



## LAW ENFORCEMENT-BASED VICTIM SERVICES IN UTAH: 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 Utah. 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 - Utah*.

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## OVERVIEW

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

### Key Takeaways

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

### Discussion

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

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

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

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

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

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

#### **Key Takeaways**

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

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

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

## Discussion

### Privacy

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

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

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

### Confidentiality

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

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

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

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

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

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

States Supreme Court case *Brady v. Maryland*.

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

### Privilege

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

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

### Understanding the Differences

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

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

### **Key Takeaways**

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

### **Discussion**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Key Takeaways**

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

#### **Discussion**

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

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

The third area—Ethical Standards for Serving Victims & Survivors of Crime—contains “ethical expectations” of victim service providers that are “based on core values” in the field and are intended to serve as guidelines for providers in the course of their work. The Ethical Standards are comprised of five sections:

- (1) Scope of Services;
- (2) Coordinating within the Community;
- (3) Direct Services;
- (4) Privacy, Confidentiality, Data Security and Assistive Technology; and
- (5) Administration and Evaluation.<sup>22</sup>

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

responsible manner.”<sup>23</sup>

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

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

**Key Takeaways**

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

### Discussion

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

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

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

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

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

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

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

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

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

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

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

#### **Key Takeaways**

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

#### **Discussion**

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

### **What are key considerations for system-based advocates who receive a subpoena?<sup>32</sup>**

#### **Key Takeaways**

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

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

### Discussion

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

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

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

## SELECT LAWS

## SELECT PRIVACY LAWS

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

The Utah constitution protects victim privacy through its broad guarantee of fair treatment for crime victims. Utah Const. art. 1, § 28(1)(a) (guaranteeing victims the right to be treated with fairness, respect and dignity); *see also* Utah Code Ann. § 77-37-1(1) (declaring legislative intent to treat all victims with dignity, respect, courtesy and sensitivity).

Utah law also protects victim privacy through narrower constitutional and statutory provisions, such as those limiting access to victims' identifying and locating information. For instance, under the Utah Rights of Crime Victims Act, a victim has "the right, at any court proceeding, including any juvenile court proceeding, not to testify regarding the victim's address, telephone number, place of employment, or other locating information unless the victim specifically consents or the court orders disclosure on finding that a compelling need exists to disclose the information. A court proceeding on whether to order disclosure shall be in camera." Utah Code Ann. § 77-38-6(a). Additionally, state law bars the disclosure of a victim's address, telephone number, and victim impact statement where such information is held by a state agency or employee for the purposes of complying with a victim's notification rights. *Id.* at § 77-38-3(11)(a); *see also id.* at § 77-38-3(11)(b) (listing the persons or entities allowed access to such information in the performance of their duties). Relatedly, Utah law provides that a victim's request for notification of an offender's release or escape is private information that the Department of Corrections may not release "(a) to the offender under any circumstances; or (b) to any other party without the written consent of the victim." *Id.* at § 64-13-14.7(4).

Utah also protects victims' privacy interests through constitutional and statutory safety-related rights. *See, e.g.,* Utah Const. art. 1, § 28(1)(a) (guaranteeing victims the right to be free from harassment and abuse throughout the criminal justice process); Utah Code Ann. § 77-37-3(1)(a) (guaranteeing victims' the right to be informed of the level of protection from intimidation and harm available during their participation in the criminal justice process); *id.* at § 77-37-4(1) (guaranteeing child-victims "the right to protection from physical and emotional abuse during their involvement with the criminal justice process"); *id.* at § 77-36-2.1 (guaranteeing safety-related rights to cohabitant abuse victims); *id.* at § 78B-7-408 (guaranteeing safety-related rights to dating violence victims); *id.* at § 78B-7-509 (guaranteeing safety-related rights to sexual violence victims). The state further protects victim privacy by providing victims with the right to secure waiting areas, separate from the defendant and members of the defendant's family. *Id.* at § 77-37-3(1)(d).

