloses the communication either for the purpose of placing or retaining the client in the hospital, although this section shall continue in effect after the patient is in the hospital or placed under arrest or under the supervision of law enforcement authorities; (2) if a judge finds that the client, after having been informed that a communication would not be privileged, has made a communication to a mental health counselor in the course of a psychiatric examination ordered by the court, although the communication shall be admissible only on issues involving the patient's mental or emotional condition and not as a confession or admission of guilt; (3) in a proceeding, except one involving child custody, in which the client introduces his or her mental or emotional condition as an element of his or her claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and mental health counselor be protected; (4) in a proceeding after the death of a client in which the client's mental or emotional condition is introduced by any party claiming or defending through or as beneficiary of the patient as an element of the claim or the defense and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and mental health counselor be protected; (5) in the initiation of proceedings under G. L. c. 119, § 23(a)(3) or § 24, or G. L. c. 210, § 3, to give testimony in connection therewith; (6) in a proceeding whereby the mental health counselor has acquired the information while conducting an investigation pursuant to G. L. c. 119, § 51B; (7) in a case involving child custody, adoption, or the dispensing with the need for consent to adoption where, upon a hearing in chambers, the court exercises its discretion to determine that the mental health counselor has evidence bearing significantly on the client's ability to provide

	suitable care or custody, and it is more important to the welfare of the child that the communication be disclosed than that the relationship between client and mental health counselor be protected, although in the case of adoption or the dispensing with the need for consent to adoption, the court shall determine that the client has been informed that the communication should not be privileged; or (8) in a proceeding brought by the client against the mental health counselor and in any malpractice, criminal, or license revocation proceeding in which disclosure is necessary or relevant to the claim or defense of the mental health counselor. (e) Exception. In criminal actions, such privileged communications may be subject to discovery and may be admissible as evidence, subject to applicable law.

SELECT DEFINITIONS

Definitions of the terms used in the above-referenced privileges are included below, when available.	
Psychotherapist-Patient Privilege Definitions	Mass. Gen. Laws Ann. ch. 233 § 20B. The following words as used in this section shall have the following meanings: “Patient”, a person who, during the course of diagnosis or treatment, communicates with a psychotherapist; “Psychotherapist”, a person licensed to practice medicine, who devotes a substantial portion of his time to the practice of psychiatry. “Psychotherapist” shall also include a person who is licensed as a psychologist by the board of registration of psychologists; a graduate of, or student enrolled in, a doctoral degree program in psychology at a recognized educational institution as that term is defined in section 118, who is working under the supervision of a licensed psychologist; or a person who is a registered nurse licensed by the board of registration in nursing whose certificate of registration has been endorsed authorizing the

	practice of professional nursing in an expanded role as a psychiatric nurse mental health clinical specialist, pursuant to the provisions of section eighty B of chapter one hundred and twelve. "Communications" includes conversations, correspondence, actions and occurrences relating to diagnosis or treatment before, during or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions and occurrences, and any records, memoranda or notes of the foregoing.
Sexual Assault Counselor-Victim Privilege Definitions	Mass. Gen. Laws Ann. ch. 233 § 20J. As used in this section the following words, unless the context clearly requires otherwise, shall have the following meaning: "Rape crisis center", any office, institution or center offering assistance to victims of sexual assault and the families of such victims through crisis intervention, medical and legal counseling. "Sexual assault counsellor", a person who is employed by or is a volunteer in a rape crisis center, has undergone thirty-five hours of training, who reports to and is under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist or psychotherapist and whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault. "Victim", a person who has suffered a sexual assault and who consults a sexual assault counsellor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused by such sexual assault. "Confidential communication", information transmitted in confidence by and between a victim of sexual assault and a sexual assault counsellor by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term includes all information received by the sexual assault counsellor which arises out of and in the course of such counseling and assisting, including, but not limited to reports, records, working papers or memoranda.

