Beyond the Criminal Justice System

PROTECTING SEXUAL ASSAULT SURVIVORS' PRIVACY

This project was supported by Grant No. 15JOVW-21-GK-02205-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice.

ISSUED 2026

Protecting Sexual Assault Survivors' Privacy

I. INTRODUCTION: SURVIVORS' NEED FOR PRIVACY THROUGHOUT CIVIL LEGAL REPRESENTATION

Attorneys must protect sexual assault survivors' privacy to the extent possible. How we protect each client's privacy will depend on how their age, gender, sexual orientation, race, abilities, immigration status, and other identities converge to establish their need for those protections.

Protecting survivors' privacy can be complicated because our ability to provide legal representation typically depends on survivors disclosing information about themselves and their assault. One of the reasons to give clients a menu of options is so that they can choose how they want their information protected. Survivors know best how their safety, autonomy, and recovery will be affected by disclosures of their personal information.

II. CONFIDENTIALITY AND PRIVILEGE

This section provides an overview of four aspects of attorneys' obligations to protect client privacy[1]:

- **Attorney-Client Privilege** is an evidentiary rule that generally protects confidential communications between an attorney and client from disclosure to third persons.
- The **Work Product Doctrine** protects documents and other tangibles prepared by an attorney or their representative in anticipation of litigation from disclosure to third parties.

Victim Rights Law Center thanks Ali Wilkinson, Esq., Krista Green Pratt, Esq., and Mara O'Malley, Esq., for their contributions to this chapter. VRLC also thanks Michelle Harper, Esq., Paula Finley Mangum, Esq., Jessica E. Mindlin, Esq., Kathryn Reardon, Esq., Sarah Boonin, Esq., Julie Field, Esq., Cassandra Hearn, Sybil Hebb, Esq., and Lydia Watts, Esq. for their contributions to a previous version of this chapter.

Preparation of this material was supported by grant number 15JOVW-21-GK-02205-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, and conclusions expressed are those of the author(s) and do not necessarily represent the views of the U.S. Department of Justice.

[1] Victim Rights Law Center (VRLC) created "Client-Centered Privilege and Confidentiality Explanations" to help explain attorney-client privilege and confidentiality to clients. Available in English, Spanish, Haitian Creole, and Hmong in VRLC's Resource Library at https://victimrights.org/resource-library/.

- **Ethical Confidentiality Rules** prohibit an attorney from disclosing communications with their client to third persons.
- **Violence Against Women Act (VAWA) Confidentiality Provisions** prohibit the disclosure of personally identifying information when attorneys provide legal assistance and/or victim services unless certain conditions are met.

Attorney-client privilege, the work product doctrine, and ethical confidentiality rules are jurisdiction specific. Attorneys need to know the specific laws where they practice. Similarly, the VAWA confidentiality provisions require knowledge of jurisdiction-specific statutory mandates and case law.

A. Attorney-Client Privilege

Jurisdictions across the United States – federal,[2] tribal, state, territorial, and the District of Columbia – typically include an attorney-client privilege. The privilege is driven by the laws of each jurisdiction. The privilege generally protects an attorney and the attorney's client from being required to provide testimony (written or oral) that would reveal the content of confidential communications between the attorney and the client. If the privilege applies, no one can require the attorney to disclose the privileged information except for the client. This privilege is meant to protect and encourage honest, open communications between an attorney and their clients, leading to more effective legal services.[3]

The scope of the privilege, when it attaches, exceptions, and waiver of the privilege are covered below.

1. Scope of the Privilege

For the privilege to apply, four conditions must be met:

a. There must be a *communication*.

[2] No federal rule is directly on point codifying the privilege, but it is subsumed within F.R.E. 501, which provides that common law privileges apply.

[3] *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (stating that the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

b. The communication must be made between *privileged parties*.

c. The communication must be *confidential*.

d. The communication must be made for the purpose of *obtaining or providing legal advice*.[4]

Each of these requirements is discussed below. Waiver and exceptions to the privilege are also discussed.

a. Communication

Attorney-client privilege protects "communications." Communications can include not only written and oral communications, but also physical gestures – like nodding or shaking one's head, facial expressions, or holding up a certain number of fingers – so long as the gestures are meant to convey information to the attorney.[5] Observations, however, are not necessarily communications.

Facts do not become privileged simply because they have been communicated to an attorney.[6] For instance, a client could invoke the privilege if asked, "Did you tell your attorney that you invited the assailant to your home?" However, the privilege could not be invoked if the client was asked, "Did you invite the assailant to your home?" Similarly, preexisting documents that are not privileged do not become privileged by virtue of sending them to an attorney.[7]

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[4] Rest. (Third) of Law Gov. Lawyers § 68.

[5] Rest. (Third) of Law Gov. Lawyers § 69(e); *City & County of San Francisco v. Superior Court*, 231 P.2d 26, 30 (Cal. 1951) ("The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney.").

[6] *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981) ("'The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning a fact is an entirely different thing. The client cannot be compelled to answer the question 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of fact into his communication to his attorney.'" (quoting *City of Philadelphia, Pa. v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

[7] Rest. (Third) of Law Gov. Lawyers § 69(j).

b. Privileged Parties

Existence of Attorney-Client Relationship

In order for the privilege to attach, an attorney-client relationship must exist. While a retainer agreement will make this relationship clear, a retainer agreement is not required. Courts generally agree that an attorney-client relationship exists when:

- The client reasonably believes that they are represented by the attorney;[8] or
- A prospective client is seeking legal advice from the attorney.[9]

Presence of Third Parties

For the privilege to attach, the communication must be between only the attorney and the attorney's client. However, an important exception in certain jurisdictions allows specific other people to be present during the communication. These people can be divided into two groups: attorney agents and client agents.

Attorney Agents

In some jurisdictions, an attorney's agents are those individuals who assist the attorney in legal representation. The attorney-client privilege can extend to others "when the purpose of the communication is to assist the attorney

[8] *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997) ("[C]ourts have found the privilege applicable where the client reasonably believed that a poseur was in fact a lawyer, reasonably believed that a lawyer represented the client rather than another party, or reasonably believed that a conversation with a lawyer was confidential, in the sense that its substance would not be overheard by or reported to anyone else.").

[9] *Matter of Bevill, Bresler & Schuman Asset Mgmt. Corp.*, 805 F.2d 120, 124 n.1 (3d Cir. 1986) ("The attorney-client privilege protects conversations between prospective clients and counsel as well as communications with retained counsel."); *Richardson v. Sexual Assault/Spouse Abuse Resource Center, Inc.*, 764 F. Supp. 2d 736, 742 (D. Md. 2011) (finding that intake call to SARC was privileged).

in rendering advice to the client."[10] Thus, courts have found that the presence of the following agents will not necessarily destroy the privilege:

- Support staff, such as a paralegal, secretary, or receptionist;[11]
- A translator;[12]
- An investigator who will be assisting with the case;[13]
- A physician or mental health provider.[14]

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[10] *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995). *But see Merck Eprova AG v. Gnosis S.p.A.*, No. 07 CIV 5898 RJS JCF, 2010 WL 3835149, at *2 (S.D.N.Y. Sept. 24, 2010) ("when an attorney seeks out a third party to provide information rather than to act as a translator for client communications, the communications between the attorney and the third party are not privileged").

[11] *United States v Kovel*, 296 F.2d 918, 926 (2d Cir. 1961) ("[T]he complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. The assistance of these agents being indispensable to [the lawyer's work] and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.") (citing to 8 Wigmore, Evidence, §2301). *But see Dabney v. Inv. Corp. of Am.*, 82 F.R.D. 464, 465–66 (E.D. Pa. 1979) (privilege was not available for communications with a law student who was not acting under the direct supervision of a member of the Bar).

[12] *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995); *Farahmand v. Jamshidi*, No. Civ.A 04-542 (JDB), 2005 WL 331601, at *2 (D.D.C. Feb. 11, 2005) (holding that sending privileged document to plaintiff's son-in-law did not constitute a waiver of the attorney-client privilege where he translated the document).