Utah extends heightened privacy protections to certain categories of victims. For instance, the state protects victim privacy through its rape shield law, under which a sex crime

victim's sexual history cannot be admitted into evidence, except under limited circumstances. Utah R. Evid. 412. Utah also protects the privacy interests of sexual assault victims by guaranteeing them the right to determine whether to provide a personal statement to law enforcement about their assault and whether to allow law enforcement to access any paperwork from their forensic examination. Utah Code Ann. §76-5-606(1)(d).

Utah also recognizes that child-victims have unique needs and require additional privacy protections. *See* Utah Code Ann. § 77-37-1(2) (declaring legislative intent to provide child-victims with additional protections so that they are treated in the “most effective and least traumatic, intrusive, or intimidating manner”). For instance, child-victims have the right to keep confidential any interviews conducted at a Children’s Justice Center, including video and audio recordings, as well as transcripts of those records. Utah Code Ann. § 77-37-4(5)(a). Subject to certain statutory limitations, records and transcripts of these interviews may not be distributed, released, or displayed to anyone without a court order. *Id.*; *see also id.* at § 77-37-4(5)(b) (describing the type of court order necessary for disclosure of confidential child-victim interview records and transcripts and noting that the court “may impose restrictions on access to the materials considered reasonable to protect the privacy of the child victim”); *id.* at § 77-37-4(6)(a) (listing the offices and designated employees that may distribute and receive a recording or transcript of a child-victim interview without a court order).

As discussed more fully in the sections “Select Confidentiality Laws” and “Select Privilege Laws,” Utah also protects victim privacy through victim-specific confidentiality and privilege protections. *See, e.g.,* Utah R. Evid. 512 and Utah Code Ann. § 77-38-405 (victim advocate-victim confidentiality and privilege); Utah Code Ann. § 77-38-203 (sexual assault counselor-victim confidentiality and privilege); *id.* at § 53B-28-202 (institutional advocacy services provider-victim confidentiality); Utah R. Evid. 506 (physician- and mental health therapist-patient privilege). Additionally, the state’s rules of criminal procedure limit the circumstances under which a victim’s private records may be disclosed in response to a subpoena. Where a court orders disclosure, it may “in its discretion or upon motion of either party or the victim or the victim’s representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.” Utah R. Crim. Proc. 14(b)(6).

The section “Select Confidentiality Laws” also includes information about victims’ privacy protections in the context of public records request.

## SELECT CONFIDENTIALITY LAWS

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

Utah offers a number of confidentiality rights and protections to crime victims who interact with the criminal justice system. For instance, subject to certain limitations, the state

expressly protects the confidentiality of communications between: victims and sexual assault counselors, Utah Code Ann. § 77-38-204; victims and victim advocates, *id.* at § 77-38-405; and, in the context of higher education, victims and institutional advocacy services, *id.* at § 53B-28-202. The purpose of these confidentiality protections is to enhance and promote the mental, physical and emotional recovery of these victims. *See id.* at § 77-38-202 (purpose of sexual assault counselor-victim confidentiality); *id.* at § 77-38-402 (purpose of victim advocate-victim confidentiality). If either the Confidential Communications for Sexual Assault Act, *id.* at § 77-38-204, or the Confidential Communications for Institutional Advocacy Services Act, *id.* at § 53B-28-202, applies, those statutes govern disclosure of confidential victim advocate-victim communications, not the Privileged Communications with Victim Advocates Act, *id.* at § 77-48-403. *Id.* at § 77-38-404. The procedures governing requests for disclosure of these confidential communications in the criminal justice setting is discussed further in the section “Select Privilege Laws.”

Where a victim seeks a certification of helpfulness for a U-Visa application, the certifying entity may not disclose the victim’s personal identifying information or any information regarding the victim’s citizenship or immigration status, unless: “(i) required to do so by applicable state or federal law or court order; or (ii) the certifying agency has written authorization from: (A) the victim; or (B) if the victim is a minor or is otherwise not legally competent, from the victim’s parent or guardian.” Utah Code Ann. § 77-38-503(8)(a). This confidentiality protection “does not modify legal obligations of a prosecutor or law enforcement to disclose information and evidence to a defendant.” *Id.* at § 77-38-503(8)(a).

