

process, and prevent them from feeling that the system misled or betrayed them. This knowledge may also empower victims to take control of their circumstances and make informed decisions, voluntary assertions, or waivers. It will also help the professionals with whom victims come into contact protect their safety and privacy to the best of their ability.

This *Strategies* article is Part I of a two-part series addressing two types of victim privacy laws – confidentiality and privilege. Part I provides an overview of *confidentiality* laws in order to assist prosecutors in effectively balancing offender accountability with the safety needs and expectations of victims during criminal investigations and prosecutions. Part II of the series provides a discussion of common *privileges* and the scenarios in which conflicts with these privileges may arise. Part II also provides prosecutors with strategies to protect privileges when the privacy interests of victims might outweigh the need to disclose privileged information.

THE IMPORTANCE OF VICTIM PRIVACY LAWS: VICTIM SAFETY AND AUTONOMY

The “right of privacy” is “[t]he right of a person ... to be free from unwarranted public scrutiny or exposure.”² Victims who have sought help from advocates, clergy, law enforcement, or health professionals may hold deeply rooted beliefs about their right to privacy and will need to have the scope of privacy rights, as they relate to various affiliated criminal justice professionals, explained.³ If their privacy is breached or invaded, not only will victims feel that their statements and lives have been unjustly exploited, but their legal rights may also have been violated.

Information that individuals deem private often involves the people and procedures that matter most in life and that affect persons greatly. It can be the source of joy but, more often, the cause of great embarrassment, or information that the individual simply wishes to keep secret. Indeed, “belonging to an individual,” as well as “secret,” are both included in the definition of the word “private.”⁴ The facts and history associated with domestic violence and sexual assault crimes are often secrets that have been harbored by victims for years – sometimes the entire span of their lives. Victims can feel so strongly that their history is a secret that they often have great difficulty sharing facts with anyone. This difficulty is one of the many reasons that a victim’s

right to privacy must be fully explained to the victim and protected when possible.

UNDERSTANDING CONFIDENTIALITY LAWS

The privacy umbrella includes information that is confidential under the law. *Confidentiality is both an ethical and legal duty* that a professional owes to a victim, client, or patient *to keep certain communications and information safe*. Confidentiality is defined as “[a] communication made within a certain protected relationship – such as husband-wife, attorney-client, or priest-penitent – and is legally protected from forced disclosure.”⁵ At its most basic level, confidentiality allows victims to fully disclose the details of the violence they have endured so that they can receive services without fear that their personal information will be exposed. The level at which the confidential information is legally protected is inextricably linked to the professional and organizational status of the professional who receives this information from the victim.

Confidentiality laws encourage open, honest, and safe communication between victims and the professionals they rely on to support their healing and pursuit of justice in cases involving intimate partner violence and sexual assault. These services, provided in a compassionate and secure setting, may be necessary to meet sexual or domestic violence victims’ legal, medical, mental health, counseling, housing, and financial needs. Confidentiality is the foundation upon which victims rebuild their trust, empowerment, and autonomy after they have been greatly diminished or destroyed following acts of violence.⁶

Confidentiality laws encourage victims to disclose their victimization in the context of therapeutic and other professional relationships. This enhances professionals’ overall ability to protect victims from future intimidation and harm by their abusers, while protecting the information against a disclosure that the victim may not wish to make at to law enforcement.

CONFIDENTIALITY VERSUS PRIVILEGE

Confidentiality is a duty, while a privilege is a legal right. Confidentiality is the broad application of privacy laws used to create a duty to protect a victim’s information and safety. A privilege is a legal right that gives both the sharer and the holder of information special protection

to refuse to disclose privileged communications within the confines of certain relationships, including: advocate/client; psychiatrist/client; clergy/penitent; physician/patient; spousal; and attorney/client. Although confidentiality and privilege are separate legal principles, some courts have found that some information qualifies as both a privileged communication protected by statute, rule, or constitutional provision as well as a confidential communication. In such cases, the rights of privilege control, and the information can be released only with the victim's permission.

Historically, common law privileges like attorney/client and spousal were created to encourage open and private discourse in certain protected relationships. Privileges today can be common law based (e.g., attorney/client) or codified by state statute (e.g., advocate/client or psychiatrist/client).⁷ Furthermore, privileges can be categorized in one of three ways, as absolute, semi-absolute, or qualified;⁸ these are each discussed in further detail in Part II of this series. Whether and how privileges are categorized is state specific. Prosecutors should note that even when the four corners of a statute indicate that the privilege is absolute, a review of current case law is necessary, as state courts may have allowed in camera review of records on constitutional due process and confrontation grounds.

