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

## INTRODUCTION

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

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

## USING THIS RESOURCE

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

# TABLE OF CONTENTS



This draft publication was developed by the National Crime Victim Law Institute (NCVLI) under 2018-V3-GX-K049, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this draft publication are those of the contributors and do not necessarily represent the official position of the U.S. Department of Justice.

## OVERVIEW

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

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

While both system-based and community-based advocates serve victims and operate under a general ethical rule of confidentiality, there are significant differences between them. System-based advocates are typically employed by a law enforcement agency, office of the prosecuting attorney, corrections or another entity within the city, county, state or federal government. Titles for system-based vary; for example, victim advocates, victim-witness coordinators, victim assistance personnel.[2] Because system-based advocates are typically a component of a government agency or program, a primary focus of their work is assisting victims in their interactions with the system, and they will typically be able to provide services to the victims during the pendency of the investigation, prosecution and post-conviction legal aspects of a case. In addition, this placement as part of a government agency or program generally means that system-based advocates are subject to the *Brady* disclosure obligations (*see Brady v. Maryland* Section below for additional information) and generally, their communications with victims are not protected by privilege.

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

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

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

Privacy

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

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

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

Confidentiality

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

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

the legal framework that recognizes this promise—are what qualifies this information as "confidential."

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

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

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

the information falls within the state's required disclosures to defendant pursuant to the United States Supreme Court case *Brady v. Maryland*.

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

Privilege

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

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

Understanding the Differences

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

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

HIPAA: Federal law—as well as state law in many jurisdictions—provides crime victims with different forms of protections from disclosure of their personal and confidential information. This includes protections against the disclosure of medical and/or therapy and other behavioral health records without the victim's consent. HIPAA—codified at 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.500 et seq.—is the acronym for the Health Insurance Portability and Accountability Act, a federal law passed in 1996. HIPAA does a variety of things, but most relevantly, it requires the protection and confidential handling of protected health information (PHI). This is important, because although it permits release of PHI in response to a valid court order, no such release may be made in response to a subpoena or other request unless one of the following circumstances is met:

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

Advocates may wish to inform victims that they may proactively contact their medical providers, informing them that the victims are asserting privilege and other legal protections in their records, and requesting that these providers: (1) give them prompt notice of any request for the victims' medical records; (2) refuse to disclose the records pursuant to any such request without first receiving a valid court order; and (3) ensure that no medical records are released without first permitting the victims to file a challenge to their release.

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

Protections afforded by FERPA include the right of parents or eligible students to provide a signed and dated, written consent that clearly identifies which education records or

personally identifiable information may be disclosed by the educational agency or institution; the person who may receive such records or information; and the purpose for the disclosure prior to disclosure of an education record or personally identifiable information, except in limited circumstances such as health or safety.[12]

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

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

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

The federal open records' law, known as the Freedom of Information Act (FOIA or the "Act"), 5 U.S.C. §552, was enacted in 1966. Similar to its state counterparts, FOIA provides for the legally enforceable right of any person to obtain access to federal agency records subject to the Act, except to the extent that any portions of such records are protected from public disclosure by one of the nine exemptions. Three such exemptions, Exemptions 6, 7(C) and 7(F) protect different types of personal information in federal records from disclosure. Exemption 6 "protects information about individuals in 'personnel and medical files and similar files' when the disclosure of such information 'would constitute a clearly unwarranted invasion of personal privacy.'"[15] Exemption 7(C) "is limited to information compiled for law enforcement purposes, and protects personal information when disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.' Under both exemptions, the concept of privacy not only encompasses that which is inherently private, but also includes an 'individual's control of information concerning [his/her/their] person.'"[16] Exemption 7(F), which also applies to law enforcement records, exempts records that contain information that "could reasonably be expected to endanger the life or physical safety of any individual."

Similar to FOIA, state open records' laws contain numerous exemptions, including for some types of law enforcement records (for example prohibitions on disclosing identifying information of victims' and witnesses' generally or of child-victims and/or victims of certain crimes). Advocates should have an understanding of their jurisdiction's open records' laws, especially as they relate to exemptions from disclosure that may be afforded to law enforcement and other victim-related records within their office's possession. Jurisdiction-specific victims' rights laws—including rights to privacy and protection—also provide grounds for challenging public records' requests for victims' private information.

VOCA: The Victims of Crime Act of 1984 (VOCA)–codified at 34 U.S.C. §§ 20101-20111–established the "Crime Victims Fund," which is managed by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The Crime Victims Fund (the Fund) is financed by, *inter alia,* fines and penalties from persons convicted of crimes against the United States as opposed to by tax dollars.[17] The Fund supports victim assistance programs that offer direct victim services and crime victim compensation.[18] Examples of direct services are crisis intervention, emergency shelters or transportation, counseling and criminal justice advocacy; and crime victim compensation programs that cover expenses incurred as a result of the crime.[19]

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

Even if disclosure of individual client information is required by statute or court order, state administering agencies and sub-recipients' privacy and confidentiality obligations owed to crime victims do not disappear. State administering agencies and subrecipients of VOCA funds "shall make reasonable attempts to provide notice to victims affected by the disclosure of the information, and take reasonable steps necessary to protect the privacy and safety of the persons affected by the release of the information." 28 C.F.R. § 94.115(b).