Utah also protects victim confidentiality in the context of public records requests. In general, under the Government Records Access and Management Act (GRAMA), Utah Code Ann. §§ 63G-2-101 through 63G-2-901, public records are open to any person for inspection or copying. Utah Code Ann. § 63G-2-201(1). This general rule does not apply to records that are required to be kept confidential by state or federal law. *Id.* at § 63G-2-201(3)(b); *see also id.* at § 77-38-405(2) (stating that records containing information from a confidential communication between a victim advocate and a victim may not be disclosed under GRAMA to the extent that they include information about the confidential communication). This general rule also does not apply to private records, such as medical records or employment records containing an individual’s home address, home telephone number, social security number, insurance coverage, marital status or payroll deductions. *Id.* at § 63-2-302(1). GRAMA also exempts from disclosure records that government entities have designated as “private,” such as certain financial records and any “other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy.” *Id.* at § 63G-2-302(2). Utah law also expressly exempts certain victim-related records from disclosure under GRAMA. For instance, a victim’s address, telephone number and victim impact statement are protected records that are not subject to disclosure in response to a public records request. *Id.* at § 77-38-3(11)(a) (“A victim’s address, telephone number, and victim impact statement maintained by a peace officer, prosecuting agency, Youth Parole Authority, Division of Juvenile Justice Services, Department of Corrections, and Board of Pardons and Parole, for purposes of providing

notice under this section, is classified as protected as provided in Subsection 63G-2-305(10).”). Likewise, any record in the custody of the Utah Office for Victims of Crime is not subject to a public records request. *Id.* at § 63G-2-305(65). Additionally, a Form I-918 Supplement B certification—the helpfulness certification form for U-Visa applications discussed above—is expressly exempt from disclosure under GRAMA. *Id.* at § 63G-2-305(76).

As detailed in the following section, “Select Privilege Laws,” Utah law also protects the confidentiality of communications between victims and certain providers of counseling and other support services through evidentiary privileges. *See, e.g.*, Utah R. Evid. 512 and Utah Code Ann. § 77-38-405 (victim advocate-victim confidentiality and privilege); Utah Code Ann. § 77-38-203 (sexual assault counselor-victim confidentiality and privilege); *id.* at § 53B-28-202 (institutional advocacy services provider-victim confidentiality); Utah R. Evid. 506 (physician- and mental health therapist-patient privilege).

## SELECT PRIVILEGE LAWS

### What are key privileges in Utah?

Victims in Utah have a number of privileges that they can assert to prevent disclosure of their private communications with certain professionals, including victim advocates, sexual assault counselors, physicians and mental health care providers. *See, e.g.*, Utah R. Evid. 512 and Utah Code Ann. § 77-38-405 (victim advocate-victim confidentiality and privilege); Utah Code Ann. § 77-38-203 (sexual assault counselor-victim confidentiality and privilege); *id.* at § 53B-28-202 (institutional advocacy services provider-victim confidentiality); Utah R. Evid. 506 (physician- and mental health therapist-patient privilege).

Disclosure of privileged victim records is permissible in limited circumstances. For instance, disclosure of privileged victim advocate-victim communications is permitted:

- (1) when the victim, or the victim’s guardian or conservator if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:
  - (A) the specific confidential communication subject to disclosure;
  - (B) the limited purpose of the disclosure; and
  - (C) the name of the individual or party to which the specific confidential communication may be disclosed;

(2) when the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;

(3) when the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;

(4) when the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

Utah R. Evid. 512(d). These exceptions apply to communications between victims and both government and nongovernment-based victim advocates.