Laws protecting privacy that may be included in as well as affected by victim's rights statutes, case law, and state constitutional provisions⁹ vary from jurisdiction to jurisdiction, and prosecutors, advocates, and other professionals should check their local laws to determine the exact scope of confidentiality and privilege. One of the most important things to understand and to explain to victims is the ability to pierce the protective shields of confidentiality and privilege. While both confidentiality and privilege laws protect the privacy rights of a victim, confidentiality may be more easily pierced.¹⁰ Contrastingly, the burden is generally much higher when seeking to compel disclosure in a privileged relationship.¹¹ To help the reader better understand the various *confidentiality laws* and their impact on victims and the prosecution of cases, the below section reviews victim confidentiality laws as they apply to various affiliated criminal justice professionals, with a focus on victim advocate confidentiality laws.

CONFIDENTIALITY: REQUIREMENTS FOR ADVOCATES, MEDICAL PROFESSIONALS, AND LAW ENFORCEMENT

Advocates

Victims can receive the support of advocates from two main sources: local non-governmental agencies, including domestic violence or rape crisis centers, and prosecutor's offices' victim-witness assistance programs.¹² The distinction is an important one, and because the victim will likely be unaware of differences in the advocates' roles, the applicable confidentiality rules should be explained to the victim.

Generally, a community advocate affiliated with a local community program will have a strict duty of confidentiality to maintain pursuant to state law and – if the program receives federal funding – grant guidelines.¹³ A victim-witness assistant employed by the prosecutor's office, however, will mostly likely be regarded as part of the prosecution team and thus may or may not be able to protect sensitive victim information.¹⁴ In both of these scenarios, confidentiality laws govern the release of a victim's personal information and an external actor's ability to obtain that information. Depending on the type of information the victim-witness assistant receives, the assistant might be legally required to disclose private information pursuant to the rules of discovery and relevant case law.¹⁵ In fact, some jurisdictions legislate a prosecutorial affirmative duty "to review the notes of [victim-witness] advocates and inquire about their conversations with victims, which responsibility stems from the ... [state's] obligation to produce exculpatory evidence and, on request, material and relevant 'statements' of persons."¹⁶ Part of the rationalization for the victim-witness assistant being considered a member of the prosecution team – and even for the prosecutor's affirmative duty to review the victim-witness assistant's notes – is that the victim-witness assistant's duties traditionally had fallen to the prosecutors themselves. Victim-witness assistants now help victims and witnesses "cope with the realities of the criminal justice system and the disruption of personal affairs attending a criminal prosecution during a time of personal trauma."¹⁷ Thus, in some jurisdictions, due to the functions that the victim-witness assistants perform as part of the prosecution team, their work is subject to the same legal discovery obligations and their notes are subject to the same discovery rules as prosecutors. Although prosecutors

are primarily responsible for reviewing the victim-witness assistant's notes and disclosing any exculpatory evidence therein, advocates have a duty to relay to prosecutors any information they believe is exculpatory.¹⁸

Some funding sources, including grants received under the Violence Against Women Act (VAWA)¹⁹ or Family Violence Protection Services Act (FVPSA),²⁰ contain confidentiality requirements that apply to the domestic violence and sexual assault program grantees.²¹ Grantee programs and their staff are prohibited from sharing the confidential information of victims receiving services from their agencies, except in limited circumstances, unless the victim expressly consents to the disclosure of information.²² These confidentiality restrictions protect victim information including a victim's name, contact information, date of birth, social security number, race, religion, or any combination of the above that would personally identify a victim. These restrictions are subject to compelled disclosure, as discussed above, but professionals should still argue against disclosure or propose limited or redacted disclosure and should take precautions to "protect the privacy and safety of the persons affected by the release of information."²³

Prosecutors and law enforcement who are trying to locate a victim may not be able to obtain such information from the advocacy agency, as information concerning the victim's location is a confidential communication protected by law,²⁴ and employees of the advocate agency must absolutely honor this confidence.²⁵ Even if the staff at the local domestic violence agency is aware of the victim's whereabouts, they may not provide the prosecutor with this information if there is advocate/client confidentiality in their jurisdiction. If a victim confides in a community advocate that she is planning to secretly move to a residence in another jurisdiction to flee from her abuser, this information cannot be shared with anyone, including the prosecutor, without the victim's express consent. In cases where a prosecutor is trying to locate the victim for trial, the prosecutor may wish to work with community advocates to maintain the confidentiality of the victim's location by asking advocates to relay messages to victims, including a request that the victim call the prosecutor directly.