VOCA also mandates that none of the protections afforded to victims be circumvented. For example, a crime victim may neither be required to release personally identifying information in exchange for services nor be required to provide personally identifying information for recording or reporting purposes. 28 C.F.R. § 94.115(d).

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

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

Yes, there is an ethical code–or "principles of conduct"–that guides victim advocates in their work.[20] Although there is no formal regulatory board that oversees victim assistance programs, the *Model Standards for Serving Victims & Survivors of Crime (Model Standards)* was created by the National Victim Assistance Standards Consortium with guidance from experts across the nation "to promote the competency and ethical integrity of victim service providers, in order to enhance their capacity to provide high-quality, consistent responses to crime victims and to meet the demands facing the field today."[21] The *Model Standards* cover three areas: (1) Program Standards for Serving Victims & Survivors of Crime; (2) Competency Standards for Serving Victims & Survivors of Crime; and (3) Ethical Standards for Serving Victims & Survivors of Crime.

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

Notably, "[p]rofessionals who are trained in another field (e.g., psychology, social work) but are engaging in victim services will [also] abide by their own professional codes of ethics. If th[ose] ethical standards establish a higher standard of conduct than is required by law or another professional ethic, victim assistance providers should meet the higher ethical standard. If ethical standards appear to conflict with the requirements of law or another professional ethic, providers should take steps to resolve the conflict in a responsible manner."[23]

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

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

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

In a criminal prosecution, the term "discovery" refers to the exchange of information between parties to the case—the prosecutor and defendant. *See, e.g.*, Fed R. Crim. P. 16 (entitled "Discovery and Inspection," the rule explicitly and exclusively governs discovery between the government and defendant). It does not govern defendant's ability to obtain information directly from a crime victim or other nonparty. With regard to discovery from the prosecutor, a criminal defendant has no federal constitutional right to general discovery.[24] The prosecutor, instead, is only constitutionally required to disclose information that is exculpatory and material to the issue of guilt, *see Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), and which is within the custody or control of the prosecutor.[25] The *Brady* rule imposes an affirmative "duty to disclose such evidence . . . even [when] there has been no request [for the evidence] by the accused, . . . and . . . the duty encompasses impeachment evidence as well as exculpatory evidence."[26] The prosecutor's *Brady* obligation extends to all exculpatory material and impeachment evidence and to "others acting on the government's behalf in th[e] case."[27]

Federal and state courts have found that prosecution-based victim advocates are considered part of the "prosecution team" for *Brady* purposes.[28] Beyond that material to which a defendant is constitutionally entitled, a prosecutor's obligation to disclose information is governed by statute or procedural rule. A criminal defendant is often entitled to additional discovery materials from the prosecutor pursuant to statutes or rules, though discovery statutes and rules vary widely between jurisdictions.

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

Prosecutors are required by law to disclose exculpatory statements to the defense. Because system-based advocates are generally considered agents of the prosecutors, and prosecutors are deemed to know what advocates know, such advocates are generally required to disclose to the prosecutors the exculpatory statements made by victims to advocates.[29] Examples of exculpatory statements might include:

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

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

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

- When possible, avoid receiving a victim impact statement in writing prior to sentencing.
- Develop relationships with complementary victim advocates and communicate about your obligations and boundaries regarding exculpatory evidence. This will allow everyone to help set realistic expectations with victims regarding privacy.
- Establish how exculpatory information will be communicated to the prosecutor's office.

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

*Giglio v. United States,* 405 U.S. 150 (1972), is a case that was heard before the United States Supreme Court.[30] The impact of the Court's decision in *Giglio* intersects with advocates' work as it makes it imperative that advocates understand: (1) what "material evidence" is (see *Brady v. Maryland* section for additional information); (2) how the advocate's role is or is not related to the prosecutor's office along with any corresponding professional, ethical obligations; (3) ways to avoid re-victimization by preventing violations that would cause a victim to undergo a second trial for the same crime; (4) the types of procedures and regulations that need to be implemented for advocates to ensure–in the face of prosecutor or advocate turnover–that all relevant and appropriate information is provided to the prosecutor handling the case; and (5) whether state or other local laws impose additional obligations that build on those prescribed by *Giglio*.