[13] *Clark v. City of Munster*, 115 F.R.D. 609, 613 (N.D. Ind. 1987) ("Statements made by [the client] to a private investigator employed by his attorney are protected by the attorney-client privilege."). *But see Claude P. Bamberger Int'l, Inc. v. Rohm and Haas Co.*, Civ. No. 96-1041, 1997 WL 33768546, at *2–3 (D.N.J. Aug. 12, 1997) (finding that memorandum summarizing communications between investigator and client's employees was not privileged because it was not made for the purpose of securing legal advice, but rather was to search for business improprieties within the corporation).

[14] *City & Cnty of San Francisco v. Superior Ct. In & For City & Cnty. of San Francisco*, 231 P.2d 26, 30 (Cal. 1951) ("[W]hen communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination without fear that the latter will be compelled to reveal the information disclosed."); *In re Houseman*, 66 S.W.3d 368, 372–74 (Tex. Ct. App. 2001) (privilege applied to communications between mental health professional and client when

Inquiry about an attorney's agents is a fact-sensitive and jurisdiction-specific inquiry; caution should be used when introducing third parties to the communications between attorneys and clients.

Client Agents

The presence of third parties on behalf of the client may not necessarily break the privilege where reasonably necessary to the consultation, including to facilitate communication, and where the client intends for the communications to remain confidential despite the presence of the third person.

Statutes and courts differ widely in how broadly they define client agents, with some holding that the presence of a third person must be strictly necessary. Others take a more nuanced view. But generally, the stronger the need for the third person to participate in the communication, the more likely a court will find that the privilege is not broken. Generally, but not always, a person who is present merely for moral support will break the

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mental health professional was hired by attorney in guardianship proceeding to assess client's mental competency). *But see Murray v. Bd. of Ed.*, 199 F.R.D. 154, 156–57 (S.D.N.Y. 2001) (finding the privilege did not apply where the client met with the psychiatrist on her own behalf rather than at the direction of her attorney in preparation for trial); *Lewis v. State*, 709 S.W.2d 734, 736 (Tex. Ct. App. 1986) (presence of sexual assault survivor's sister and caseworker broke the privilege because the survivor had adverse interests with the sister at the time).

Many jurisdictions have an advocate-client privilege, and all jurisdictions have a psychotherapist-patient privilege. Additionally, the Supreme Court recognized a federal psychotherapist privilege in *Jaffee v. Redmond*, 518 U.S. 1, 2 (1996).

The existence of these "double" privileges may also be grounds for asserting the privilege. *See* Rest. 3d Law Gov. Lawyers § 71, b ("The presence of a stranger to the lawyer-client relationship does not destroy confidentiality if another privilege protects the communications in the same way as the attorney-client privilege. Thus, in a jurisdiction that recognizes an absolute husband-wife privilege, the presence of a wife at an otherwise confidential meeting between the husband and the husband's lawyer does not destroy the confidentiality required for the attorney-client privilege."). However, this is still a developing area of law, and should not be relied upon in determining whether an advocate or therapist is necessary to the communication. VRLC has various jurisdiction-specific FAQs that can help you identify such privileges and related laws. Please request these FAQs by contacting us at TA@victimrights.org.

privilege.[15] If another role requires a third party's presence (i.e., to assist an individual with a disability, to interpret or translate, or to otherwise help make communications clearer), a court is more likely to find the privilege remains.[16] Many jurisdictions do not recognize a privilege for that third-party's affirmative communications unless it otherwise meets the attorney-client privilege requirements.

Some courts have found that the privilege remained intact notwithstanding the presence of a third person who has the following relationship with the client:

- Spouse;[17]

[15] *Wichansky v. Zowine*, No. CV-13-01208-PHX-DGC, 2015 WL 5693521, at *2 (D. Ariz. Sept. 29, 2015) (finding friend who attended attorney-client sessions broke privilege when he was there just for support); *Swyear v. Fare Foods Corp.*, No. 316CV01214SMYRJD, 2017 WL 3503401, at *2 (S.D. Ill. July 12, 2017) ("Here, it appears that Swyear's mother was present during the initial consultation to provide emotional or moral support. While the Court is not unsympathetic to Swyear's position, the presence of her mother during the consultation waived the attorney-client privilege."); *Fox v. Alfini*, 432 P.3d 596, 602 (Colo. 2018) (presence of parents of 30-year-old stroke victim deemed not necessary, thereby destroying any privilege, when the victim had no signs of stroke and did not otherwise display a need for parents to assist her in communicating with her attorney). *But see Accomazzo v. Kemp*, 319 P.3d 231, 235–36 (Ariz. Ct. App. 2014) (presence of parents did not break the privilege where they were there to support the daughter, help the daughter understand the legal process, and the daughter intended that the communications remain confidential); *Stroh v. General Motors Corp.*, 213 A.D.2d 267, 268 (N.Y. App. Ct. 1995) (presence of daughter of elderly client did not destroy the privilege when the daughter transported her to the law office and "put her sufficiently at ease to communicate effectively with counsel").

[16] *Stevens v. Brigham Young University-Idaho*, No. 4:16-cv-00530-DCN, 2018 WL 2974388, at *4 (D. Idaho June 11, 2018) (presence of friend, who was there to assist client with her disabling anxiety, did not break the privilege over communications between client and her attorney).

[17] *U.S. v. Rothberg*, 896 F. Supp. 450, 454 n.7 (E.D.Pa. 1995) (noting that "[b]ecause of spousal confidentiality, it was ruled that communication between client and lawyer with wife present did not waive privilege). *But see State v. Gordon*, 504 A.2d 1020, 1025–26 (Conn. 1985) (presence of spouse was not necessary to the representation and therefore her presence broke the attorney-client privilege protection), *distinguished by Theresa Bowling, M.D. v. Stamford Anesthesiology Servs., P.C.*, No. X08FSTCV165016258S, 2019 WL 5067071, at *2 (Conn. Super. Ct. Sept. 11, 2019) (finding that where there was a "reasonable expectation of confidentiality" and the spouse did not indicate the desire to testify, the marital privilege was maintained and therefore the attorney-client privilege remained intact).

- Parent;[18]
- Other family member[19] or, in very limited instances, a friend.[20]

[18] *United States v. Bigos*, 459 F.2d 639, 643 (1st Cir. 1972) (presence of father did not break the privilege where the record showed the intent to preserve confidentiality); *Accomazzo v. Kemp*, 319 P.3d 231, 235–36 (Ariz. Ct. App. 2014) (presence of parents did not break the privilege where they were there to support the daughter and the daughter intended that the communications remain confidential); *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (presence of father did not break the privilege when parties intended the communication to be kept privileged, and the father acted "in a normal and supportive parental fashion" in being at the conference with his son and the attorney); *Schreiber v. Kellogg*, No. 90-5806, 1992 WL 309632, at *1 (E.D. Pa. Oct. 19, 1992) ("[I]t appears that defendant's father was taking an ordinary parental interest and advisory role in his son's legal affairs. The presence of a parent in such a capacity at a meeting with his son and his attorney does not defeat the attorney-client privilege."); *De Los Santos v. Superior Court*, 613 P.2d 233, 236 (Cal. 1980) (statements made by a minor to his parent as guardian ad litem in connection with questions asked by the minor's attorney were privileged). In addition, some states have a statutorily recognized parent-child privilege. VRLC has jurisdiction-specific FAQs and other resources to help understand the various privacy laws that may come into play when representing minors. Please request these resources by contacting us at TA@victimrights.org.

[19] *Stroh v. General Motors Corp.*, 213 A.D.2d 267, 268 (N.Y. App. Ct. 1995) (stating: "We are here presented with an aged woman required to recall, and perhaps relive, what was probably the most traumatic experience of her life. Her daughter selected the law firm to represent her, transported her to the law office, and put her sufficiently at ease to communicate effectively with counsel" and finding the privilege applied). *But see United States v. Stewart*, 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003) (forwarding otherwise privileged document to the client's daughter broke the attorney-client privilege); *Matter of Guardianship of Walling*, 727 P.2d 586, 592 (Okla. 1986) (presence of grandmother broke the privilege when she was not reasonably necessary for the transmission of the communication).