Prosecutors may also consider obtaining information from alternative, non-confidential sources, such as family, friends, or coworkers of the victim.²⁶ If a prosecutor does obtain con-

tact information for a victim from a non-confidential source, however, the prosecutor should consider whether directly contacting the victim would further jeopardize her safety. It is also important for prosecutors to recognize that by contacting the victim, whether to urge compliance with a court subpoena or to encourage the victim to participate in a criminal prosecution, the prosecutor will have effectively removed the protective shield that the victim was trying to create. Removal of the protection may have both practical and psychological implications: a victim may feel violated by the disclosure of information, even if it was obtained from a legal, non-confidential source, and the victim may decline to participate in the prosecution and remain concerned about her safety.

The disclosure of personal information to a prosecutor's office can affect the immediate safety of the victim as well as the confidential trust that was built between the victim and those confidantes who were helping the victim remain safe. Since the overriding concern must always be victim safety, all advocates should be diligent about keeping private information in that category in order not to jeopardize the victim's welfare. Additionally, if the victim believes that a trusted confidant told the prosecutor her whereabouts, she may no longer trust that source or any support person, and may doubt whether information within the protected confines of other agencies is being held safely. Consequently, the victim may be cautious about reaching out to helpful sources if she is in need of assistance in the future. Most urgently, the victim may feel unsafe in her new location and may feel the need to move again. While prosecutors have a duty to hold offenders accountable, they must simultaneously balance the important safety and autonomy needs of victims. When possible, prosecutors should try to reassure victims in these situations by explaining that they were located using information from only non-confidential sources.

In order to ensure victim safety, confidentiality laws dictate that private information shared between the advocate and the victim be kept confidential.²⁷ So how can a prosecutor balance the victim's privacy concerns and still hold the offender accountable? Confidentiality restrictions may result in requiring prosecutors to think more strategically and creatively about how to honor victims' privacy concerns without jeopardizing the prosecution of dangerous offenders. If a prosecutor wants to proceed to trial without the victim, the prosecutor must be prepared to prove an

evidence-based case.²⁸ For example, the prosecutor may need to utilize 911 calls, photographs, excited utterances, police and other witness' testimony, and medical records, rather than rely on the victim's participation in the case.

PRACTICE TIP

Where victims are or may become unavailable to the prosecution at trial, analyze and prepare for objections under *Crawford v. Washington* and its progeny, and consider filing a forfeiture by wrongdoing motion. The doctrine of forfeiture by wrongdoing permits the admissibility of a victim or witness' previously made statement(s) where he/she is unavailable due to the defendant's wrongdoing. For more information see, *The Prosecutors' Resource on Crawford* and *The Prosecutors' Resource on Forfeiture by Wrongdoing*.

Medical Professionals

Communications between health care providers and their adult patients are generally confidential, which means that health care providers have a duty to not disclose patient information inside and outside of the courtroom without the patient's consent. Confidentiality may extend as far as confirming or denying whether an individual is even a patient of a health care professional or facility. The source of this principle is found in state and federal law³³ and professional ethics.³⁴

Exceptions to confidentiality exist in the form of mandatory reporting laws, which vary by jurisdiction. Various states, for example, require that health care professionals report information to police about any person who presents with a serious bodily injury, an injury that was inflicted by a deadly weapon, or an injury received as a result of the commission of any crime.³⁵ Four states — California, Colorado, Kentucky, and Louisiana — have statutes requiring that medical professionals report when they have treated an adult victim of domestic violence.³⁶ Seven states have reporting laws that mandate a report to police whenever non-accidental or intentional injuries occur.³⁷ As it is difficult to contemplate a situation in which injuries that are caused by domestic violence or sexual assault would not be non-accidental or intentional, those states' statutes have the same impact as statutes that require incidents of domestic violence to be reported. The majority of states require medical personnel to report injuries caused by criminal conduct, most certainly

including domestic violence and sexual assault.³⁸ These laws have a direct impact on confidential communications between physicians and patients, as the physician-patient privilege regarding injuries and the cause of those injuries might not apply in a judicial proceeding resulting from a report to police by a health care professional.³⁹

In sexual assault and domestic violence cases, prosecutors routinely obtain the medical records of a victim via her signed medical release waiver or a subpoena *duces tecum*.⁴⁰ State statutes dictate the extent to which medical records remain private and how the government in an investigation and prosecution can access them.⁴¹ There are many instances where a victim's statements to a health care professional will be potentially exculpatory or relevant in a domestic or sexual violence case.