Communications with victim advocates who work within the criminal justice system are subject to disclosure obligations under additional circumstances. Specifically, under Rule of Evidence 512(d),

(5) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate may disclose the confidential communication to a parent or guardian if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services;

(6) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405;

(7) if the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:

(A) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or

(B) the confidential communication is exculpatory evidence, including impeachment evidence.

Utah R. Evid. 512(d); *see also* Utah Code Ann. § 77-38-405(1)(a) (disclosure of victim advocate-victim confidential communications generally prohibited except: “(i) that a criminal justice system victim advocate shall provide the confidential communication to a prosecutor who is responsible for determining whether the confidential communication is exculpatory or goes to the credibility of a witness; (ii) that a criminal justice system victim advocate may provide the confidential communication to a parent or guardian of a victim if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children’s Justice Center or a law enforcement agency for the purpose of providing advocacy services; or (iii) to the extent allowed by the Utah Rules of Evidence”); *id.* at § 77-38-405(1)(b) (“If a prosecutor determines that the confidential communication is exculpatory or goes to the credibility of a witness, after the court notifies the victim and the defense attorney of the opportunity to be heard at an in camera review, the prosecutor will present the confidential communication to the victim, defense attorney, and the court for in camera review in accordance with the Utah Rules of Evidence.”); *id.* at § 78B-1-137(6)(b) (“A victim advocate as defined in Section 77-38-403 may not, without the written consent of the victim, or the victim’s guardian or conservator if the guardian or conservator is not the accused, be examined in a civil or criminal proceeding as to a confidential communication, as defined in Section 77-38-403, unless the victim advocate is a criminal justice system victim advocate, as defined in Section 77-38-403, and is examined in camera by a court to determine whether the confidential communication is privileged.”).

System-based victim advocates, as soon as reasonably possible, must “notify a victim, or a parent or guardian of the victim if the victim is a minor and the parent or guardian is not the accused: (a) whether a confidential communication with the criminal justice system victim advocate will be disclosed to a prosecutor and whether a statement relating to the incident that forms the basis for criminal charges or goes to the credibility of a witness will also be disclosed to the defense attorney; and (b) of the name, location, and contact information of one or more nongovernment organization advocacy services providers specializing in the victim’s service needs, when a nongovernment organization advocacy services provider exists and is known to the criminal justice system victim advocate.” *Id.* at § 77-38-405(3).

Disclosure of confidential communications between victims and sexual assault counselors is also only allowed in limited situations, including where:

- (1) the victim is a minor and the counselor believes it is in the best interest of the victim to disclose the confidential communication to the victim’s parents;
- (2) the victim is a minor and the minor’s parents or guardian have consented to disclosure of the confidential communication to a third party based upon representations made by the counselor that it is in the best interest of the

minor victim to make such disclosure;

(3) the victim is not a minor, has given consent, and the counselor believes the disclosure is necessary to accomplish the desired result of counseling; or

(4) the counselor has an obligation under Title 62A, Chapter 4a, Child and Family Services, to report information transmitted in the confidential communication.

Utah Code Ann. § 77-38-204. Additionally, a sexual assault counselor “cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential communication as defined in Section 77-38-203 made by the victim.” *Id.* at § 78B-1-137(6)(a).

In the context of higher education, notwithstanding an institution’s obligations under the state’s open records law, confidential communications between victims and institutional advocacy service providers are subject to less stringent protections. Such records may be disclosed if “(a) the victim gives written and informed consent to the disclosure; (b) the person has an obligation to disclose the confidential communication under Section 62A-3-305 [vulnerable adult], 62A-4a-403 [child], or 78B-3-502 [violent behavior]; (c) the disclosure is required by federal law; or (d) a court of competent jurisdiction orders the disclosure.” *Id.* at § 53B-28-202(2).

Under the Utah Rules of Evidence, information that a victim communicates to a physician or a mental health professional is privileged, during the victim’s life, subject to certain exceptions. Utah. R. Evid. 506(b). For instance, where the communications at issue are relevant to an issue of the victim’s physical, mental or emotional condition in any proceeding in which that condition is an element of any claim or defense, an exception to this privilege may apply. *Id.* at R. 506(b)(1).