Domestic Violence Counselor-Victim Privilege Definitions	Mass. Gen. Laws Ann. ch. 233 § 20K. As used in this section the following words shall unless the context clearly requires otherwise have the following meanings: “Abuse”, causing or attempting to cause physical harm; placing another in fear of imminent physical harm; causing another to engage in sexual relations against his will by force, threat of force, or coercion. “Confidential communication”, information transmitted in confidence by and between a victim and a domestic violence victims’ counselor by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term includes all information received by the domestic violence victims’ counselor which arises out of and in the course of such counseling and assisting, including, but not limited to, reports, records, working papers, or memoranda. “Domestic violence victims’ counselor”, a person who is employed or volunteers in a domestic violence victims’ program, who has undergone a minimum of twenty-five hours of training and who reports to and is under the direct control and supervision of a direct service supervisor of a domestic violence victims’ program, and whose primary purpose is the rendering of advice, counseling or assistance to victims of abuse. “Domestic violence victims’ program”, any refuge, shelter, office, safe home, institution or center established for the purpose of offering assistance to victims of abuse through crisis intervention, medical, legal or support counseling. “Victim”, a person who has suffered abuse and who consults a domestic violence victims’ counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused by such abuse.
Human Trafficking Caseworker-Victim Privilege Definitions	Mass. Gen. Laws Ann. ch. 233 § 20M(a). As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

	"Confidential communication", information transmitted in confidence by and between a victim and a victim's caseworker by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term confidential communication shall include all information received by a victim's caseworker which arises out of and in the course of such counseling and assisting including, but not limited to, reports, records, working papers or memoranda. "Human trafficking victim" or "victim", a person who is subjected to the conduct prohibited under sections 50 or 51 of chapter 265. "Human trafficking victims' caseworker," a person who is employed by or volunteers with a program serving human trafficking victims, who has undergone a minimum of 25 hours of training and who reports to and is under the direct control and supervision of a direct service supervisor of a human trafficking victim program, and whose primary purpose is the rendering of advice, counseling or assistance to human trafficking victims. "Human trafficking victims' program", any refuge, shelter, office, safe house, institution or center established for the purpose of offering assistance to human trafficking victims through crisis intervention, medical, legal or support counseling.
Social Worker-Client Privilege Definitions	Mass. Gen. L. Ann. ch. 112, § 135. As used in this section and sections one hundred and thirty-five A and one hundred and thirty-five B the following words shall have the following meanings, unless the context clearly indicates otherwise: "Client", a person with whom a social worker has established a social worker-client relationship. "Communications", includes conversations, correspondence, actions and occurrences regardless of the client's awareness of such conversations, correspondence, actions and occurrences and any records, memoranda or notes of the foregoing. "Reasonable precautions", reasonable efforts to take one or more

	of the following actions as would be taken by a reasonably prudent social worker under the same or similar circumstances: (a) communicates a threat of death or serious bodily injury to any reasonably identified victim or victims; (b) notifies an appropriate law enforcement agency in the vicinity where the client or any potential victim resides; (c) arranges for the client to be hospitalized voluntarily; or (d) takes appropriate steps, within the legal scope of social work practice, to initiate proceedings for involuntary hospitalization.
Allied Mental Health or Human Services Professional-Client Privilege Definitions	Mass. Gen. Laws Ann. ch. 112, § 163. As used in sections one hundred and sixty-three to one hundred and seventy-two, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings: “Allied mental health and human services professional”, a licensed marriage and family therapist, a licensed rehabilitation counselor, a licensed educational psychologist or a licensed mental health counselor. “Licensed marriage and family therapist”, a person licensed or eligible for licensure under section one hundred and sixty-five. “Practice of marriage and family therapy”, the rendering of professional services to individuals, family groups, couples or organizations, either public or private for compensation, monetary or otherwise. Said professional services shall include applying principles, methods and therapeutic techniques for the purpose of resolving emotional conflicts, modifying perceptions and behavior, enhancing communications and understanding among all family members and the prevention of family and individual crisis. Individual marriage and family therapists may also engage in psychotherapy of a nonmedical nature with appropriate referrals to psychiatric resources and research and teaching in the overall field of human development and interpersonal relationships. “Licensed rehabilitation counselor”, a person licensed or eligible for licensure under section one hundred and sixty-five. “Practice of rehabilitation counseling”, the rendering of professional services for compensation, monetary or otherwise. These professional services would include the application of principles, methods and techniques of the rehabilitation counseling