In addition to medical records, the results of criminalistic and DNA testing following a sexual assault forensic examination can also be accessed by the prosecution.⁴² This evidence is routinely obtained by the prosecution in furtherance of the case investigation and is not viewed as a confidential or privileged communication between a doctor or nurse examiner and patient. The results of the sexual assault forensic examination kit must be provided to the defense since they are material and potentially inculpatory or exculpatory to the offender.⁴³ However, statements regarding a victim's prior sexual history made during the examination that are not related to this incident may be redacted⁴⁴ prior to trial under state rape shield laws⁴⁵ and applicable case law.⁴⁶ The defense maintains the burden of filing any pretrial motions to pierce rape shield and release information regarding a victim's prior sexual history. Prosecutors can and should also file the relevant rape shield motions to ensure that this information is not disclosed during the trial.⁴⁷

Law Enforcement

It is crucial that law enforcement respect and uphold confidentiality statutes during an investigation. Various state laws require that law enforcement documents replace a victim's name with her initials or a pseudonym in order to protect her privacy.⁴⁸ Particularly in sexual assault and domestic violence cases, state statutes and policies have recognized that confidentiality laws not only encourage the reporting of crimes, but they prevent re-victimization by

PRACTICE TIP

Generally, prosecutors should file motions to prevent irrelevant and prejudicial information from being introduced at trial. Evidence offered to prove that a victim engaged in other sexual conduct, has a certain sexual predisposition, or opinion evidence regarding the victim's character is generally inadmissible pursuant to rape shield laws and evidentiary rules.

Arguments to exclude such evidence include:

- The information is irrelevant;
- The evidence has no probative value;
- The evidence has no bearing on the victim's credibility or on any other material issue;
- The evidence is unduly inflammatory;
- The danger of harm or prejudice to the victim or other witnesses outweighs the evidence's probative value;
- The exclusion of the evidence does not violate the defendant's due process right to a fair trial; and
- The evidence is inadmissible under state or federal constitution or statute.

Determining when to file motions to exclude such evidence depends on consideration of many factors, including pertinent statutes and rules and strategies that seek to exclude inadmissible evidence without prematurely divulging prosecution strategies or suggesting additional legal tactics that the defense had not considered.

prohibiting unwanted publicity. Law enforcement should keep a victim's address and other personal information confidential. This is particularly important in cases involving intimate partner violence, where a victim's safety may be compromised to an even greater extent once she has left her batterer. Law enforcement should tell victims what, if any, protocols they follow to keep information private in order to minimize victims' personal fears for their own safety, as well as the safety of other family members.

CONFIDENTIALITY AND THE RESPONSIBILITIES OF COMMUNITY PARTNERS

With the advent of more coordinated community services for victims of domestic and sexual violence, such as those provided through Family Justice Centers,⁴⁹ it is critical to understand that different professional partners, within the broad

paradigm of victim services, have different roles and responsibilities as they relate to protecting victims' confidential information. Even organizations that share the same building, floor, or office space may have different responsibilities and goals. Criminal justice professionals must recognize that other partners may have confidentiality requirements and that some partners must decline to share information about a specific victim/client.⁵⁰ Partner agencies, including prosecutor's offices, that may work together on a community collaboration or grant are encouraged to create a *memorandum of understanding* at the outset to specifically delineate the roles, responsibilities, and legal obligations regarding the sharing of victims' confidential information so that everyone knows who can disseminate what, if any, information and to whom.⁵¹ It is advantageous to create a model victim release-of-information form to ensure that the victim clearly understands what confidential information is protected by which agency, and what information the victim is willing to release, to whom, and for what specified purpose.⁵²

DEFINING THE PROSECUTOR'S ROLE WITH CONFIDENTIAL INFORMATION

Prosecutor's offices and other government entities have an ethical and legal duty to disclose any potentially material or exculpatory information in a criminal case to the defense pursuant to *Brady v. Maryland*,⁵³ state discovery, and state professional conduct rules. Prosecutors, and the victim assistants and advocates who work in prosecutor's offices, should clearly explain to victims, especially those receiving services from other community agencies, that a prosecutor's office employees cannot necessarily protect the same information with the same confidentiality standards as other allied agencies.

One of the very first conversations that a prosecutor should have with a victim should focus on the distinction between a civil and criminal case. The prosecutor should explain to the victim that criminal prosecution is not a civil lawsuit; there is no plaintiff. Rather, the state has filed criminal charges against the defendant. Thus, unlike in a civil suit when a lawyer represents one party in the suit, the prosecutor represents the state, and is tasked with seeking justice and a conviction in order to protect the community as well as the victim. Additionally, the defendant has certain rights under the U.S. Constitution throughout the criminal case that are not present in a civil case. Prosecutors should explain that sensitive

information shared with the prosecutor, or in the case file, may not remain confidential in a criminal case. The prosecutor may be required by law to provide known information to the defense. In short, the case will not be presented as victim versus defendant, but instead as the state versus defendant.