**What are key considerations for system-based advocates who receive a subpoena?[31]**

In addition to providing prompt notice of receipt of a subpoena to the victim—whose rights and interests are implicated—a key consideration for system-based advocates, their superiors and the attorneys with whom they work is determining the type of subpoena received.[32] Subpoenas that system-based advocates often encounter are subpoenas demanding either: (a) a person's presence before a court or to a location other than a court for a sworn statement; or (b) a person's presence along with specified documentation, records or other tangible items.[33]

When system-based advocates receive the latter (which is called a subpoena duces tecum) there are a number of factors that should be considered, such as whether the documentation, record or item sought (a) is discoverable; or (b) constitutes *Brady* material, as defined by federal, state and local law. If an item, for example, is neither discoverable nor *Brady* material, an advocate, by law, may not be required to disclose the item. The same may be true if the item falls within an exception to discovery and does not constitute *Brady* material.[34] For additional information on *Brady* material, *see* the *Brady v. Maryland* section pertaining to disclosure obligations. Notably, this analysis is relevant to other types of subpoenas as well. For example, if a person is subpoenaed to testify and it is anticipated

that defense counsel will attempt to elicit testimony that he/she/they are not legally entitled to, a prosecutor may file a motion in advance–such as a motion in limine or a motion for a protective order–requesting that the scope of the testimony be limited, narrowly tailored or otherwise limited in accordance with the jurisdiction's laws. For advocates employed by prosecutor's offices this analysis must be completed in cooperation with the prosecuting attorney.

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

## SELECT LAWS

## SELECT PRIVACY LAWS

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

Victims of crime in Oregon have myriad constitutional rights—under Article 1, sections 42 and 43 of Oregon's Constitution—that protect victims' rights and interests and contemplate or necessitate victims' privacy. *See* Or. Const. art. I, § 42(1)(c) (recognizing the right of victims "to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal defendant provided, however, that nothing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state"); Or. Const. art. I, § 42(1) (explaining that victims' constitutional rights are intended to "preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role in the criminal and juvenile justice systems, [and] to accord crime victims due dignity and respect"); Or. Const. art. I, § 42(1)(a) (recognizing the right of victims "to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition"); Or. Const. art. I, § 43(1)(a) (recognizing the right of victims "to be reasonably protected from the criminal defendant or the convicted criminal throughout the criminal justice process and from the alleged youth offender or youth offender throughout the juvenile delinquency proceedings").

Privacy rights are protected by statute at various stages of the criminal justice process, including during production and discovery. Oregon law prohibits defense counsel—in the absence of a court order—from sharing with defendant "personal identifiers of a victim or witness" obtained from the district attorney pursuant to mandated disclosures. Or. Rev. Stat. Ann. § 135.815(5)(a). The trial court must, however, grant an order providing for the disclosure of a victim's personal identifiers to the defendant if the court finds: "(A) [t]he defendant's lawyer has requested the district attorney to disclose the information to the defendant; (B) [t]he district attorney has refused to disclose the information to the defendant; and (C) [t]he need for the information cannot reasonably be met by other means." Or. Rev. Stat. Ann. § 135.815(5)(b). "Personal identifiers" as the term relates to a victim's information, is defined, in turn, to include: "the victim's address, electronic mail address, telephone number, Social Security number, date of birth, any user names or other identifying information associated with the victim's social media accounts and the identifying number of the victim's depository account at a financial institution, as defined in ORS 706.008, or credit card account." Or. Rev. Stat. Ann. § 135.815(6)(a)(B).

Oregon offers victims additional protections from disclosure of their personal information, including protective orders. For example, "[u]pon a showing of good cause, the court may at any time order that specified disclosures be denied, restricted or deferred, or make such other order as is appropriate." Or. Rev. Stat. Ann. § 135.873(2). In addition, "[u]pon request of any party, the court may permit a showing of good cause for denial or regulation of disclosures, or portion of such showing, to be made in camera." Or. Rev. Stat. Ann. § 135.873(3). If the court grants an order for "relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal." Or. Rev. Stat. Ann. § 135.873(4). Additional protections exist in cases "involving a sexual offense, an offense involving the visual or audio recording of sexual conduct by a child or invasion of personal privacy under ORS 163.700 or 163.701." Or. Rev. Stat. Ann. § 135.873(5)-(6). In such cases—upon the request of a district attorney or victim—"the court shall enter a protective order prohibiting any party to or attorney in, or the agent of a party to or attorney in, criminal proceedings [relating to the charges] . . . from copying or disseminating any information of a sexually explicit nature including, but not limited to, photographs depicting a person in a state of nudity, photographs of human genitalia, any information of the prior sexual history of the victim and any visual or audio recording of the sexual victimization." Or. Rev. Stat. Ann. § 135.873(5). In such cases, courts shall also—upon the request of a district attorney or victim and in the absence of a finding that there is good cause to do otherwise—"enter a protective order prohibiting any party to or attorney in, or the agent of a party to or attorney in, criminal proceedings [relating to the charges] . . . from copying or disseminating a visual or audio recording of the victim describing the victim's sexual victimization." Or. Rev. Stat. Ann. § 135.873(6).