[20] A friend or non-family member could be necessary to communications. However, the majority of case law has found a friend present for moral support does break the privilege. *See Total Marketing Technologies, Inc. v. Angel Medflight Worldwide Air Ambulance Serv.*, No. 8:10-cv-2680-T-33TBM, 2012 WL 2368880, at *1–2 (M.D. Fla. June 22, 2012) (presence of friend, who was at meeting in a supportive role, broke the privilege); *United States v. Evans*, 113 F.3d 1457, 1463 (7th Cir. 1997) (presence of friend for moral support broke the privilege); *People v. Doss*, 514 N.E.2d 502, 505 (Ill. Ct. App. 1987) (finding it was reversible error to accord privilege to the attorney-client communications where the third party was merely providing moral support who despite his "low intelligence level. . . needed no help getting across what was important to the[] attorney").

c. Confidential Communications

The communications made must be intended to be "confidential" when they are made.[21] The underlying information, however, does not need to be confidential; the substance of the information communicated is not typically determinative.[22]

As discussed above, the presence of a third party tends to show that there was no expectation of confidentiality, which destroys the privilege. Speaking with an attorney in a public space (such as an elevator with other passengers or where others can easily overhear) can also destroy the privilege.[23]

In addition, the communications must be intended to remain confidential. That means that subsequently sharing an otherwise privileged communication with a third party can break the privilege.[24]

d. Legal Advice

Finally, the communications must be made for the purpose of obtaining legal advice.

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[21] REST. (THIRD) OF THE LAW GOV. LAWYERS § 71 ("A communication is in confidence . . . if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person . . . or another person with whom communications are protected under a similar privilege.")

[22] *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 388 (D. D.C. 1978) ("[T]he Court finds that the communication need not be of confidential information for the privilege to apply. Instead, the Court holds that a client communication is privileged if it was made with the intention of confidentiality, and an Attorney communication is privileged if it would directly or indirectly reveal confidential communications by the client and if it was considered confidential by the client." (internal citations omitted)).

[23] REST. (THIRD) OF THE LAW GOV. LAWYERS § 71, cmt. c ("The circumstances may indicate that the communicating person knows that a nonprivileged person will learn of it, thus impairing its confidentiality. For example, a client may talk with a lawyer in a loud voice in a public place where nonprivileged persons could readily overhear.").

[24] *People v. Harris*, 442 N.E.2d 1205, 1208 (N.Y. 1982) (finding no expectation of confidentiality when client spoke to attorney over the phone with police officer and another person present). *But see People v. O'Neil*, 986 N.Y.S.2d 302, 309–10 (Dist. Ct. 2014) (upholding attorney-client privilege where Defendant was hand-cuffed to a wall near the telephone and the police officer present "made no effort to move himself to a position where he could not hear the Defendant's conversation with his attorney").

Generally, courts have held that background information (such as the existence and purpose of the attorney-client relationship,[25] the client's identity,[26] and fees paid[27]) is not privileged.

When a communication contains both legal advice and non-privileged content, many courts apply the "predominant" or "primary" purpose test. Under this test, if *one* of the significant purposes of the communication was to obtain legal advice, the privilege will apply to the whole communication.[28]

2. Exceptions to the Privilege

There are exceptions to the attorney-client privilege, but most are largely applicable in corporate settings[29] or multi-client settings.[30] Of general applicability, courts consistently recognize the crime-fraud exception.[31] Under this exception, when a client speaks with an attorney in order to further an ongoing or future crime or fraud, the communications are not

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[25] *Constand v. Cosby*, 232 F.R.D. 494, 503 (E.D. Pa. 2006) ("However, the fact of whether the lawyers gave plaintiff legal advice is not protected by the attorney client privilege and must be disclosed.").

[26] *Lefcourt v. U.S.*, 125 F.3d 79, 86 (2d Cir. 1997) ("As a general rule, a client's identity and fee information are not privileged.").

An exception exists when the revealing of the client's identity would itself reveal a confidential communication. *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 957 F.3d 505, 510 (5th Cir. 2020).

[27] *Berliner Corcoran & Rowe LLP v. Orian*, 662 F. Supp. 2d 130, 134 (D. D.C. 2009) ("[T]he weight of authority holds that communications relating solely to the payment of attorneys' fees are not covered by the attorney-client privilege unless they reveal confidences about the nature of legal services rendered.").

[28] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759–60 (D.D.C. 2014); *Smith-Brown v. Ulta Beauty, Inc.*, No. 18 C 610 (N.D. Ill. June 27, 2019) (collecting cases). Not all jurisdictions follow this approach, *see e.g., In re Polaris, Inc.*, 967 N.W.2d 397, 408 n.1 (Minn. 2021) (noting that the Minnesota Supreme Court in applying the "predominant purpose test" requires that legal advice must be *the primary* purpose of the communication); check your jurisdiction for the applicable test.

[29] For example, the fiduciary exception allows for a corporation's shareholders to pierce the corporation's attorney-client privilege.

[30] When joint representation exists, the common interest exception means that neither client can assert the attorney-client privilege against the other client if a subsequent litigation relating to the subject matter of the prior joint representation occurs.

[31] *U.S. v. Zolin*, 491 U.S. 554, 562–63 (1989).

privileged.[32] Statements about a past or completed crime, however, are generally privileged unless the client is seeking advice on how to cover up the crime.[33] Note, however, that confidentiality protections of the VAWA may protect communications that fall within the crime-fraud exception. See below for more information about VAWA confidentiality.

3. Waiver of the Privilege

The client, not the attorney, holds the attorney-client privilege. That means that the attorney cannot waive the privilege, even after the client's death, unless they do so while acting as the client's agent.[34]

The privilege can be waived explicitly. This occurs when a client, or the attorney on the client's behalf, discloses privileged communications to an unprotected third party.[35]

The attorney-client privilege can also be implicitly waived in the following circumstances:

- When a client testifies concerning the attorney-client privilege;
- When a client places the relationship directly at issue; or
- When a client asserts reliance on an attorney's advice as an element of a claim or defense.[36]

Waiver must be intentional. Accordingly, a court may find no waiver if the disclosure was inadvertent, the holder of the privilege took reasonable

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[32] *In re Grand Jury Proceedings*, 417 F.3d 18, 22 (1st Cir. 2005).

[33] *Id.*

[34] *Swidler & Berlin v. U.S.*, 524 U.S. 399, 410–11 (1998).

[35] *Weil v. Inv./Indicators, Research and Mgmt, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) ("[I]t has been widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject.") (collecting cases).

[36] *Regions Bank v. Kaplan*, No. 8:12-cv-1837-T-17MAP, 2015 WL 5687882, at *2 (M.D. Fla. Sept. 25, 2015). *See also United States v. Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) ("[A] client's offer of his own or his attorney's testimony as to a specific communication constitutes a waiver as to all.").

steps to protect the disclosure, and the holder promptly took reasonable steps to rectify the error.[37]

B. Work Product Doctrine

The work product doctrine protects documents and other tangibles prepared by an attorney or an attorney's representative in anticipation of litigation from disclosure to third parties.[38] Work product immunity can also extend to third parties, such as third-party consultants.[39] Unlike with the attorney-client privilege, the documents do not need to be "communications" or relate to confidential matters.

The purpose of the work product doctrine is to allow attorneys to develop evidence and their theory of the case with certain assurances that the work may not be discovered by their adversary.[40]

The work product doctrine is considered a qualified immunity. Materials are subject to discovery by the opposing party if that party shows that it "has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[41]

However, even upon this showing, an attorney's mental impressions, conclusions, opinions, or legal theories are generally protected from disclosure.[42]

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[37] Fed. R. Evid. 502(b).

[38] FED. R. CIV. P. 26(b)(3)(A).

[39] *Id*.

[40] *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

[41] FED. R. CIV. P. 26(b)(3)(A)(ii). *See also Jinks-Umstead v. England*, 232 F.R.D. 142, 147 (D.D.C. 2005) (finding even if there were substantial need, the work product doctrine would not be overcome because the information could have been obtained through other discovery methods, such as interrogatories or depositions).

[42] FED. R. CIV. P. 26(b)(3)(B); *Security Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 32 (D. Conn. 2003) (stating that the work product doctrine was waived as to a memorandum discussing investigative findings where the individual spoke about the memorandum at deposition; however, the mental impressions and opinions of counsel would not be waived because the testimony was limited to findings and the bases therefor).