	profession such as client assessment, job analysis, vocational assessment, counseling and job development for the purpose of maximizing or restoring the capacities of physically or mentally handicapped individuals for self-sufficiency and independent living including vocational and social functioning and creating those conditions favorable to this goal. The practice of rehabilitation counseling involves the following objectives: assisting individuals in the coordination of appropriate services; counseling with individuals, families or groups; serving an advocacy role with communities or groups toward the provision or implementation of rehabilitation services; research and teaching in the field of rehabilitation counselor education. "Licensed mental health counselor", a person licensed or eligible for licensure under section one hundred and sixty-five. "Practice of mental health counseling", the rendering of professional services to individuals, families or groups for compensation, monetary or otherwise. These professional services include: applying the principles, methods and theories of counseling, human development, learning theory, group and family dynamics, the etiology of mental illness and dysfunctional behavior and psychotherapeutic techniques to define goals and develop treatment plans aimed toward the prevention, treatment and resolution of mental and emotional dysfunction and intra or interpersonal disorders in all persons irrespective of diagnosis. The practice of mental health counseling shall include, but not be limited to, diagnosis and treatment, counseling and psychotherapy, of a nonmedical nature of mental and emotional disorders and the psychoeducational techniques aimed at prevention of such disorders and consultations to individuals, couples, families, groups, organizations and communities. Practice of mental health counseling in independent practice with individuals diagnosed with psychosis may be undertaken by a licensed mental health counselor: (a) who is licensed under section 165 on or after March 1, 1992; or (b) who was licensed prior to March 1, 1992 and who meets the certification criteria for independent practice with individuals diagnosed with psychosis as established by the board of registration of allied mental health and human services professions. "Licensed educational psychologist", a person licensed or eligible for licensure under section one hundred and sixty-five of this chapter and who has been certified as a school psychologist by the Massachusetts department of education; provided, however, that an

	educational psychologist shall not perform in private practice any of the services for which he is licensed for any student in a school system by which such educational psychologist is employed and provided, further, that an educational psychologist who violates this provision shall have his license suspended for a period to be determined by the board pursuant to the provisions of section one hundred and sixty-nine. "Practice of educational psychology", the rendering of professional services to individuals, groups, organizations or the public for compensation, monetary or otherwise. Such professional services include: applying psychological principles, methods and procedures in the delivery of services to individuals, groups, families, educational institutions and staff and community agencies for the purpose of promoting mental health and facilitating learning. Such services may be preventative, developmental or remedial and include psychological and psychoeducational assessment, therapeutic intervention, program planning and evaluation, research, teaching in the field of educational psychology, consultation and referral to other psychiatric, psychological, medical and educational resources when necessary. "Advertise", includes, but is not limited to, distributing or causing to be distributed any card, sign or device to any person; or the causing, permitting or allowing of any sign or marking on or in any building or structure, or in any newspaper or magazine or in any directory, or on radio or television, or by the use of any other means designed to secure public attention. "Use a title or description of", means to hold oneself out to the public as having a particular status by means of statements on signs, mailboxes, address plates, stationery, announcement, calling cards or other instruments of professional identification. "Board", the Massachusetts board of registration of allied mental health and human services professions. "Recognized educational institution", any educational institution which grants a bachelor's, master's, or doctor's degree and which is recognized by the board, or by a nationally or regionally recognized educational or professional accrediting organization; provided, however, that such institution is also approved by the United States Department of Education.

	"Approved Continuing Education", continuing education such as research and training programs, college and university courses, in-service training programs, seminars and conferences designed to maintain and enhance the skills of allied mental health and human services professionals and which are recognized by the board. "Licensed applied behavior analyst", an individual who, by training, experience and examination, meets the requirements for licensing by the board and is duly licensed to engage in the practice of applied behavior analysis in the commonwealth. "Licensed assistant applied behavior analyst", an individual who, by training, experience and examination, meets the requirements for licensing by the board and is duly licensed to engage in the practice of applied behavior analysis under the supervision of a licensed applied behavior analyst or a physician or psychologist qualified to practice applied behavior analysis if it is consistent with the accepted standards of their respective professions. "Practice of applied behavior analysis", the design, implementation and evaluation of systematic instructional and environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvements in human behavior, including the direct observation and measurement of behavior and the environment, the empirical identification of functional relations between behavior and environmental factors, known as functional assessment and analysis, and the introduction of interventions based on scientific research and which utilize contextual factors, antecedent stimuli, positive reinforcement and other consequences to develop new behaviors, increase or decrease existing behaviors and elicit behaviors under specific environmental conditions that are delivered to individuals and groups of individuals; provided, however, that the "practice of applied behavior analysis" shall not include psychological testing, neuropsychology, diagnosis of mental health or developmental conditions, psychotherapy, cognitive therapy, sex therapy, psychoanalysis, psychopharmacological recommendations, hypnotherapy or academic teaching by college or university faculty.