Even with a protective order in place, however, the "sexually explicit" information "may be copied or disseminated for the purpose of: (a) [p]roviding discovery; (b) [s]ubmitting

evidence to a grand jury, a court, an agency of state government, a local government or a federal agency for use in judicial or administrative proceedings; (c) [h]aving the information or materials examined by an expert witness for the court, the state or any party; (d) [p]roviding copies of the information or materials to the parties' attorneys or agents; or (e) [s]haring the information or materials with an agency of state government for use in carrying out duties imposed on the agency by statute." Or. Rev. Stat. Ann. § 135.873(7). Upon request, victims are also entitled to a "copy of information or materials" that are the subject of the protective order. Or. Rev. Stat. Ann. § 135.873(8).

Victims of crime are also entitled to a court order—upon request—prohibiting the disclosure of the victim's address and telephone number to the defendant "unless good cause is shown." Or. Rev. Stat. Ann. § 135.970(1). Additionally, victims must be "clearly informed by the defense or other contacting agent, either in person or in writing, of the identity and capacity of the person contacting the victim, that the victim does not have to talk to the defendant's attorney, or other agents of the defendant, or provide other discovery unless the victim wishes, and that the victim may have a district attorney, assistant attorney general or other attorney or advocate present during any interview or other contact." Or. Rev. Stat. Ann. § 135.970(2). Consistent with this requirement, "victim[s] may not be required to be interviewed or deposed by or give discovery to the defendant, the defendant's attorney or any agent of the defense unless the victim consents." Or. Rev. Stat. Ann. § 135.970(3). Lastly, "district attorney[s] or other law enforcement officer[s] or investigator[s] involved in the investigation or prosecution of crimes, or any employee thereof" are prohibited from requiring victims "in a case involving the use of force, violence, duress, menace or threat of physical injury in the commission of any sex crime under ORS 163.305 to 163.575," to submit to a polygraph examination as a prerequisite to filing an accusatory pleading. Or. Rev. Stat. Ann. § 163.705.

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

## SELECT CONFIDENTIALITY LAWS

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

Oregon law recognizes the confidentiality of communications between victims and certain providers of counseling and other physical and mental health support services, as well as of records related to the provision of the services. *See, e.g.*, Or. Rev. Stat. Ann. § 40.264(1)(b)(A)-(C) (in the context of the "certified advocate or qualified victim services program-victim" privilege, defining "confidential communication" to mean "a written or oral communication that is not intended for further disclosure[,]" except to: "(A) [p]ersons

present at the time the communication is made who are present to further the interests of the victim in the course of seeking safety planning, counseling, support or advocacy services; (B) [p]ersons reasonably necessary for the transmission of the communication; or (C) [o]ther persons, in the context of group counseling"); Or. Rev. Stat. Ann. § 40.230(1)(a)(A)-(C) (in the context of the "psychotherapist-patient" privilege, defining "[c]onfidential communication" to "mean[] a communication not intended to be disclosed to third persons except: (A) [p]ersons present to further the interest of the patient in the consultation, examination or interview; (B) [p]ersons reasonably necessary for the transmission of the communication; or (C) [p]ersons who are participating in the diagnosis and treatment"); Or. Rev. Stat. Ann. § 40.235(1)(a)(A)-(C) (in the context of the "physician-patient" privilege, defining "[c]onfidential communication" to "mean[] a communication not intended to be disclosed to third persons except: (A) [p]ersons present to further the interest of the patient in the consultation, examination or interview; (B) [p]ersons reasonably necessary for the transmission of the communication; or (C) [p]ersons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family").

Oregon statutes also provide victims with protection from disclosure of confidential or otherwise private information pursuant to public records' requests. For example, the Address Confidentiality Program was created to "[p]rotect the confidentiality of the actual address of a victim of domestic violence, a sexual offense, stalking or human trafficking; and . . . [p]revent assailants or potential assailants of the victim from finding the victim through public records." Or. Rev. Stat. Ann. § 192.822(1). Pursuant to statute, "[e]xcept as provided in this section and ORS 192.842, when a program participant submits a current and valid Address Confidentiality Program authorization card to a public body, the public body shall accept the substitute address on the authorization card as the address of the program participant when creating a new public record. Upon the request of the program participant, the public body shall use the substitute address on the authorization card in any ongoing actions or proceedings." Or. Rev. Stat. Ann. § 192.836(2). In addition, "[e]xcept as provided in ORS 192.820 to 192.868, a public body that receives a request from a program participant under ORS 192.836 may not disclose the actual address or telephone number of the program participant." Or. Rev. Stat. Ann. § 192.844(1).