Prosecutors should explain that, because they are not the victim's lawyer, the attorney/client privilege does not apply to the prosecutor-victim/witness relationship. It is important to make this clear from the beginning because a prosecutor may be required to disclose information that a victim told prosecutors, perhaps under the mistaken belief that it would be kept confidential. A victim should also be told that information disclosed to an advocate at a local agency may be protected in that context, but if the victim disclosed similar information to the prosecutor and/or an advocate within the prosecutor's office, any potentially exculpatory information would be required to be turned over to the defense under *Brady*.

Although exculpatory evidence must be turned over to the defense pursuant to *Brady*, not all information received by the prosecutor is subject to disclosure; there are situations in which the prosecutor can take steps to honor a victim's privacy and protect her safety. For example, assume the victim writes down her new confidential address and phone number and gives it to the advocate with the understanding that it be given only to the prosecutor because the victim is scared the defendant will cause her further harm. During discovery, defense counsel asks for the victim's current location so he can interview her before trial. In the name of victim safety, the prosecutor can file a pretrial motion for a protective order to prevent disclosure of the victim's address and explain to the court why turning over this confidential information would be potentially harmful to the victim. This motion may need to detail the offender's history of violence and threats, any current civil or criminal orders of protection, as well as any documented violations of those protective orders and/or no-contact conditions.

The prosecutor can also argue to a court that the victim is under no obligation to speak to any attorneys prior to trial. Rather than litigate a motion that might result in the court ordering disclosure of a victim's address, the prosecutor may ask the court instead to provide the defense with an opportunity to speak to the victim over the phone, in the courthouse, or another safe location if she is willing to be

interviewed. To reduce these situations, prosecutors should inform victims at the outset that any information they give to the prosecutor's office may be subject to discovery. Victims who want to move or take shelter in a confidential location can call the prosecutor or have their community advocate check in with the prosecutor on a regular basis so that they don't fall out of communication.

The law does not expressly permit prosecutors to protect confidential information that victims provide to their offices because of the nature of their status as government actors. In the case of a victim's confidential location, however, prosecutors can argue that the communication should be protected, but this argument is grounded in public policy (the desire to protect victim safety) and perhaps state law, and there may not necessarily be a legal right against disclosure. On the other hand, a prosecutor should generally argue to protect privileged communications between a victim and a professional that are made within the context of a privileged relationship as a matter of protecting an important legal right of victims. It is important for prosecutors to appreciate the distinction between privileged communications and confidential information so that they have a firm grasp on what information may be protected even when it is the subject of a subpoena.

CONCLUSION

Prosecutors should develop an understanding of privacy laws, particularly those regarding confidentiality and privilege, not only in terms of protecting victims and supporting them throughout their participation in the criminal justice process, but also so prosecutors can properly apply these rules throughout their professional duties, including during communications, interviews, investigations, and trial preparation. Part II of this series examines common privileges within the context of intimate partner and family violence prosecutions, and provides strategies for prosecutors to ensure that privileged communications are not revealed during criminal prosecutions.

ENDNOTES

1 Viktoria Kristiansson is an Attorney Advisor with AEquitas. The author wishes to acknowledge Toolsi Meisner, JD; Tovah Kasdin, principal of the Domestic Violence Consulting Group; Charlene Whitman, Associate Attorney Advisor, AEquitas; Terry Fromson, Managing Attorney, Women's Law Project; Meg Garvin, Executive Director and Clinical Professor of Law, National Crime Victim Law Institute, Lewis & Clark Law School; and Jennifer G. Long, Director, AEquitas for their significant contributions to this article.