[1] *See Office for Victims of Crime, Ethical Standards, Section I: Scope of Services*, https://www.ovc.gov/model-standards/ethical_standards_1.html.

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

[3] Examples of community-based advocates include: crisis hotline or helpline staff; rape crisis center staff; domestic violence shelter staff; campus advocates; and homicide support program staff.
[4] *See* Nat'l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), June 2011, at 3 n.30 (listing victims' constitutional and statutory rights to privacy and to dignity, respect or fairness).
[5] *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (recognizing that the United States Constitution provides a right of personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) ("[A] right to personal privacy . . . does exist under the Constitution.").
[6] There are different levels of privileges: absolute, absolute diluted and qualified. When an absolute privilege attaches, only a victim has the right to authorize disclosure of that information and the court can never order the information to be disclosed without the victim's consent. Absolute privileges are rare, however, because privileges are seen to run contrary to the truth finding function of courts.
[7] *See, e.g.*, Ala. R. Evid. 503A(a)(7) ("'Victim counselor' means any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or prosecutor's office and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence."); Alaska Stat. Ann. § 18.66.250(5)(B) ("'[V]ictim counseling center' means a private organization, an organization operated by or contracted by a branch of the armed forces of the United States, or a local government agency that . . . is not affiliated with a law enforcement agency or a prosecutor's office[.]"); Haw. Rev. Stat. Ann. § 626-1, Rule 505.5(a)(6) ("A 'victim counseling program' is any activity of a domestic violence victims' program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor's office, or the department of human services."); Ind. Code Ann. § 35-37-6-5(2) ("'[V]ictim service provider' means a person . . . that is not affiliated with a law enforcement agency[.]"); Neb. Rev. Stat. Ann. § 29-4302(1) ("Advocate means any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor's office whose primary purpose is assisting domestic violence and sexual assault victims[.]"); N.M. Stat. Ann. § 31-25-2(E) ("'[V]ictim counselor' means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney[.]").
[8] Terms that inform the intersection of victim services and HIPAA, FERPA, FOIA or VOCA are "implied consent" and "waiver." "Informed consent" is defined as "1. [a] person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. For the legal profession, informed consent is defined in Model Rule of Professional Conduct 1.0(e)[;] [or] 2. [a] patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical field community would give to a patient regarding the risks involved in the proposed treatment or procedure." *Informed consent*, Black's Law Dictionary (8th ed. 2004). "Waiver" is defined as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage . . . ." *Waiver*, Black's Law Dictionary (8th ed. 2004).
[9] *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)*, https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Are law enforcement records considered education records?*, https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records.
[14] *Id.*
[15] *Office for Victims of Crime, Crime Victims Fund*, https://www.ovc.gov/pubs/crimevictimsfundfs/intro.html#VictimAssist.
[16] *Id.*
[17] *Id.*
[18] Department of Justice Guide to the Freedom of Information Act, at 1, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf.
[19] *Id.*
[20] *Ethic*, Merriam-webster.com, https://www.merriam-webster.com/dictionary/ethics (last visited July 31, 2019).