Crime victims in Oregon have other statutory-based confidentiality protections with respect to public records. For example, Oregon statute explicitly exempts from disclosure pursuant to a public records' request the following information "unless the public interest requires disclosure in the particular instance": (1) "Investigatory information compiled for criminal law purposes"—with the caveat that "[t]he record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim[,]" Or. Rev. Stat. Ann. § 192.345(3); (2) "Social Security numbers as provided in ORS 107.840[,]" Or. Rev. Stat. Ann. § 192.345(28); (3) "A medical examiner's report,

autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117." Or. Rev. Stat. Ann. § 192.345(36).

Additional information that is exempt from disclosure under public records' laws includes: (1) "[i]nformation of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance[,]" Or. Rev. Stat. Ann. § 192.355(2)(a); (2) "[i]mages of a dead body, or parts of a dead body, that are part of a law enforcement agency investigation, if public disclosure would create an unreasonable invasion of privacy of the family of the deceased person, unless the public interest by clear and convincing evidence requires disclosure in the particular instance[,]" Or. Rev. Stat. Ann. § 192.355(2)(b); (3) [i]nformation submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure[,]" Or. Rev. Stat. Ann. § 192.355(4); (4) "[a]ny public records or information the disclosure of which is prohibited by federal law or regulations[,]" Or. Rev. Stat. Ann. § 192.355(8); (5) "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law[,]" Or. Rev. Stat. Ann. § 192.355(9); and (6) "[r]ecords of or submitted to a domestic violence service or resource center that relate to the name or personal information of an individual who visits a center for service, including the date of service, the type of service received, referrals or contact information or personal information of a family member of the individual[,]" Or. Rev. Stat. Ann. § 192.355(38). For purposes of this exemption, "'domestic violence service or resource center' means an entity, the primary purpose of which is to assist persons affected by domestic or sexual violence by providing referrals, resource information or other assistance specifically of benefit to domestic or sexual violence victims." Or. Rev. Stat. Ann. § 192.355(38).

If disclosures are to be made with respect to "[i]nformation submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential," the public body that is the custodian or otherwise in possession of the information must first redact the following: "(1) [r]esidential address and telephone numbers; (2) [p]ersonal electronic mail addresses and personal cellular telephone numbers; (3) [s]ocial Security numbers and employer-issued identification card numbers; and (4) [e]mergency contact information." Or. Rev. Stat. Ann. § 192.377.

Oregon law also provides protections against disclosure of body-worn camera recordings under some circumstances. "Audio or video recordings, whether digital or analog, resulting from a law enforcement officer's operation of a video camera worn upon the officer's person that records the officer's interactions with members of the public while the officer is on duty[,]" are exempt from disclosure pursuant to a public records' request "unless the

public interest requires disclosure in the particular instance[.]" Or. Rev. Stat. Ann. § 192.345(40). Additionally, when one of these recordings "is subject to disclosure, the following [restrictions] apply: (a) [r]ecordings that have been sealed in a court's record of a court proceeding or otherwise ordered by a court not to be disclosed may not be disclosed[;] (b) [a] request for disclosure under this subsection must identify the approximate date and time of an incident for which the recordings are requested and be reasonably tailored to include only that material for which a public interest requires disclosure[;] [and] (c) [a] video recording disclosed under this subsection must, prior to disclosure, be edited in a manner as to render the faces of all persons within the recording unidentifiable." *Id.*

Individuals may also submit a written request that "a public body not [] disclose a specified public record indicating the home address, personal telephone number or electronic mail address of the individual." Or. Rev. Stat. Ann. § 192.368(1). If this request "demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, personal telephone number or electronic mail address remains available for public inspection[,]" the public body is prohibited from disclosing the public record. *Id.* Evidence that may be submitted to show the required risk to personal safety "include[s], but is not limited to, evidence that the individual or a family member residing with the individual has: (A) [b]een a victim of domestic violence; (B) [o]btained an order issued under ORS 133.055; (C) [c]ontacted a law enforcement officer involving domestic violence or other physical abuse; (D) [o]btained a temporary restraining order or other no contact order to protect the individual from future physical abuse; or (E) [f]iled other criminal or civil legal proceedings regarding physical protection." Or. Rev. Stat. Ann. § 192.368(2)(b). However, "[a] public body may disclose a home address, personal telephone number or electronic mail address of an individual exempt from disclosure under subsection (1) of this section upon court order, on request from any law enforcement agency or with the consent of the individual." Or. Rev. Stat. Ann. § 192.368(4).

Lastly, Oregon law provides additional protections from disclosure for other specific types of records, including: (1) "[r]ecords less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy[;]" (2) "[r]ecords less than 75 years old which were sealed in compliance with statute or by court order[;]" and (3) "[s]tudent records required by state or federal law to be exempt from disclosure." Or. Rev. Stat. Ann. § 192.398(1), (2), (4).