As with the attorney-client privilege, the work product protections can be waived upon voluntary disclosure[43] and are subject to the crime-fraud exception.[44]

C. Attorney-Client Confidentiality

Attorney-client confidentiality is different from the attorney-client privilege. Confidentiality rules, often part of the rules of professional conduct, are typically found in jurisdictions' ethics codes. Attorneys owe a duty of confidentiality to their clients, which covers all information learned during the attorney-client relationship.[45] A breach of confidentiality can lead to disciplinary proceedings and attorney sanctions.

The duty of confidentiality is broader than the attorney-client privilege. Confidentiality covers all information pertaining to the legal representation, not just information learned from the client. This breadth is intended to safeguard client confidences and trust[46] and to allow the attorney to fully develop the facts essential to the representation.[47]

Unlike the attorney-client privilege, which is focused on what others can obtain from the attorney or client during discovery and litigation, exceptions to attorney-client confidentiality focus on when the attorney can disclose client confidences other than through compulsion of law. As with the attorney-client privilege and work product doctrine, these confidentiality rules are jurisdiction- and fact-specific.

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[43] *United States v. Nobles*, 422 U.S. 225, 239–40 (1975).

[44] *Jinks-Umstead v. England*, 232 F.R.D. 142, 145 (D.D.C. 2005) ("Work product protection can be overcome by a showing that the client consulted with the attorney in furtherance of a crime or fraud.").

[45] *See* ABA MODEL RULES OF PROF'L CONDUCT (hereinafter "MODEL RULES"), R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/.

[46] *See, e.g., Matter of Venie*, 395 P.3d 516, 524 (N.M. 2017) ("The confidences that clients share with their attorneys must be vigorously protected as the attorney-client relationship cultivates the trust imperative to the attorney's efficient representation of the client.").

[47] *State v. Boatwright*, 401 P.3d 657, 662 (Kan. Ct. App. 2017).

The American Bar Association provides a model rule on confidentiality, which all jurisdictions have adopted to some extent.[48] However, jurisdictions vary significantly as to the extent of any exception to confidentiality under their rules of professional conduct.

Under the Model Rule 1.6, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation,[49] or the disclosure is permitted by paragraph (b)."[50]

Under Model Rule 1.6(b), an attorney may reveal information relating to the representation of a client to the extent the attorney reasonably believes the disclosure is necessary in certain circumstances, including:

1. To prevent reasonably certain death or substantial bodily harm;[51]
2. To prevent the client from committing a future crime or fraud that is reasonably certain to result in substantial injury to the financial

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[48] *See* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/.

[49] Commentary to MODEL RULE 1.6 lists as examples that an attorney may be impliedly authorized "to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter." Model Rules, *supra* note 44, at R. 1.6, cmt. 5.

[50] MODEL RULES, *supra* note 44, at R. 1.6(a).

[51] Jurisdictions differ as to whether an attorney is permitted or required to disclose in this circumstance. *Compare In re Grand Jury Investigation*, 902 N.E.2d 929, 931 (Mass. 2009) ("While nothing in rule 1.6(b) required Attorney Doe to disclose [the client's] communications to the judge or police, he had discretion to do so.") *with* F.S.A. Bar Rule 4-1.6(b) (When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another.").

There may also be exceptions requiring disclosure in your jurisdiction's child or elder abuse reporting statutes. VRLC has jurisdiction-specific FAQs and other resources to help understand the various privacy laws that may come into play when representing minor. We also have access to jurisdiction-specific information about protecting the privacy of elders and adults with disabilities. Please request these resources and information by contacting us at TA@victimrights.org or visit our Resource Library at https://victimrights.org/resource-library/.

interests or property of another, when the client has used the attorney's services to further the crime;[52]

3. To prevent or mitigate substantial injury to the financial interests or property of another that is reasonably certain to result, or has resulted, from the client's commission of a crime or fraud, when the client has used the attorney's services to further the crime;[53]
4. To seek legal advice about the attorney's compliance with the rules;
5. To establish a claim or defense between an attorney and client;[54]
6. To comply with a law or court order; or
7. To detect and resolve a conflict of interest arising from an attorney's change in employment, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Note, however, that confidentiality protections of the VAWA may protect communications that may be revealed under a jurisdiction's attorney-client

[52] What is "reasonably certain" is subjective and can lead to sanctions against an attorney who reveals information too readily. *See The Florida Bar v. Knowles* 99 So.3d 918, 922 (Fla. 2012) (finding it was improper for attorney to disclose client's statement that she would do anything to avoid deportation, including lying to the court, because there was not a sufficient basis for the attorney to reasonably believe that her client was going to commit a crime by lying to the court at the upcoming hearing).

[53] Commentary to the Model Rules clarifies that this exception "addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated." MODEL RULES, *supra* note 44, at R. 1.6, cmt. 8. However, this exception does not apply when a person has committed a crime or fraud and then employs the lawyer for representation concerning that offense because the attorney's services must have been used to perpetrate the fraud. *Id. See also In re Mack*, 519 N.W.2d 900, 902 (Minn. 1994) (finding a violation of Rule 1.6, among others, when attorney knew that client lied in a deposition to cover up financial fraud, but did nothing to correct it).

[54] This rule also generally allows an attorney to reveal client confidences if necessary to establish or collect a lawyer's fee. *See generally In re Disciplinary Proceedings Against Boelter*, 985 P.2d 328, 334 (Wash. 1999) (attorney was permitted, but not required, to reveal client confidences or secrets in litigation to recover fees if he reasonably believed the disclosure to be necessary); ABA FORMAL OPINION 10-456 (July 14, 2010) ("[A] lawyer may disclose information protected by the rule only if the lawyer 'reasonably believes [it is] necessary' to do so in the lawyer's self-defense"); *In re Disciplinary Proceedings Against Thompson*, 847 N.W.2d 793, 800 (Wis. 2014) (stating that the attorney must have genuinely believed the disclosure to have been necessary, and the lawyer's belief must be objectively reasonable).

confidentiality law. See below for more information about VAWA confidentiality.

Like with the attorney-client privilege, the duty of confidentiality extends through the termination of the attorney-client relationship and does not end with the client's death.[55]

D. VAWA Confidentiality

Victim service providers, the definition for which includes legal assistance providers, who receive funding from the Office of Violence Against Women (OVW) have additional legal confidentiality requirements under VAWA.[56] OVW-funded attorneys are subject to these requirements if they provide OVW-funded legal assistance. VAWA defines "legal assistance" to include assistance in specific matters and proceedings.[57] If OVW-funded attorneys provide "legal assistance" or other "victim services," then they must adhere to the VAWA confidentiality provisions.

VAWA prohibits disclosure of personally identifying information or individual information collected in connection with victim services requested, utilized, or denied by the individual without:

- The informed, written, reasonably time-limited consent of the individual;[58]
- A statutory mandate to disclose;
- A mandate to disclose created by case law; or
- A court order to disclose the information.[59]

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[55] *McNelis v. Crain*, 78 N.E.3d 1237, 1241 (Ohio Ct. App. 2016).

[56] 34 U.S.C. § 12291 and 28 C.F.R. § 90.4.

[57] 34 U.S.C. § 12291(a)(24).

[58] VRLC has several templates for VAWA-compliant releases of information, including a general release, a Spanish-English release, and a plain language release, all of which can be found in VRLC's Resource Library at https://victimrights.org/resource-library/.

[59] 34 U.S.C. § 12291(b)(2) and 28 C.F.R. § 90.4(b)(3)(i). The Family Violence Prevention and Service Act (42 U.S.C. § 10402 and 45 C.F.R. § 1370.4) and the Victims of Crime Act (28 C.F.R. § 94.115) also have similar nondisclosure provisions. VRLC has a Comparison Chart with these laws which you may request by contacting us at TA@victimrights.org.

Personally identifying information (PII)[60] or personal information includes:

- First and last name;
- Home or other physical address;
- Contact information (including email or telephone number);
- Social Security number, driver license number, passport number, or student identification number; and
- Any other information that would serve to identify the individual, including date of birth, racial or ethnic background, or religious affiliation.[61]

These VAWA confidentiality obligations attach to the entire program that is providing victim services, even if not everyone within the program is providing victim services (as defined by 34 U.S.C. § 12291(a)(51)).[62]

If VAWA confidentiality applies, it requires that clients' personally identifying information not be disclosed even when *permitted* by a jurisdiction's law. However, case law in a jurisdiction may establish that ethical rules that are *mandates* (e.g., that an attorney *shall* regularly communicate with their client) may establish a court mandate under VAWA that would allow disclosure. The analysis of whether case law establishes a court mandate would include consideration of a court's authority over the practice of law in the jurisdiction, which may require review of relevant case law.