In addition to these statutory and rule-based limitations on the disclosure of victims’ privileged and confidential communications, Utah Rule of Criminal Procedure 14(b) governs the process for subpoenaing victims’ privileged records in criminal cases. Under this subsection of Rule 14, “[n]o subpoena or court order compelling the production of medical, mental health, school, or other privileged records pertaining to a victim shall be issued by or at the request of any party unless the court finds after a hearing, upon notice as provided [in Utah R. Crim. Proc. 14(b)(3)], that the records are material and the party is entitled to production of the records sought under applicable rules of privilege, and state and federal law.” Utah R. Crim. Proc. 14(b)(1). The request for the subpoena or court order must “identify the records sought with particularity and be reasonably limited as to subject matter.” *Id.* at R. 14(b)(2). The request must also “be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim’s representative and on the opposing party. Service on an unrepresented victim must

be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the request for the subpoena to the victim or victim's representative within 14 days of receiving it." *Id.* at R. 14(b)(3). If the court makes the necessary findings, "it must issue a subpoena or order requiring the production of the records to the court. The court will then conduct an in camera review of the records and disclose to the defense and prosecution only those portions that the requesting party has demonstrated a right to inspect." *Id.* at R. 14(b)(4).

Where a party seeks non-privileged records, papers or other objects related to a victim, the party "must serve a copy of the subpoena upon the victim or victim's representative. Service on an unrepresented victim must be facilitated through the prosecutor. The prosecutor must make reasonable efforts to provide a copy of the subpoena to the victim within 14 days of receiving it. The subpoena may not require compliance in less than 14 days after service on the prosecutor or victim's representative." *Id.* at R. 14(b)(5).

As noted above, in the court's discretion or upon the motion of either party, the victim or the victim's representative, the court may "issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records." *Id.* at R. 14(b)(6). Importantly, nothing in this criminal procedure rule "alters or supersedes other rules, privileges, statutes or caselaw pertaining to the release or admissibility of an individual's medical, psychological, school or other records." *Id.* at R. 14(b)(8).

For reference, the privileges noted in this section appear below.

**Victim Advocate-  
Victim Privilege**

Utah R. Evid. 512(b)–(d).

(b) Statement of the Privilege. A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication.

(c) Who May Claim the Privilege. The privilege may be claimed by the victim engaged in a confidential communication, or the guardian or conservator of the victim engaged in a confidential communication if the guardian or conservator is not the accused. An individual who is a victim advocate at the time of a confidential communication is presumed to have authority during the life of the victim to claim the privilege on behalf of the victim.

(d) Exceptions. An exception to the privilege exists in the following circumstances:

(1) when the victim, or the victim's guardian or conservator if the guardian or conservator is not the accused, provides written,