## SELECT PRIVILEGE LAWS

**What are key privileges in Oregon?**

Victims in Oregon have a number of privileges they can assert to prevent disclosure of their private communications with certain advocates and victim services programs, counselors, social workers, physicians and others. *See, e.g.,* Or. Rev. Stat. Ann. § 40.264 (recognizing a "certified advocate or qualified victim services program" privilege); Or. Rev. Stat. Ann. § 40.230 (recognizing a "psychotherapist-patient" privilege); Or. Rev. Stat. Ann. § 40.250 (recognizing a "regulated social worker-client privilege"); Or. Rev. Stat. Ann. § 40.262 (recognizing a "counselor-client privilege"); Or. Rev. Stat. Ann. § 40.235 (recognizing a "physician-patient privilege").

Certified advocate or qualified victim services program-victim privilege: "Except as provided in subsection (3) of this section, a victim has a privilege to refuse to disclose and to prevent any other person from disclosing: (a) Confidential communications made by the victim to a certified advocate in the course of safety planning, counseling, support or advocacy services. (b) Records that are created or maintained in the course of providing services regarding the victim." Or. Rev. Stat. Ann. § 40.264(2). Without the victim's consent, disclosure of these confidential communications is permitted only under the following very narrow circumstances: "[t]o the extent necessary for defense in any civil, criminal or administrative action that is brought against the certified advocate, or against the qualified victim services program, by or on behalf of the victim; and (b) [a]s otherwise required by law." Or. Rev. Stat. Ann. § 40.264(3).

Psychotherapist-patient privilege: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family." Or. Rev. Stat. Ann. § 40.230(2). "The following is a nonexclusive list of limits on the privilege granted by this section: (a) If the judge orders an examination of the mental, physical or emotional condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise. (b) There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient: (A) In any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense; or (B) After the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense. (c) Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of mental examination performed under ORCP 44. (d) There is no privilege under this section with regard to any confidential communication or record of such confidential communication that would otherwise be privileged under this

section when the use of the communication or record is allowed specifically under ORS 426.070, 426.074, 426.075, 426.095, 426.120 or 426.307." Or. Rev. Stat. Ann. § 40.230(4).

Regulated social worker-client privilege: "A regulated social worker under ORS 675.510 to 675.600 may not be examined in a civil or criminal court proceeding as to any communication given the regulated social worker by a client in the course of noninvestigatory professional activity when the communication was given to enable the regulated social worker to aid the client, except when: (1) [t]he client or a person legally responsible for the client's affairs gives consent to the disclosure; (2) [t]he client initiates legal action or makes a complaint against the regulated social worker to the State Board of Licensed Social Workers; (3) [t]he communication reveals a clear intent to commit a crime that reasonably is expected to result in physical injury to a person; (4) [t]he communication reveals that a minor was the victim of a crime, abuse or neglect; or (5) [t]he regulated social worker is a public employee and the public employer has determined that examination in a civil or criminal court proceeding is necessary in the performance of the duty of the regulated social worker as a public employee." Or. Rev. Stat. Ann. § 40.250.

Counselor privilege: "A professional counselor or a marriage and family therapist licensed by the Oregon Board of Licensed Professional Counselors and Therapists under ORS 675.715 shall not be examined in a civil or criminal court proceeding as to any communication given the counselor or therapist by a client in the course of a noninvestigatory professional activity when such communication was given to enable the counselor or the therapist to aid the client, except: (1) When the client or those persons legally responsible for the affairs of the client give consent to the disclosure. If both parties to a marriage have obtained marital and family therapy by a licensed marital and family therapist or a licensed counselor, the therapist or counselor shall not be competent to testify in a domestic relations action other than child custody action concerning information acquired in the course of the therapeutic relationship unless both parties consent; (2) When the client initiates legal action or makes a complaint against the licensed professional counselor or licensed marriage and family therapist to the board;
(3) When the communication reveals the intent to commit a crime or harmful act; or
(4) When the communication reveals that a minor is or is suspected to be the victim of crime, abuse or neglect." Or. Rev. Stat. Ann. § 40.262.

Physician-patient privilege: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family." Or. Rev. Stat. Ann. § 40.235(2). Limited exceptions to this privilege exist, including the following: "(a) If the judge orders an examination of the physical condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is

ordered unless the judge orders otherwise. (b) Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44. (c) There is no privilege under this section with regard to any confidential communication or record of such confidential communication that would otherwise be privileged under this section when the use of the communication or record is specifically allowed under ORS 426.070, 426.074, 426.075, 426.095, 426.120 or 426.307." Or. Rev. Stat. Ann. § 40.235(4).

Non-English-speaking person-interpreter privilege: "A non-English-speaking person has a privilege to refuse to disclose and to prevent an interpreter from disclosing any communications to which the non-English-speaking person was a party that were made while the interpreter was providing interpretation services for the non-English-speaking person. The privilege created by this section extends only to those communications between a non-English-speaking person and another, and translated by the interpreter, that would otherwise be privileged under ORS 40.225 to 40.295." Or. Rev. Stat. Ann. § 40.273(2).