III. OTHER FEDERAL PRIVACY LAWS

Other federal laws that impact the privacy of survivor clients include:

The Victims of Crime Act of 1984 (VOCA, 28 C.F.R. § 94.102, *et seq.*) and the **Family Violence Prevention and Services Act** (FVPSA, 42

[60] 34 U.S.C. § 12291(a)(25). PII is defined at "individually identifying information for or about an individual," including information likely to lead to disclosure of the individual's location.

[61] Id.

[62] 34 U.S.C. § 12291(b)(2) (describing these obligations as attaching to the grantee or subgrantee organization). See too, Question 11, pg. 5, OVW's "Frequently Asked Questions (FAQs) on the VAWA Confidentiality Provision (34 U.S.C. § 12291(b)(2)," October 2017.

U.S.C. § 10401, *et seq.*). VOCA and FVPSA contain confidentiality protections that are very similar to those found in VAWA.[63]

The Health Insurance Portability and Accountability Act of 1996 (HIPAA, 45 C.F.R., Part 160 and Subparts A and E of Part 164). HIPAA prohibits health care providers from sharing protected health information with third parties without a patient's written authorization. There are some exceptions, including disclosures that are mandated by law or a court order.[64]

Title X of the Public Health Service Act (42 U.S.C. § 300, *et seq.*) allows for access to comprehensive family planning services and related preventative health services. Title X requires documented consent to release certain personal information.[65]

The Family Educational Rights and Privacy Act (FERPA, 20 U.S.C. § 1232g; 34 C.F.R. Part 99.) FERPA allows parents of students, and students aged 18 and older, to inspect, review, and challenge education records, and to require written consent for the release of students' education records. (Exceptions apply.)[66]

Title IX (20 U.S.C. § 1681) and **The Jeanne Clery Act** (20 U.S.C. § 1092(f))**.** Title IX and the Jeanne Clery Act contain provisions that may apply to the confidentiality expectations for campus-based responses to gender-based violence.

Prison Rape Elimination Act Standards (28 CFR § 115, *et seq*.)**.** The Prison Rape Elimination Act (PREA) was enacted in 2003. The regulations, implemented in 2012, are the PREA Standards. The PREA Standards are

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[63] For additional information about VAWA, VOCA, and FVPSA confidentiality laws and how they compare to each other, see "VAWA, VOCA, and FVPSA Confidentiality Laws: A Comparison Chart," available in VRLC's Resource Library at https://victimrights.org/resource-library/.

[64] For additional information about VAWA, HIPAA, FERPA, and Title X confidentiality laws and how they compare to each other, see "VAWA, HIPAA, FERPA, and Title X Privacy Laws: A Comparison Chart," available in VRLC's Resource Library at https://victimrights.org/resource-library/.

[65] Id.

[66] Id.

intended to eliminate sexual abuse in confinement and include some requirements for facilities to protect the privacy of survivors in custodial settings.

Brady obligations – exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963). The U.S. Supreme Court decision *Brady v. Maryland* established the rule that exculpatory evidence received by law enforcement or a prosecutor's office (including victim-witness assistants employed by these government entities) must be turned over to the defense.

IV. TRIBAL PRIVACY LAW

Attorneys and clients who are affiliated with Tribes or Alaska Native Villages may have additional confidentiality protections. With more than five hundred Tribes and Villages in the United States, the relevant laws may be established by the Tribe or Village or may be found in state or federal law.

Some Tribes and Villages have codified attorney-client privilege laws.[67] Other Tribes' laws are conveyed through oral tradition. Attorneys who work with indigenous survivors need to understand the relevant privilege laws that may protect their clients' privacy. Similarly, practitioners need to be aware of any mandatory reporting laws in the Tribes' or Villages that may impact client confidentiality.

In addition to determining the legal confidentiality protections that apply, attorneys need to consider confidentiality issues that can come up with legal work in remote and geographically challenging locations. Attorneys need to manage releases of information and ensure that they can have confidential communications with clients when they live far from where the attorney works. Attorneys need to ensure that they protect a client's confidentiality and privilege when engaging with Tribal and Village governments.

V. OTHER JURISDICTION-SPECIFIC PRIVACY-RELATED LAWS

Mandatory reporting laws. Most jurisdictions have mandatory reporting laws requiring certain individuals to report abuse or injury to law

[67] For example, attorney-client privilege law may be found in the Tualip Tribal Court Code at § 2.05120(2).

enforcement or social services agencies. Common examples of acts that must be reported include child abuse; elder abuse; abuse of adults with disabilities; and non-accidental injuries, such as gunshot and stab wounds (only health care providers are typically required to report non-accidental injuries).[68]

Duties to protect. Many jurisdictions have statutes or case law that create a mandatory or permissive duty to protect a client and/or a third party from harm. Mental health professionals are typically the only people with such duties in a jurisdiction. These duties may require mental health professionals to disclose personally identifying information to law enforcement or someone else.

Rape shield laws. A sexual assault survivor's prior sexual conduct, including prior sexual assaults, is generally protected from disclosure in court by "rape shield" laws. These laws prohibit a survivor's previous sexual history or conduct from being admitted as evidence. The majority of jurisdictions and the federal government have enacted rape shield laws, although potentially subject to certain limited exceptions.[69] These statutes

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[68] For more information on mandatory reporting laws, see VRLC's jurisdiction-specific FAQs (the Minors Privacy FAQs go into detail on child abuse reporting laws and the Clergy Privacy FAQs cover clergy mandatory reporting requirements), "Mandatory Reporting of Non-Accidental Injuries: A State-by-State Guide," and our Minors Privacy Toolkit, which includes a flow chart for mandatory reporting of child abuse that is also relevant to other types of reporting. All resources are available in VRLC's Resource Library at https://victimrights.org/resource-library/.

[69] *See, e.g.*, **Alabama**: ALA. CODE § 12-21-203(b) (evidence relating to the past sexual behavior of the victim shall not be admissible as direct evidence or on cross examination of the victim or other witnesses); **California**: CAL. EVID. CODE § 1103(c)(1) & (2) (opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct or any such evidence is not admissible to prove consent; nor is evidence of the manner in which the victim was dressed at the time of the assault); **Florida**: FLA. STAT. § 794.022(2) & (3) (evidence of prior consensual sexual activity between victim and any person other than offender is not admissible, and reputation evidence relating to a victim's prior sexual conduct or evidence presented for purpose of showing the manner of dress of victim at the time of assault is not admissible); **Illinois**: 725 ILL. COMP. STAT. 5/115-7(a) (the prior sexual activity or reputation of the victim is not admissible); **Massachusetts**: MASS. GEN. LAWS Ch. 233, § 21B (evidence of the reputation of the victim's sexual conduct and specific instances of the victim's sexual conduct are not admissible); **New York**: N.Y. CRIM. PROC. LAW § 60.42 (evidence of a victim's

are intended to ensure that a trial's focus is on the sexual assault and the defendant's behavior rather than the survivor's past sexual activity.[70] While a survivor's pre-assault sexual history may be protected by sexual assault shield laws, their post-assault sexual activity will generally be deemed admissible as impeachment evidence.[71]

The most common exceptions to rape shield laws include the admissibility of: (1) specific sexual acts that occurred with the assailant within a reasonable time period before and after the alleged assault;[72] (2) specific

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sexual conduct shall not be admissible); **Ohio**: OHIO REV. CODE ANN. § 2907.02(D) (evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admissible); **Pennsylvania**: 18 PA. CONS. STAT. ANN. § 3104 (specific instances of a victim's past sexual conduct, opinion evidence of a victim's past sexual conduct, and reputation evidence of a victim's past sexual conduct are not admissible); **Texas**: TEX. R. EVID. 412 (reputation or opinion evidence of the past sexual behavior of a victim is not admissible; evidence of specific instances of the victim's sexual behavior is not admissible); **Washington**: WASH. REV. CODE § 9A.44.020 (evidence of the victim's past sexual behavior including, but not limited to, the victim's marital history, divorce history, or general reputation for promiscuity, non-chastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and inadmissible to prove consent). *See also* FED. R. EVID. 412.