[21] *Office for Victims of Crime, Purpose & Scope of The Standards,* https://www.ovc.gov/model-standards/purpose_and_scope.html.
[22] *Id.* Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For "Scope of Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_1.html. For "Coordinating within the Community," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_2.html. For "Direct Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_3.html. For "Privacy, Confidentiality, Data Security and Assistive Technology," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_4.html. For "Administration and Evaluation," the ethical standard and the corresponding commentary can be located at https://www.ovc.gov/model-standards/ethical_standards_5.html.
[23] *Office for Victims of Crime, Ethical Standards for Serving Victims & Survivors of Crime*, https://www.ovc.gov/model-standards/ethical_standards.html.
[24] For a sample law enforcement-based victim services code of ethics drafted by the International Association of Chiefs of Police, see *Law Enforcement-Based Victim Services – Template Package I: Getting Started*, https://www.theiacp.org/sites/default/files/LEV/Publications/Template%20Package%20I%2C%20final_11.02.20.pdf.
[25] *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).
[26] *See United States v. Agurs*, 427 U.S. 97, 106–07 (1976).
[27] *Strickler v. Greene*, 527 U.S. 263, 280 (1999).
[28] *Id.*
[29] *See, e.g.*, *Eakes v. Sexton*, 592 F. App'x 422, 429 (6th Cir. 2014) (finding that "contrary to the district court's conclusion that the [state] prosecutor was not responsible for failing to disclose the Victim-Advocate report because the Advocate was located 'in a separate part of the District Attorney's office,' the prosecutor is in fact responsible for disclosing all *Brady* information in the possession of that office, such as the Victim-Advocate report, even if the prosecutor was unaware of the evidence prior to trial"); *Commonwealth v. Liang*, 747 N.E.2d 112, 114 (Mass. 2001) (concluding that "the notes of [prosecution-based] advocates are subject to the same discovery rules as the notes of prosecutors[,]" and "[t]o the extent that the notes contain material, exculpatory information . . . or relevant 'statements' of a victim or witness . . . the Commonwealth must disclose such information or statements to the defendant, in accordance with due process and the rules of criminal procedure").
[30] Notably, for advocates/entities that receive VOCA funding, because this disclosure is "compelled by statutory or court mandate," it does not pursuant to statute, require a signed, written release from the victim. Nevertheless, if disclosure is required, VOCA requires that advocates make reasonable attempts to notify the victim affected by the disclosure and take whatever steps are necessary to protect their privacy and safety.
[31] Defendant John Giglio was tried, convicted and sentenced for forgery related crimes. While Giglio's case was pending appeal, his attorney filed a motion for a new trial, claiming that there was newly discovered evidence that the key Government witness—"the only witness linking [Giglio] with the crime"—had been promised that he would not be prosecuted in exchange for his testimony. The defense attorney's motion was initially denied, but certiorari review was granted "to determine whether the evidence [that was] not disclosed . . . require[d] a new trial under the due process criteria of" cases, including *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which "held that suppression of material evidence justifies a new trial" whether the prosecutor intended to withhold information or not. "An affidavit filed by the Government as part of its opposition to a new trial confirm[ed] [Giglio's] claim that a promise was made to [the key Government witness]" by the former Assistant United States Attorney "that [the witness] would not be prosecuted if he cooperated with the Government." This promise of leniency was made by the formerly assigned Assistant United States Attorney who did not handle the trial; and the Assistant United States Attorney who handled the trial was unaware of the promise. The Supreme Court held that nondisclosure of material evidence "is the responsibility of the prosecutor"—whether nondisclosure was intentional or not—and that such action is directly attributable to the Government. Addressing the topic of "turnover," principally, the Court explained that "[t]o the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to [e]nsure communication of all relevant information on each case to every lawyer who deals with it." Giglio's conviction was reversed, and the case was remanded to the lower court.
[32] This section addresses subpoenas directed to system-based advocates. For information concerning community-based advocates and subpoenas, please contact NCVLI for technical assistance.

[33] Terminology for subpoenas varies from jurisdiction-to-jurisdiction. Common examples of subpoenas include: "subpoenas"; "subpoenas duces tecum"; "deposition subpoenas"; and "subpoenas ad testificandum." *See Subpoena*, Black's Law Dictionary (8th ed. 2004).
[34] *See Subpoena*, Black's Law Dictionary (8th ed. 2004) (defining "subpoena" as "[a] writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply"); *subpoena duces tecum*, Black's Law Dictionary (8th ed. 2004) (defining "subpoena duces tecum" as "[a] subpoena ordering the witness to appear and to bring specified documents, records, or things"); *deposition subpoena*, Black's Law Dictionary (8th ed. 2004) (defining "deposition subpoena" as "1. [a] subpoena issued to summon a person to make a sworn statement in a time and place other than a trial[;] [and] 2. [i]n some jurisdictions, [this is referred to as] a subpoena duces tecum").
[35] Attorney work product "is generally exempt from discovery or other compelled disclosure." *Work product*, Black's Law Dictionary (8th ed. 2004).
[36] The Massachusetts Guide of Evidence summarizes "the law of evidence applied in proceedings in the courts of the Commonwealth of Massachusetts as set forth in the Massachusetts General Laws, common law, and rules of court, and as required by the Constitutions of the United States and Massachusetts. The provisions contained in [the] Guide may be cited by lawyers, parties, and judges, but are not to be construed as adopted rules of evidence or as changing the existing law of evidence." Mass. G. Evid. § 102. The Guide covers many of the statutory privileges discussed in this document. Additional information about how and when these privileges apply is contained in the Editor's Notes to each section of the Guide.

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