Person with a disability-sign language interpreter privilege: "A person with a disability has a privilege to refuse to disclose and to prevent a sign language interpreter from disclosing any communications to which the person with a disability was a party that were made while the interpreter was providing interpretation services for the person with a disability. The privilege created by this section extends only to those communications between a person with a disability and another, and translated by the interpreter, that would otherwise be privileged under ORS 40.225 to 40.295." Or. Rev. Stat. Ann. § 40.272(2).

## SELECT DEFINITIONS

**"Victim"**

Under the Oregon Constitution, for purposes of rights recognized in Article 1, section 42, "'[v]ictim' means any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor." Or. Const. art. I, § 42(6)(c). For purposes of rights recognized in Article 1, section 43, "'[v]ictim' means any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor." Or. Const. art. I, § 43(3)(a).

Under Oregon statute section 135.873 (Protective orders; in camera proceedings; sealing records), "victim" is given the same meaning as provided in section 131.007. As defined by section 131.007, victim means: "the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime and includes, in the case of a

homicide or abuse of corpse in any degree, a member of the immediate family of the decedent and, in the case of a minor victim, the legal guardian of the minor. In no event shall the criminal defendant be considered a victim." Or. Rev. Stat. Ann. § 131.007.

Under Oregon statute section 135.970 (Victim or witness identifying information; contacts; depositions; threats), "'victim' means the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime against the person or a third person and includes, in the case of a homicide or abuse of corpse in any degree, a member of the immediate family of the decedent and, in the case of a minor victim, the legal guardian of the minor. In no event shall the criminal defendant be considered a victim." Or. Rev. Stat. Ann. § 135.970(5).

Under Oregon statute 192.820 (Address Confidentiality Program), "victim" is defined as follows:
"(8) 'Victim of a sexual offense' means:
(a) An individual against whom a sexual offense has been committed, as described in ORS 163.305 to 163.467, 163.427, 163.466 or 163.525; or
(b) Any other individual designated by the Attorney General by rule.
(9) 'Victim of domestic violence' means:
(a) An individual against whom domestic violence has been committed, as defined in ORS 135.230, 181A.355 or 411.117;
(b) An individual who has been a victim of abuse, as defined in ORS 107.705; or
(c) Any other individual designated a victim of domestic violence by the Attorney General by rule.
(10) 'Victim of human trafficking' means:
(a) An individual against whom an offense described in ORS 163.263, 163.264 or 163.266 has been committed; or
(b) Any other individual designated by the Attorney General by rule. In adopting rules under this subsection, the Attorney General shall consider individuals against whom an act recognized as a severe form of trafficking in persons under 22 U.S.C. 7102 has been committed.
(11) 'Victim of stalking' means:
(a) An individual against whom stalking has been committed, as described in ORS 163.732; or
(b) Any other individual designated by the Attorney General by rule." Or. Rev. Stat. Ann. § 192.820(8)-(9).

**Key terms—including "victim"—in the context of privileges.**

For purposes of Or. Rev. Stat. Ann. § 40.264 (certified advocate or qualified victim services program privilege), key terms are defined as follows:
"(1) As used in this section:

(a) 'Certified advocate' means a person who:
(A) Has completed at least 40 hours of training in advocacy for victims of domestic violence, sexual assault or stalking, approved by the Attorney General by rule; and
(B) Is an employee or a volunteer of a qualified victim services program.
(b) 'Confidential communication' means a written or oral communication that is not intended for further disclosure, except to:
(A) Persons present at the time the communication is made who are present to further the interests of the victim in the course of seeking safety planning, counseling, support or advocacy services;
(B) Persons reasonably necessary for the transmission of the communication; or
(C) Other persons, in the context of group counseling.
(c) 'Qualified victim services program' means:
(A) A nongovernmental, nonprofit, community-based program receiving moneys administered by the state Department of Human Services or the Oregon or United States Department of Justice, or a program administered by a tribal government, that offers safety planning, counseling, support or advocacy services to victims of domestic violence, sexual assault or stalking; or
(B) A sexual assault center, victim advocacy office, women's center, student affairs center, health center or other program providing safety planning, counseling, support or advocacy services to victims that is on the campus of or affiliated with a two- or four-year post-secondary institution that enrolls one or more students who receive an Oregon Opportunity Grant.
(d) 'Victim' means a person seeking safety planning, counseling, support or advocacy services related to domestic violence, sexual assault or stalking at a qualified victim services program." Or. Rev. Stat. Ann. § 40.264(1)(a)-(d).