- 2 BLACK'S LAW DICTIONARY 1350 (8th ed. 2004)(“right of privacy”).
- 3 Prosecutors should explain privilege and confidentiality laws whenever possible but should also inform victims of their ability to have independent counsel who can advocate specifically for their privacy rights. For more information on victim's rights attorneys and referrals for pro bono representation, contact the National Crime Victims Law Institute, http://law.lclark.edu/centers/national_crime_victim_law_institute/.
- 4 BLACK'S LAW DICTIONARY 1233 (8th ed. 2004)(“private”).
- 5 BLACK'S LAW DICTIONARY 296 (8th ed. 2004)(“confidential communication”).
- 6 See generally Leslie Hagan, Communications and Violence Against Women: Michigan Law on Privilege, Confidentiality, and Mandatory Reporting, 17 T. M. COOLEY L. REV. 183 (2000); see generally Kimberly A. Tolhurst, Confidentiality: Sexual Assault and the Healthcare System, BATTERED WOMAN'S JUSTICE PROJECT (2005), available at <http://www.docstoc.com/docs/83089364/Sexual-Assault-and-the-Healthcare-System> (last visited Nov. 4, 2011).
- 7 AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, www.aequitasresource.org. Please contact AEQUITAS for compilation on privilege laws categorized by discipline.
- 8 See Loretta Frederick, *Confidentiality and Information Sharing Concerns for Advocates*, available at <http://www.mcbw.org/files/u1/confidentiality.pdf>; *The Laws in your State*, RAPE, ABUSE & INCEST NATIONAL NETWORK (RAINN), <http://rainn.org/public-policy/laws-in-your-state> (last visited March 22, 2013).
- 9 See, e.g., Colorado Constitution Article II, Sec. 16a; see also California Constitution that addresses victim's rights with respect to discovery requests directed. Civil attorneys interested in discussing these rights in detail should contact NCVLI for technical assistance. NAT'L CRIM VICTIM LAW INSTITUTE, CALIFORNIA VICTIMS' RIGHTS LAW, <https://law.lclark.edu/live/files/4920-california> (last visited March 23, 2013).
- 10 See, e.g., NEB. REV. STAT. ANN. § 29-4303 (2012)(a party seeking disclosure of confidential information must enumerate why it is seeking disclosure, that it is necessary, and attach an affidavit explaining how the confidential communication is relevant and material to the case).
- 11 Ky. R. EVID. 506 (“Counselor-Client Privilege,” overcoming privilege only where judge finds substance of communication is relevant to an essential issue; there are no alternative means to obtain a substantial equivalent of the communication, and the need for the information outweighs the interest protected by the privilege). Victims may also wish to secure the independent counsel of a victims' rights attorney, *supra* note 3.
- 12 In this article, the term “victim-witness assistant” will refer to advocates who are employed by a prosecutor's office. The term “community advocate” will refer to advocates employed by domestic or sexual violence programs or other community service organizations.
- 13 VIOLENCE AGAINST WOMEN ACT, 42 U.S.C.A. § 13925(2)(“Nondisclosure of confidential or private information”); see also, e.g., N.M. STAT. ANN. § 31-25-3 (2012).
- 14 See, e.g., Commonwealth v. Bing Sial Liang, 747 N.E.2d 112 (2001), in which the court, after a defendant “moved for production of notes of victim-witness advocate who spoke with complaining witnesses,” held that the notes were protected as prosecution work product. *But see* MASS. GEN. LAWS ANN. CH 258B, §§ 1, 3, “Work of victim-witness advocates was subject to same legal discovery obligations as that of prosecutors, and victim-witness advocates' notes were subject to same discovery rules.”
- 15 See, e.g., MASS. R. CRIM. P. RULE 14(a)(2, 5), “Unless victim-witness advocates' notes contain exculpatory evidence or “statements” of witnesses, their notes are protected as work product; however, accompany-

ing this protection is an affirmative duty on the prosecutor to review the notes of advocates and inquire about their conversations with victims, which responsibility stems from the Commonwealth's obligation to produce exculpatory evidence and, on request, material and relevant “statements” of persons.” (Cited in Commonwealth v. Bing Sial Liang, 747 N.E.2d 112 (2001)). See also, *The Laws in Your State*, RAPE, ABUSE, & INCEST NATIONAL NETWORK (RAINN), <http://rainn.org/public-policy/laws-in-your-state> (last visited March 23, 2013). See also Loretta Frederick, Confidentiality and Information Sharing Concerns for Advocates, available at <http://www.mcbw.org/files/u1/confidentiality.pdf>.