[70] See Shacara Boone, New Jersey Rape Shield Legislation: From Past to Present – the Pros and Cons, 17 WOMEN'S RTS. L. REP. 223, 223 n.6, 225 (1996). See also generally Douglas E. Beloof, Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights, 38 SUFFOLK L. REV. 291 (2005).

[71] See Richard I. Haddad, Shield or Sieve? People v. Bryant and the Rape Shield Law in High-Profile Cases, 39 COLUM. J.L. & SOC. PROBS. 185, 191 (2005); Josh Maggard, Courting Disaster: Re-Evaluating Rape Shields in Light of People v. Bryant, 66 OHIO ST. L.J. 1341, 1358 n.92 and 1363 n.129 (2005).

[72] *See, e.g.*, **Alabama**: ALA. CODE § 12-21-203(c) (evidence relating to victim's past sexual activity that directly involves the participation of the defendant may be admitted after *in camera* review of evidence); **California**: CAL. EVID. CODE § 1103(c)(3) (prohibition of opinion evidence, reputation evidence, and evidence of specific instances of victim's sexual conduct does *not* apply to victim's sexual conduct with defendant); **Florida**: FLA. STAT. § 794.022(2) (statute only excludes evidence of prior consensual sexual activity between victim and *any person other than offender*, although even instances of sexual activity between victim and any person other than offender may be admissible in certain scenarios) (emphasis added); **Illinois**: 725 ILL. COMP. STAT. 5/115-7(a) (evidence of victim's past sexual activity with the accused may be admitted if offered by defendant on issue of whether victim consented); **Massachusetts**: MASS. GEN. LAWS Ch. 233, § 21B (evidence of a victim's past sexual conduct with the accused may be

sexual acts that may explain injuries and physical characteristics alleged to be the result of the assault;[73] and (3) specific facts that allegedly demonstrate a survivor's motivation to lie.[74] Most statutes also allow for a general exception to inadmissibility when, in the court's discretion, the probative value of the evidence outweighs any prejudicial effect.[75]

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admissible); **New York**: N.Y. CRIM. PROC. LAW § 60.42 (evidence of victim's prior sexual conduct admissible if it proves or tends to prove specific instances of victim's prior sexual conduct with the accused); **Ohio**: OHIO REV. CODE ANN. § 2907.02(D) (evidence of prior sexual activity with the accused may be admissible); **Pennsylvania**: 18 PA. CONS. STAT. ANN. § 3104 (allows use of evidence of victim's past sexual conduct with the defendant where consent of the victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence); **Texas**: TEX. R. EVID. 412 (allows use of evidence of specific instances of past sexual behavior with the accused offered on the issue of consent); **Washington**: WASH. REV. CODE § 9A.44.020 (evidence of past sexual behavior may be admissible when the perpetrator and victim have engaged in sexual intercourse with each other in the past and when past behavior is material to the issue of consent).

[73] *See, e.g.*, **Florida**: FLA. STAT. § 794.022(2) (evidence of prior consensual sexual activity by the victim may be admitted after *in camera* review if used to prove that the defendant was not the source of semen, pregnancy, injury, or disease); **Massachusetts**: MASS. GEN. LAWS Ch. 233, § 21B (evidence of victim's prior sexual conduct may be admitted after *in camera* review to show the cause of any physical feature, characteristic or condition of the victim); **New York**: N.Y. CRIM. PROC. LAW § 60.42 (evidence of prior sexual conduct may be admissible if it rebuts the prosecution's evidence which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim); **Ohio**: OHIO REV. CODE ANN. § 2907.02(D) (evidence of prior sexual activity may be admissible if it involves evidence of the origin of semen, pregnancy or disease); **Texas**: TEX. R. EVID. 412 (evidence of prior sexual activity may be used to rebut or explain scientific or medical evidence introduced by the State).

[74] *See, e.g.*, **California**: CAL. EVID. CODE § 1103(c)(5) (nothing in sexual assault shield statute makes inadmissible evidence offered to attack the credibility of victim as provided in CAL. EVID. CODE § 782; CAL. EVID. CODE § 782 (provides review and admissibility procedure for evidence of prior sexual activity used to attack the victim's credibility); **Massachusetts**: MASS. GEN. LAWS Ch. 233, § 21B; *Commonwealth v. Sa*, 790 N.E.2d 733, 737 (Mass. App. Ct. 2003) (interpreting MASS. GEN. LAWS Ch. 233, § 21B to allow evidence of prior sexual activity to show victim's bias or motivation after *in camera* review); **Texas**: TEX. R. EVID. 412 (evidence may be admitted that relates to the motive or bias of the alleged victim).

[75] *See, e.g.*, **Illinois**: 725 ILL. COMP. STAT. 5/115-7(b) (evidence used for impeachment may be used if the court determines that the evidence is relevant and the probative value outweighs the danger of unfair prejudice); **New York**: N.Y. CRIM. PROC. LAW § 60.42 (evidence may be admissible if after an *in camera* hearing the court finds it relevant and admissible in the interests of justice); **Texas**: TEX. R. EVID. 412 (evidence of specific instances of a victim's past sexual

Rape shield statutes are rules of *admissibility*, not outright privacy protections. Therefore, they do not prohibit the defense in a civil or criminal case from investigating a victim's sexual history or, in a criminal case, the compulsory discovery of such evidence if it is in the prosecutor's possession. The information may be acquired even if it is found inadmissible during a trial.[76]

Because rape shield statutes govern the admission of evidence in court, their protections do not extend outside the courtroom.

> [CHECK YOUR JURISDICTION'S LAW: At the pre-trial stage, assess the extent to which your jurisdiction's sexual assault shield law and any exceptions apply so you can advise your client about the level of protection they will likely receive.]
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> [PRACTICE TIP: If the defense is making statements about the survivor that are likely to damage their reputation and/or bias the jury, consider asking the court to issue a "gag order" prohibiting the parties from discussing the case in public. *See* "Torts," below.]

Crime victims' rights. All jurisdictions provide either constitutional or statutory rights to victims of crime.[77] Although these crime victims' rights laws vary with respect to victims' standing, enforcement, and remedies, they may provide an additional protection for a survivor's privacy. (*See Criminal Justice and Sexual Assault Survivors* for further discussion of

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behavior is admissible if it's probative value outweighs the danger of unfair prejudice); **Washington**: WASH. REV. CODE § 9A.44.020 (evidence regarding the past sexual behavior of the victim may be admissible if relevant to the issue of the victim's consent, as long as the probative value of the evidence is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice).

[76] *See, e.g.*, WASH. REV. CODE § 9A.44.020 (in a sexual assault case, "evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim . . . ."); WASH. R. EVID. 412 (evidence "offered to prove that any alleged victim engaged in other sexual behavior" or evidence "offered to prove any alleged victim's sexual predisposition" is not admissible in any civil proceeding unless it falls within a statutory exception).

[77] *See* Victim Law Library, NAT'L CRIME VICTIM LAW INSTITUTE, https://ncvli.org/professional-resources/victim-law-library/ for links to each jurisdiction's crime victim rights laws.

crime victims' rights.) Finally, in some jurisdictions, a right to privacy may be codified in the constitution or by statute. Depending upon how this privacy right has been interpreted in case law, it may afford some privacy protection.[78]

Torts. Consider tort claims related to privacy violations in sexual assault cases. A survivor may consider filing a slander, defamation, intentional infliction of emotional distress,[79] or invasion of privacy suit to protect their

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[78] *See, e.g.*, **Alaska**: ALASKA CONST. ART. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); **Florida**: FLA. CONST. ART. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."); **Louisiana**: LA. CONST. ART. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."); **Massachusetts**: M.G.L. c. 214 § 1B ("A person shall have a right against unreasonable, substantial or serious interference with his privacy."); **Montana**: MONT. CONST. ART. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); **Rhode Island**: R.I. GEN. LAWS § 9-1-28.1 ("every person in this state shall have a right to privacy which shall be defined to include any of the following rights individually . . . "); **Wisconsin**: WIS. STAT. § 995.50 (right of privacy recognized and interpreted). *See also, Redding v. Brady*, 606 P.2d 1193, 1195 (Utah 1980) ("there is and should be such a right which protects against any wrongful or unseemly intrusion into what should properly be regarded as one's personal affairs").