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|  | <p>informed, and voluntary consent for the disclosure, and the written disclosure contains:</p> <p>(A) the specific confidential communication subject to disclosure;</p> <p>(B) the limited purpose of the disclosure; and</p> <p>(C) the name of the individual or party to which the specific confidential communication may be disclosed;</p> <p>(2) when the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;</p> <p>(3) when the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;</p> <p>(4) when the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;</p> <p>(5) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate may disclose the confidential communication to a parent or guardian if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services;</p> <p>(6) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405;</p> <p>(7) if the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:</p> <p>(A) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or</p> <p>(B) the confidential communication is exculpatory evidence, including impeachment evidence.</p> <p>Utah Code Ann. § 77-38-405</p> <p>(1)(a) A victim advocate may not disclose a confidential communication with a victim, including a confidential</p> |
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|  | <p>communication in a group therapy session, except:</p> <p>(i) that a criminal justice system victim advocate shall provide the confidential communication to a prosecutor who is responsible for determining whether the confidential communication is exculpatory or goes to the credibility of a witness;</p> <p>(ii) that a criminal justice system victim advocate may provide the confidential communication to a parent or guardian of a victim if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or a law enforcement agency for the purpose of providing advocacy services; or</p> <p>(iii) to the extent allowed by the Utah Rules of Evidence.</p> <p>(b) If a prosecutor determines that the confidential communication is exculpatory or goes to the credibility of a witness, after the court notifies the victim and the defense attorney of the opportunity to be heard at an in camera review, the prosecutor will present the confidential communication to the victim, defense attorney, and the court for in camera review in accordance with the Utah Rules of Evidence.</p> <p>(2) A record that contains information from a confidential communication between a victim advocate and a victim may not be disclosed under Title 63G, Chapter 2, Government Records Access and Management Act, to the extent that it includes the information about the confidential communication.</p> <p>(3) A criminal justice system victim advocate, as soon as reasonably possible, shall notify a victim, or a parent or guardian of the victim if the victim is a minor and the parent or guardian is not the accused:</p> <p>(a) whether a confidential communication with the criminal justice system victim advocate will be disclosed to a prosecutor and whether a statement relating to the incident that forms the basis for criminal charges or goes to the credibility of a witness will also be disclosed to the defense attorney; and</p> <p>(b) of the name, location, and contact information of one or more nongovernment organization advocacy services providers specializing in the victim's service needs, when a nongovernment organization advocacy services provider exists and is known to the criminal justice system victim advocate.</p> |
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| <p>Sexual Assault<br/>Counselor-Victim<br/>Privilege</p>                                | <p>Utah Code Ann. § 77-38-204.</p> <p>Notwithstanding Title 53B, Chapter 28, Part 2, Confidential Communications for Institutional Advocacy Services Act, the confidential communication between a victim and a sexual assault counselor is available to a third person only when:</p> <p>(1) the victim is a minor and the counselor believes it is in the best interest of the victim to disclose the confidential communication to the victim's parents;</p> <p>(2) the victim is a minor and the minor's parents or guardian have consented to disclosure of the confidential communication to a third party based upon representations made by the counselor that it is in the best interest of the minor victim to make such disclosure;</p> <p>(3) the victim is not a minor, has given consent, and the counselor believes the disclosure is necessary to accomplish the desired result of counseling; or</p> <p>(4) the counselor has an obligation under Title 62A, Chapter 4a, Child and Family Services, to report information transmitted in the confidential communication.</p>                                   |
| <p>Physician- and<br/>Mental Health<br/>Therapist-Patient<br/>Privilege Definitions</p> | <p>Utah R. Evid. 506(b)–(d).</p> <p>(b) Statement of the Privilege. A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:</p> <p>(1) diagnoses made, treatment provided, or advice given by a physician or mental health therapist;</p> <p>(2) information obtained by examination of the patient; and</p> <p>(3) information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist. Such other persons include guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.</p> |

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|  | <p>(c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.</p> <p>(d) Exceptions. No privilege exists under paragraph (b) in the following circumstances:</p> <p>(1) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:</p> <p>(A) in any proceeding in which that condition is an element of any claim or defense, or</p> <p>(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;</p> <p>(2) Hospitalization for Mental Illness. For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; and</p> <p>(3) Court Ordered Examination. For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.</p> |
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### SELECT DEFINITIONS

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| Definitions of the terms used in the above-referenced privileges are included below, when available. |   |
| Victim Advocate-Victim Privilege Definitions   | <p>Utah R. Evid. 512(a).</p> <p>(1) "Advocacy services" means the same as that term is defined in UCA § 77-38-403.</p> <p>(2) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services as defined in UCA § 77-38-403.</p> |