For purposes of Or. Rev. Stat. Ann. § 40.230 (psychotherapist-patient privilege), key terms are defined as follows:
"(1) As used in this section, unless the context requires otherwise:
(a) 'Confidential communication' means a communication not intended to be disclosed to third persons except:
(A) Persons present to further the interest of the patient in the consultation, examination or interview;
(B) Persons reasonably necessary for the transmission of the communication; or
(C) Persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.
(b) 'Patient' means a person who consults or is examined or interviewed by a psychotherapist.
(c) 'Psychotherapist' means a person who is:
(A) Licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition; or
(B) Reasonably believed by the patient so to be, while so engaged.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family." Or. Rev. Stat. Ann. § 40.230(1)-(2).

For purposes of Or. Rev. Stat. Ann. § 40.235 (physician-patient privilege), key terms are defined as follows:
"(1) As used in this section, unless the context requires otherwise:
(a) 'Confidential communication' means a communication not intended to be disclosed to third persons except:
(A) Persons present to further the interest of the patient in the consultation, examination or interview;
(B) Persons reasonably necessary for the transmission of the communication; or
(C) Persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.
(b) 'Patient' means a person who consults or is examined or interviewed by a physician.
(c)(A) 'Physician' means a person authorized and licensed or certified to practice medicine, podiatry or dentistry in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a physical condition.
(B) 'Physician' includes licensed or certified naturopathic and chiropractic physicians and dentists." Or. Rev. Stat. Ann. § 40.235(1).

For purposes of Or. Rev. Stat. Ann. § 40.273 (non-English-speaking person-interpreter privilege), key terms are defined as follows:
"(1) As used in this section:
(a) 'Interpreter' means a person who translates conversations or other communications for a non-English-speaking person or translates the statements of a non-English-speaking person.
(b) 'Non-English-speaking person' means a person who, by reason of place of birth or culture, speaks a language other than English and does not speak English with adequate ability to communicate in the proceedings." Or. Rev. Stat. Ann. § 40.273(1).

For purposes of Or. Rev. Stat. Ann. § 40.272 (person with a disability-sign language interpreter privilege), key terms are defined as follows:
"(1) As used in this section:
(a) 'Person with a disability' means a person who cannot readily understand or communicate the spoken English language, or cannot understand proceedings in which the person is involved, because of deafness or because of a physical hearing impairment or cannot communicate in the proceedings because of a physical speaking impairment.

(b) 'Sign language interpreter' or 'interpreter' means a person who translates conversations or other communications for a person with a disability or translates the statements of a person with a disability." Or. Rev. Stat. Ann. § 40.272(1).

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

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

[3] Examples of community-based advocates, include: crisis hotline or helpline staff; rape crisis center staff; domestic violence shelter staff; campus advocates; and homicide support program staff.

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

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

[6] There are different levels of privileges: absolute, absolute diluted and qualified. An absolute privilege is one in which only a victim has the right to authorize disclosure and the court can never order the information to be disclosed without the victim's consent. Absolute privileges are rare, however, because privileges are seen to run contrary to the truth finding function of courts.

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

[8] Terms that inform the intersection of victim services and HIPPA, FERPA, FOIA or VOCA are "implied consent" and "waiver." "Informed consent" is defined as "1. [a] person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. · For the legal profession, informed consent is defined in Model Rule of Professional Conduct 1.0(e)[;] [or] 2. [a] patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent

provider in the medical field community would give to a patient regarding the risks involved in the proposed treatment or procedure." *Informed consent,* Black's Law Dictionary (8th ed. 2004). "Waiver" is defined as "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage . . . ." *Waiver,* Black's Law Dictionary (8th ed. 2004).

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

[10] *Id.*

[11] *Id.*

[12] *Id.*

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

[14] *Id.*

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

[16] *Id.*

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

[18] *Id.*

[19] *Id.*

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

[21] *Office for Victims of Crime, Purpose & Scope of The Standards,* https://www.ovc.gov/model-standards/purpose_and_scope.html.

[22] *Office for Victims of Crime, Purpose & Scope of The Standards,* https://www.ovc.gov/model-standards/purpose_and_scope.html. Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For "Scope of Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_1.html. For "Coordinating within the Community," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_2.html. For "Direct Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_3.html. For "Privacy, Confidentiality, Data Security and Assistive Technology," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_4.html. For "Administration and Evaluation," the ethical standard and the corresponding commentary can be located at https://www.ovc.gov/model-standards/ethical_standards_5.html.

[23] *Office for Victims of Crime, Ethical Standards for Serving Victims & Survivors of Crime,* https://www.ovc.gov/model-standards/ethical_standards.html.

[24] *See Weatherford v. Busey*, 429 U.S. 545, 559 (1977).

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

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

[27] *Id.*

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

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

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

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

[32] Terminology for subpoenas varies from jurisdiction-to-jurisdiction. Common examples of subpoenas include: "subpoenas"; "subpoenas duces tecum"; "deposition subpoenas"; and "subpoenas ad testificandum." *See Subpoena,* Black's Law Dictionary (8th ed. 2004).

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

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