[79] For examples of intentional infliction of emotional distress law includes see **California**: *Duste v. Chevron Products Co.*, 738 F. Supp. 2d 1027, 1039–40 (N.D. Cal. 2010) (under California law, severe emotional distress, for purposes of demonstrating intentional infliction of emotional distress, is described as "emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it" (quoting *Simo v. Union of Needletrades Indus. & Textile Emp.*, 322 F.3d 602, 622 (9th Cir.2003)); Florida: *Byrd v. BT Foods, Inc.*, 948 So.2d 921, 928 (Fla. 4th DCA 2007) ("To successfully pursue a cause of action for intentional infliction of emotional distress, the plaintiff must show 'conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" (quoting *Allen v. Walker,* 810 So.2d 1090, 1091 (Fla. 4th DCA 2002)); **Illinois**: *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 36 ("To assert a claim for intentional infliction of emotional distress (IIED), a plaintiff must establish: (1) the defendant engaged in extreme and outrageous conduct toward the plaintiff; (2) the defendant intended or recklessly disregarded the probability that the conduct would cause the plaintiff to suffer emotional distress; (3) the plaintiff endured severe [and] extreme emotional distress; and (4) the defendant's conduct actually and proximately caused the plaintiff's distress." (internal citations and quotation marks omitted)); Ohio: *Hayward v. Cleveland Clinic Foundation*, 759 F.3d 601, 619 (6th Cir. 2014) (under Ohio law, "a plaintiff must establish the following four elements: (1)

privacy.[80] Or they may be threatened or served with a lawsuit alleging that they committed such torts. Either way, the same legal framework will apply.[81] When bringing or defending such claims, counsel for the survivor should consider the expense and discovery implications for civil actions, including depositions, interrogatories, and document production that may further infringe on a survivor's privacy. Motion practice to appropriately limit the scope of discovery and protect the survivor's privacy will be critical.

A defendant may threaten legal action (or actually file a suit) against a survivor for defamation or slander. Most often, these suits are filed to silence, retaliate against, and/or coerce a survivor into withdrawing their allegations. Also known as Strategic Lawsuits Against Public Participation (SLAPP) suits in states which have Anti-SLAPP laws (which provide an expedited path to dismissal of certain tort claims targeting those who exercise their right to petition the government by filing a criminal complaint or engaging in other protected activities),[82] survivors are more likely to face threats of defamation or slander if no criminal charges have been or will be filed.[83] Attorneys should consider advising clients early in the

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that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; (2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; (3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and (4) that the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it." (internal citations and quotation marks omitted)).

[80] As previously noted, attorneys funded though the Office on Violence Against Women's Legal Assistance to Victims grant program are prohibited from representing victims in tort suits.

[81] For an overview of defamation law and the related tort of invasion of privacy (or public disclosure of private facts), *see* RESTATEMENT (SECOND) OF TORTS (1977), and SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS, 5th Edition (2017) (updated annually).

[82] For a summary of SLAPP suits against victims of sexual assault, *see* Jessica E. Mindlin, Esq. & Liani Jean Heh Reeves, Esq., Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors (2005) at 128, *available online at* https://law.lclark.edu/live/files/6469-rights-and-remedies-meeting-the-civil-legal-needs.

[83] The Public Participation Project rates each state's anti-SLAPP laws. *See* State Anti-SLAPP Laws, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection. Twelve states received an "excellent" score for comprehensive anti-SLAPP laws: California, Colorado, Georgia, Hawaii, Illinois, Kansas, Nevada, Oklahoma, Tennessee, Texas, Vermont and Washington. Sixteen states have no anti-SLAPP laws: Idaho, Montana, Wyoming, North Dakota, South Dakota, Iowa, Wisconsin, Michigan, Ohio, Mississippi, Alabama, South Carolina, North Carolina, West Virginia, New Jersey, and New Hampshire.

representation about the risks of defamation claims when speaking out about the assault (in any legally unprivileged or unprotected context, including social media, traditional media, disclosures to friends and family, etc.) and about strategies to minimize risk.

A survivor may be able to file their own tort suit, with counterclaims, against the perpetrator. Or they may have a variety of defenses to raise in response to a SLAPP or civil tort suit, including those of truth and privilege. For example, the affirmative defense that truth is a complete defense to an action for defamation (although not to invasion of privacy).[84]

To the extent the perpetrator's claim relies on a survivor's statements to law enforcement, those statements may be protected in jurisdictions with Anti-SLAPP laws, and thus not actionable unless made recklessly or with malice.[85]

> [PRACTICE TIP: If an affirmative or defensive tort claim arises in a case, and you are not an expert in tort law, seek help from co-counsel who specializes in defamation actions. Limited *pro bono* assistance may be available in this practice area.]

Multidisciplinary teams (MDTs). Many jurisdictions have statutes authorizing the creation of multidisciplinary teams (MDTs) to address child abuse, elder abuse, domestic violence fatalities, etc. These laws often contain provisions protecting the confidentiality of the MDT's communications and authorizing the MDT to access certain records and information. This is not the same as privilege, but it may help protect victims' privacy if the MDT members are subpoenaed.

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[84] SACK ON DEFAMATION, *supra* note 81.

[85] *See, e.g., Correllas v. Viveiros*, 410 Mass. 314, 322–24 (1991) (affirming the dismissal of both a defamation claim and a claim for intentional infliction for emotional distress because the alleged defamatory statements were privileged reports made to police); *Dijkstra v. Westerink*, 168 N.J. Super. 128, 136 (1979) (affirming dismissal of claims against assault victim for libel, slander, malicious use and abuse of process, and invasion of privacy because victim's statements identifying plaintiff to police were qualifiedly privileged and there was no evidence that defendant made statements with actual malice). *But see Gallo v. Barile*, 284 Conn. 459, 473 (2007) (declining to find that an absolute privilege for statements made by complaining witnesses is warranted).

Health information privacy laws. In addition to HIPAA, many jurisdictions have laws regarding the privacy and confidentiality of health care information. For example, laws may regulate when a health care provider may disclose health information, to whom the information may be disclosed, and for what purpose. In addition, some jurisdictions regulate the privacy of certain medical conditions, such as H.I.V. diagnoses.

Funding-related confidentiality obligations for victim service providers. In many jurisdictions, victim service providers must agree to certain confidentiality obligations as a condition of receiving funding. Depending on the jurisdiction, these confidentiality obligations may be found in a statute, regulation, contract, or guidelines regulating victim service providers.

VI. PROTECTING CONFIDENTIALITY IN SPECIFIC CONTEXTS

A. Data Privacy and Data Breaches

In addition to the obligation to protect clients' confidences, attorneys have an obligation to represent their clients competently. This duty of competence is increasingly understood by bar associations to include a duty to protect client information received or stored electronically, and to be able to respond well when a data breach occurs. [86] Attorneys who receive federal funds have data breach reporting requirements connected to receiving those funds.[87] Other jurisdiction-specific consumer protection and data privacy laws may apply to how attorneys receive and store client information.

B. Multidisciplinary Work Settings

Attorneys need to be mindful of their particular confidentiality and privilege requirements when working in multidisciplinary settings. These settings include colocation, family justice centers and other "one-stop-shopping" venues, and staffing clinics that may have both attorneys and other professionals (e.g., social workers, victim advocates, or health care

[86] See, for example, American Bar Association (ABA) Formal Opinion 483 (October 17, 2018): An ethical violation may occur when an attorney fails to "undertake reasonable efforts to avoid data loss or to detect cyber intrusion."

[87] See VRLC's Model Data Breach Response Policy available in VRLC's Resource Library at https://victimrights.org/resource-library/.

providers). In these settings, attorneys need to establish robust firewalls between their attorney-client communications and other communications that may be occurring. This includes protecting client information in databases, when talking with clients, using printers and other technology, etc., to avoid breaking or waiving a privilege or other confidentiality protections.