- 16 Commonwealth v. Bing Sial Liang, 747 N.E.2d 112, 119 (2001) (categorizing victim-witness advocates' notes as prosecutorial work product subject to MASS. R. CRIM. P. RULE 14(a)(2, 5)).
- 17 Bing Sial Liang, 747 N.E. 2d 112 (citing Commonwealth v. Harris, 409 Mass. 461, 470, 567 N.E.2d 899 (1991)(citing MASS. GEN. LAWS ANN. CH. 258B, §§ 3, 5)).
- 18 Bing Sial Liang, 747 N.E. 2d at 116.
- 19 VIOLENCE AGAINST WOMEN ACT, 42 U.S.C. §13925 (2006) amended by Pub. L. No. 111-320, §3817, 124 Stat. 3459, 3817 (2010).
- 20 FAMILY VIOLENCE PREVENTION AND SERVICE ACT, 42 U.S.C. §10410 (2003) amended by Pub. L. No. 111-320, §3817, 124 Stat. 3459, 3498 (2010).
- 21 VIOLENCE AGAINST WOMEN ACT, 42 U.S.C.A. §13925(b)(2)(A-B).
- 22 VIOLENCE AGAINST WOMEN ACT. 42 U.S.C.A. §13925. The Confidentiality Provisions in VAWA apply to programs funded by the Violence Against Women Act (VAWA) or the Family Violence Prevention and Services Act (FVPSA). Government entities such as the court, police, and law enforcement offices, and their employees, including prosecutors, victim advocates, and victim assistants, operate under different confidentiality rules than other VAWA or FVPSA funded grantees, so prosecutors should check the laws of the particular jurisdiction before releasing victim sensitive information in cases of violence against women. Information sharing protocols such as those within Family Justice Centers can become complex when different offices are operating in a coordinated community response capacity with memoranda of understanding among different agencies, so it is important that each office knows how its set of confidentiality laws works as a unit and with another office that may have different rules. Prosecutors should take particular caution in conferring with victims of domestic violence before releasing any information that may breach confidentiality conditions. Prosecutors can file appropriate motions as permitted in their jurisdictions, (e.g., protective orders to shield personally identifying information from their abusers) in these cases.
- 23 VIOLENCE AGAINST WOMEN ACT, 42 U.S.C.A. §13925(b)(2)(c).
- 24 VIOLENCE AGAINST WOMEN ACT, 42 U.S.C.A. §13925(b)(2)(A-B).
- 25 *Id.*
- 26 When obtaining information from alternative sources, prosecutors should also refer to victim's rights laws.
- 27 See, e.g., ALA. CODE §§ 15-23-41–15-23-42 (1975).
- 28 Prosecutors must consider evidence-based prosecution strategies at all points during the investigation and prosecution of crimes of intimate partner violence, as a victim's willingness to participate may suddenly change due to safety concerns or intimidation by the offender or someone acting on his behalf. In situations of ongoing intimidation, prosecutors must respond with charges addressing the intimidation behavior and/or file and argue forfeiture by wrongdoing motions in order to effectively keep victims safe and hold offenders accountable. Please contact AEQUITAS: The Prosecutors' Resource on Violence Against Women for additional information pertaining to evidence-based prosecutions and/or forfeiture by wrongdoing motions.

29 The discussion in this two-part series often raises discrete collateral issues relevant to investigation, trial preparation, filing and litigation of motions, and use of evidence that have been pulled out and identified as “Practice Tips” to benefit the reader.

30 *Crawford v. Washington*, 541 U.S. 36 (2004).

31 AEQUITAS, THE PROSECUTORS’ RESOURCE ON CRAWFORD AND ITS PROGENY (2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf.

32 AEQUITAS, THE PROSECUTORS’ RESOURCE ON FORFEITURE BY WRONGDOING (2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

33 HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996, 42 U.S.C. § 299b-21-22 (2005). *See generally* California: CAL. EVID. CODE § 992 (West 2011); District of Columbia: D.C. CODE § 14-307 (2011); Rhode Island: R.I. GEN. LAWS § 9-17-24 (2012); Vermont: VT. STAT. ANN. TIT. 12 § 1612 (2011).

34 Am. Med. Ass’n Code of Model Ethics Op. 5.05 (2007).

35 *See, e.g.*, Alaska: ALASKA STAT. § 08.64.369 (2011). *See also* Failure to report injuries by firearm or criminal act, 18 PA. CONS. STAT. ANN. § 5106 (2004). Notably, § 5106 contains an exception to the requirement that crimes be reported if the injuries were caused by an intimate partner.

36 Statutory Compilation: Reporting Requirements for Competent Adult Victims of Domestic Violence, AEQUITAS: The Prosecutors’ Resource on Violence Against Women, October 2011 (available at <http://www.aequitasresource.org> upon request).

37 *Id.*

38 *Id.*

39 *See, e.g.*, 18 PA. CONS. STAT. ANN. § 5106 (2004).

40 “A subpoena ordering the witness to appear and to bring specified documents or records.” BLACK’S LAW DICTIONARY 1440 (8th ed. 2004) (“subpoena duces tecum”).

41 *See, e.g.*, Delaware: DEL. R. EVID. 503 (2011); Louisiana: LA. EVID. ANN. ART. 13:3734 (2011). For civil attorneys looking for guidance on drafting medical release waivers, please contact NCVLI.

42 *See generally* Alaska: ALASKA STAT. §24.65.110; Arkansas: ARK. CODE ANN. §9-4-111 (West 2009); Colorado: COLO. REV. STAT. ANN. §12-43-218 (West 2009); Connecticut: CONN. GEN. STAT. ANN. §54-86(e) (West 2009); Delaware: DEL. CODE ANN. TITLE 11, §9403 (2009); District of Columbia: D.C. CODE §15-925 (2010); Florida: FLA. STAT. ANN §456.057 (West 2010); Georgia: GA. CODE ANN. §19-13-55 (West 2009); Hawaii: HAWAII REV. STAT. §321-473 (2009), HAW. REV. STAT. §346-10 (2009); Idaho: IDAHO CODE ANN. § 9-203 (2009); Illinois: 750 ILL. COMP. STAT. ANN. 60/227.1 (West 2009); Iowa: IOWA CODE ANN. §22.7 (West 2009); West Virginia: W.VA. CODE ANN. §48-27-312 (West 2009).