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|  | <p>(3) “Criminal justice system victim advocate” means the same as that term is defined in UCA § 77-38-403.</p> <p>(4) “Health care provider” means the same as that term is defined in UCA § 78B-3-403.</p> <p>(5) “Mental health therapist” means the same as that term is defined in UCA § 58-60-102.</p> <p>(6) “Victim” means an individual defined as a victim in UCA § 77-38-403.</p> <p>(7) “Victim advocate” means the same as that term is defined in UCA § 77-38-403.</p> <p>Utah Code Ann. § 77-38-403.</p> <p>As used in this part:</p> <p>(1) “Advocacy services” means assistance provided that supports, supplements, intervenes, or links a victim or a victim’s family with appropriate resources and services to address the wide range of potential impacts of being victimized.</p> <p>(2) “Advocacy services provider” means an entity that has the primary focus of providing advocacy services in general or with specialization to a specific crime type or specific type of victimization.</p> <p>(3) “Confidential communication” means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services.</p> <p>(4) “Criminal justice system victim advocate” means an individual who:</p> <ul style="list-style-type: none"> <li>(a) is employed or authorized to volunteer by a government agency that possesses a role or responsibility within the criminal justice system;</li> <li>(b) has as a primary responsibility addressing the mental, physical, or emotional recovery of victims;</li> <li>(c) completes a minimum 40 hours of trauma-informed training: <ul style="list-style-type: none"> <li>(i) in crisis response, the effects of crime and trauma on victims, victim advocacy services and ethics, informed consent, and this part regarding privileged confidential communication; and</li> </ul> </li> </ul> |
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|  | <p>(ii) that have been approved or provided by the Utah Office for Victims of Crime; and</p> <p>(d) is under the supervision of the director or director's designee of the government agency.</p> <p>(5) "Health care provider" means the same as that term is defined in Section 78B-3-403.</p> <p>(6) "Mental health therapist" means the same as that term is defined in Section 58-60-102.</p> <p>(7) "Nongovernment organization victim advocate" means an individual who:</p> <p>(a) is employed or authorized to volunteer by an nongovernment organization advocacy services provider;</p> <p>(b) has as a primary responsibility addressing the mental, physical, or emotional recovery of victims;</p> <p>(c) has a minimum 40 hours of trauma-informed training:</p> <p>(i) in assisting victims specific to the specialization or focus of the nongovernment organization advocacy services provider and includes this part regarding privileged confidential communication; and</p> <p>(ii)(A) that have been approved or provided by the Utah Office for Victims of Crime; or</p> <p>(B) that meets other minimally equivalent standards set forth by the nongovernment organization advocacy services provider; and</p> <p>(d) is under the supervision of the director or the director's designee of the nongovernment organization advocacy services provider.</p> <p>(8) "Record" means a book, letter, document, paper, map, plan, photograph, file, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics.</p> <p>(9) "Victim" means:</p> <p>(a) a "victim of a crime" as defined in Section 77-38-2;</p> <p>(b) an individual who is a victim of domestic violence as defined in Section 77-36-1; or</p> <p>(c) an individual who is a victim of dating violence as defined in Section 78B-7-402.</p> <p>(10) "Victim advocate" means:</p> <p>(a) a criminal justice system victim advocate;</p> <p>(b) a nongovernment organization victim advocate; or</p> |
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|  | <p>(c) an individual who is employed or authorized to volunteer by a public or private entity and is designated by the Utah Office for Victims of Crime as having the specific purpose of providing advocacy services to or for the clients of the public or private entity.</p> <p>(d) “Victim advocate” does not include an employee of the Utah Office for Victims of Crime.</p>   |
| Sexual Assault Counselor-Victim Privilege Definitions                | <p>Utah Code Ann. § 77-38-203.</p> <p>As used in this part:</p> <p>(1) “Confidential communication” means information given to a sexual assault counselor by a victim and includes reports or working papers made in the course of the counseling relationship.</p> <p>(2) “Rape crisis center” means any office, institution, or center assisting victims of sexual assault and their families which offers crisis intervention, medical, and legal services, and counseling.</p> <p>(3) “Sexual assault counselor” means a person who is employed by or volunteers at a rape crisis center who has a minimum of 40 hours of training in counseling and assisting victims of sexual assault and who is under the supervision of the director or designee of a rape crisis center.</p> <p>(4) “Victim” means a person who has experienced a sexual assault of whatever nature including incest and rape and requests counseling or assistance regarding the mental, physical, and emotional consequences of the sexual assault.</p> |
| Physician- and Mental Health Therapist-Patient Privilege Definitions | <p>Utah R. Evid. 506(a).</p> <p>(1) “Patient” means a person who consults or is examined or interviewed by a physician or mental health therapist.</p> <p>(2) “Physician” means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.</p> <p>(3) “Mental health therapist” means a person who</p> <p>(A) is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced</p>  |