C. Responding to Subpoenas

Issuing and responding to subpoenas are part of an attorney's routine practice. When responding to subpoenas, attorneys need to be mindful of protecting survivors' privacy. Consider taking the following approach:

1. See if the subpoena was served correctly given the jurisdiction's laws.
2. Ask the affected client whether they want the information requested in the subpoena shared.
3. If the client does not want the information requested in the subpoena shared, consider such options as *in camera* review of the requested information, quashing the subpoena, redacting PII or other information the client wants protected, and sealing records.[88]

D. Minor Clients [89]

Children and youth who have not reached the age of majority or who are unemancipated (minor clients) have particular confidentiality needs.

Because attorneys' duties, including duties regarding confidentiality, are owed to their clients, attorneys need to be clear about who they are representing in cases involving minors. Only the minor? The minor's parents or caregivers? Both? Typically, attorneys' ethics rules are clear that an attorney must protect the confidentiality of communications with their clients regardless of the age of the clients. Attorneys also need to be clear

[88] VRLC has jurisdiction-specific research on subpoenas and warrants for each of the U.S. jurisdictions. Please contact us at ta@victimrights.org for support with addressing subpoenas.

[89] VRLC resources that may help attorneys protect their minor clients' confidentiality include jurisdiction-specific Minors Privacy FAQs and Minors' Privacy Toolkit, both available in VRLC's Resource Library at https://victimrights.org/resource-library/.

about the age or capacity at which minor clients may retain their services without a caregiver's consent. Attorneys need to explain to a minor client and any caregivers the extent to which they represent the minor rather than their caregivers and how that affects the representation.

Youth and child victims' personally identifying information must be protected from disclosure. The VAWA Confidentiality Provision states that a purpose of the Provision is to "ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families."[90] VAWA bars victim service providers, including those who provide legal assistance, from disclosing, revealing, or releasing individual client information of an unemancipated minor without the informed consent of "the minor and the parent or guardian."[91] VAWA does not allow consent for release to be given by the "abuser of the minor . . . or the abuser of the other parent of the minor."[92] However, if "a minor . . . is permitted by law to receive services without the parent's or guardian's consent, the minor . . . may release information without additional consent."[93] Therefore, OVW-funded attorneys need to know the age at which a minor is permitted by law to receive legal services in their jurisdiction.

Ethics rules and similar requirements establish an attorney's responsibility to protect a minor's confidentiality. As stated in the "American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases,"[94] a "child's attorney" is a lawyer "who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due

[90] 34 U.S.C. § 12291(b)(2)(A).

[91] 34 U.S.C. § 12291(b)(2)(B)(ii).

[92] 34 U.S.C. § 12291(b)(2)(B)(ii).

[93] 34 U.S.C. § 12291(b)(2)(B)(ii).

[94] AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Approved by the American Bar Association House of Delegates, February 5, 1996.

an adult client."[95] Other jurisdictions provide guidance in this area. For example, the Oregon State Bar asserts that the "role of the child-client's lawyer is to ensure that the child client is afforded due process and other rights and that the child client's interests are protected. For a child client with full decision-making capacity, the child-client's lawyer must maintain a normal lawyer-client relationship with the child client, including taking direction from the child client on matters normally within the child client's control."[96]

Attorneys who represent minors also need to be mindful of any child abuse and neglect mandatory reporting requirements they might have. A minor should never learn that an attorney needs to report any harm that the minor has experienced *after* the minor discloses the harm. Further, if an attorney is funded by VAWA to provide legal assistance, they may only disclose personally identifying information in a mandatory reporting situation when a statute mandates the report. If attorneys are included on the list of people in a jurisdiction who must report child abuse and neglect, they must further assess if their client meets the definition of "minor" in the statute, if the harm that the minor has experienced is identified as reportable in the statute, and they must ensure that they are not exempt from reporting because of attorney-client privilege, for example. If the attorney is required

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[95] AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, approved by the American Bar Association House of Delegates, February 5, 1996.

See too: 2 Commentary "These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position."

[96] THE OBLIGATIONS OF THE LAWYER FOR CHILDREN IN CHILD PROTECTION PROCEEDINGS WITH ACTION ITEMS AND COMMENTARY. In the Oregon State Bar, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES, June 23, 2017.

to report the harm, they may only disclose the information the statute requires them to disclose.

Minor clients who live in juvenile detention or other institutions have the same confidentiality protections as other minors. However, attorneys may face particular challenges in protecting these clients' confidentiality. For example, attorneys will probably need a release of information to meet their clients at a facility since scheduling an appointment will require them to disclose their client's name. Similar issues with phone conversations, email, and USPS mail will need to be considered. Also, attorneys will need to secure confidential meeting spaces as they would with other clients in detention or other custodial settings. Attorneys will need to be clear about who is a minor client's caregiver or guardian in order to manage releases of information when a minor client may not legally consent for their services.

E. Clients with Disabilities

Many clients' disabilities will not affect your representation. However, some clients with disabilities will have particular confidentiality needs because of a disability. The nature of those requirements depends on the disability. For example, many, if not all, clients will benefit from the use of plain language. In other cases, interpretation services maybe be necessary in order for you and your client to understand each other.

Discuss the risks of discrimination and stigma and the potential benefits of accommodations or other outcomes with your client so that they can make informed decisions about disclosures of their confidential information.

When representing clients with legal guardians, attorneys must understand their clients' legal capacity and how to provide full representation if their cognitive functioning impedes communication. For example, in such situations, avoid sharing information with a legal guardian if the scope of that guardianship does not include legal representation. Consider what to do when a legal guardian is the person harming the client. Be clear about how attorney-client confidentiality and privilege are affected by having third parties present during communications in order to support a person with a disability. In jurisdictions that define "confidential communications" to include communications where a third party is reasonably necessary for the communication to occur, document why the person was needed for the

communication. To learn more about how to protect the confidentiality of clients with certain disabilities, see *Representing Survivors of Sexual Assault with Disabilities*.

F. Clients in Custodial Settings[97]

Attorneys need to protect their clients' confidentiality in prisons, jails, immigration detention, and other custodial settings. Survivors' isolation and highly controlled living situations; social norms and policies that assert confined people have no right to privacy; and facility staff concerns that confidentiality threatens safety and order, can all promote a lack of privacy. Fulfilling VAWA and jurisdiction-specific confidentiality obligations in these settings can be challenging.

Attorneys should confer with custodial facilities and document how communication with clients will be confidential.[98] This can be part of a process of getting to know a facility and its staff and policies.[99] Any privileges and confidentiality requirements that apply to legal practice generally also apply to work with survivors in custodial settings. Be clear with survivors in custodial settings about your mandatory reporting obligations, if any. Learn how a facility arranges and monitors communication, including phone calls, written and electronic correspondence, and in-person meetings.

G. Clients Who Are Immigrants

Survivor clients who are immigrants have particular privacy needs. The immigration-related remedies for survivors of crime, and the corresponding federal immigration VAWA confidentiality laws, are designed to remove

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[97] By "clients in custodial settings," we mean survivors who are incarcerated, detained, or residing in prisons, jails, immigration detention-related facilities, community confinement, juvenile facilities, and military brigs. VRLC has a resource geared primarily to advocates that might also be useful for attorneys representing clients in custodial settings: "Eliminating Bars as Barriers: A Tip Sheet for Delivering Confidential Victim Services to Confined Survivors of Sexual Assault, Domestic and Dating Violence, and Stalking," available in VRLC's Resource Library at https://victimrights.org/resource-library/.

[98] Consider using a Memorandum of Understanding to document how you will provide confidential legal services in a facility. You can include the legal authority for confidentiality and privilege in this MOU.

[99] A facility tour helps better understand where clients may be talking with you on the phone or in person and is a great way to learn more about a facility and its staff.

immigration status as a barrier to survivors accessing the help they need. They are also intended to encourage survivors to report to and cooperate with law enforcement and criminal prosecutions. See *Serving Immigrant Survivors of Sexual Assault*, for additional information about language access, safe addresses, remote attendance, confidentiality agreements, redaction, interpreters and translators, "In the Process of Filing" letters, discovery requests, and program component segregation which may affect attorneys' confidential representation of clients who are immigrants.

VII. CONCLUSION: SURVIVORS' NEED FOR PRIVACY

Attorneys have a significant role with protecting sexual assault survivors' confidentiality and privilege. Protecting survivors' privacy, however, can be complicated because our ability to represent them depends on them disclosing information about themselves and their assault. We need to ensure survivors choose how their information is shared and protected throughout their legal representation.