43 *See, e.g., supra* note 33.

44 “The careful editing of a document, esp. to remove confidential references or offensive material.” BLACK’S LAW DICTIONARY 1303 (8th ed. 2004).

45 *See generally* Alabama: ALA. CODE § 12-21-203 (West 2011); Alaska: ALASKA STAT. 12.45.045 (West 2011); Arizona: Ariz. Rev. Stat. § 13-1421 (West 2011); California: CAL. EVID. CODE § 782 (West 2011); Colorado: COLO. REV. STAT. § 18-3-407 (West 2011); Connecticut: CONN. GEN. STAT. § 54-86f (West 2011), CONN. CODE EVID. 4-11 (West 2011); Delaware: DEL. CODE ANN. TIT. 11, § 3509 (West 2010); District of Columbia: D.C. CODE § 22-3021-22 (West 2011); FLORIDA: FL. STAT. § 794.022 (West 2010); Georgia: GA. CODE ANN. § 24-2-2 & 3 (West 2011); Hawaii: HAW. REV. STAT. §412 (West 2010); Idaho: IDAHO R. EVID. 412 (2010), IDAHO CODE ANN. § 18-6105 (West 2011); Illinois: 725 ILL. COMP. STAT. ANN. 5/115-7.

46 *People v. Santos*, 211 Ill. 2d 395, 813 N.E.2d 159 (Ill 2004); *People v. Melillo*, 25 P.3d 769 (Colo. 2001)

47 Prosecutors can also file motions to control the defense’s access to photographs (i.e., motioning to allow defense to only view photographs in police station). Victims or victims’ counsel can and should also file or respond to rape shield motions where appropriate.

48 *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 57B.02; *see generally*, Local Services, Global Outreach, FAMILY JUSTICE CENTERS ALLIANCE (2009) <http://familyjusticecenter.com/>; Mayor’s Office to Combat Domestic Violence, FAMILY JUSTICE CENTER NEW YORK CITY (2012) <http://www.nyc.gov/html/ocdv/html/fjc/fjc.shtml>.

49 Family Justice Centers are established to provide comprehensive domestic violence victim services and support in a more efficient and effective manner by bringing all of the professionals who provide the array of assistance under one roof. Professionals represented within a Family Justice Center may include advocates from non-profit groups, victim service organizations, law enforcement officers, probation officers, governmental victim assistants, forensic medical professionals, attorneys, chaplains, and representatives from community-based organizations. For more information on the establishment of Family Justice Centers, please see the Family Justice Center Initiative at the U.S. DOJ, OVW, at <http://www.ovw.usdoj.gov/pfjci.htm>.

50 The Safety Net Project of the National Network to End Domestic Violence, <http://nnedv.org/resources/for-ovw-grantees/technology-a-confidentiality.html>. (The Safety Net Project of the National Network to End Domestic violence, along with adaptations from Julie Field, Director of the Confidentiality Institute, has created a Template Memorandum of Understanding. Visit NNEDV’s website to obtain an electronic copy of the template).

51 *See* the Safety Net Project of the National Network to End Domestic Violence, <http://nnedv.org/resources/for-ovw-grantees/technology-a-confidentiality.html> for more information and a sample Template Memorandum of Understanding: Partnership for Community Collaborations. *See also* The Confidentiality Institute, www.confidentialityinstitute.org.

52 *See* the Safety Net Project of the National Network to End Domestic Violence, <http://nnedv.org/resources/for-ovw-grantees/technology-a-confidentiality.html> for more information and a Model Victim Release of Information Form. *See also* The Confidentiality Institute, www.confidentialityinstitute.org.

53 *Brady v. Maryland*, 373 U.S. 83 (1963) (Brady material is evidence, which the prosecution must turn over, that is essential to the defense of a criminal charge and that is both favorable and material to guilt or punishment).

©2013 AEQUITAS. All Rights Reserved.

This project was supported by Grant No. 2009-TA-AX-K024 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions findings, conclusions, and recommendations expressed in this publication are those of the author and do not necessarily reflect the views of OVW.

1100 H Street NW, Suite 310 • Washington, DC 20005

P: 202-558-0040 • F: 202-393-1918