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|  | practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and (B) is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction. |
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<sup>1</sup> See *Office for Victims of Crime, Ethical Standards, Section I: Scope of Services*, [https://www.ovc.gov/model-standards/ethical\\_standards\\_1.html](https://www.ovc.gov/model-standards/ethical_standards_1.html).

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

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

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

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

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

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

<sup>8</sup> Terms that inform the intersection of victim services and HIPAA, FERPA, FOIA or VOCA are "implied consent" and "waiver." "Informed consent" is defined as "1. [a] person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. For the legal profession, informed consent is defined in Model Rule of Professional Conduct 1.0(e); [or] 2. [a] patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical field community would give to a patient regarding the risks involved in the proposed treatment or procedure." *Informed consent*, Black's Law Dictionary (8th ed. 2004). "Waiver" is defined as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage . . . ." *Waiver*, Black's Law Dictionary (8th ed. 2004).

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>22</sup> *Id.* Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For “Scope of Services,” the ethical standards and their corresponding commentaries can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_1.html](https://www.ovc.gov/model-standards/ethical_standards_1.html). For “Coordinating within the Community,” the ethical standards and their corresponding commentaries can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_2.html](https://www.ovc.gov/model-standards/ethical_standards_2.html). For “Direct Services,” the ethical standards and their corresponding commentaries can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_3.html](https://www.ovc.gov/model-standards/ethical_standards_3.html). For “Privacy, Confidentiality, Data Security and Assistive Technology,” the ethical standards and their corresponding commentaries can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_4.html](https://www.ovc.gov/model-standards/ethical_standards_4.html). For “Administration and Evaluation,” the ethical standard and the corresponding commentary can be located at [https://www.ovc.gov/model-standards/ethical\\_standards\\_5.html](https://www.ovc.gov/model-standards/ethical_standards_5.html).

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

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

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

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

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

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

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

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

<sup>31</sup> Defendant John Giglio was tried, convicted and sentenced for forgery related crimes. While Giglio’s case was pending appeal, his attorney filed a motion for a new trial, claiming that there was newly discovered evidence that the key Government witness—“the only witness linking [Giglio] with the crime”—had been promised that he would not be prosecuted in exchange for his testimony. The defense attorney’s motion was initially denied, but certiorari review was granted “to determine whether the evidence [that was] not disclosed . . . require[d] a new trial under the due process criteria of” cases, including *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which “held that suppression of

material evidence justifies a new trial” whether the prosecutor intended to withhold information or not. “An affidavit filed by the Government as part of its opposition to a new trial confirm[ed] [Giglio’s] claim that a promise was made to [the key Government witness]” by the former Assistant United States Attorney “that [the witness] would not be prosecuted if he cooperated with the Government.” This promise of leniency was made by the formerly assigned Assistant United States Attorney who did not handle the trial; and the Assistant United States Attorney who handled the trial was unaware of the promise. The Supreme Court held that nondisclosure of material evidence “is the responsibility of the prosecutor”—whether nondisclosure was intentional or not—and that such action is directly attributable to the Government. Addressing the topic of “turnover,” principally, the Court explained that “[t]o the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to [e]nsure communication of all relevant information on each case to every lawyer who deals with it.” Giglio’s conviction was reversed, and the case was remanded to the lower court.

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

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

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

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

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