

Guidelines for Victim Assistance Programs
Exculpatory Evidence, Discovery, and Child Abuse Reporting
as it Relates to Victim Confidentiality

NOTE: *This document is intended simply as a starting point for Victim Assistance Programs as they work to develop policies and practices around victim confidentiality. Recognizing that all District Attorney's Offices are unique and individual it is imperative that all Victim Assistance Programs work directly with their respective District Attorney to establish policies and practices that are relevant to their office.*

I. Exculpatory Evidence

A. Definition/Explanation

Evidence tending to establish a criminal defendant's innocence; the prosecution has a duty to disclose exculpatory evidence in its possession or control when evidence may be material to the outcome of the case.

Black's Law Dictionary

Evidence known to a prosecutor that is favorable to a defendant's case and material to the issue of guilt or innocence that the state has a duty to disclose. See *Brady v. Maryland*, 373 US 83 (1963).

B. Potential Impact on Victim Confidentiality

1. Victim advocates would be required to disclose to the district attorney exculpatory statements made by the victim to the advocate. The district attorney would be required to disclose this information to the defense attorney. Because this disclosure is "compelled by statutory or court mandate", this disclosure does not require a signed, written release from the victim under the VAWA 2005 law, or the requirements of DOJ/CVAS.
 - a. Examples of exculpatory statements might include:
 1. "I lied to the police."
 2. "I hit him first and he was defending himself."
 3. "The crime didn't happen."
 4. "The defendant is not really the person who assaulted me."
2. As required by VAWA 2005, and the requirements of DOJ/CVAS, even if disclosure is required the program shall make reasonable attempts to provide notice to victims affected by the disclosure.

C. Guidelines/Suggestions

1. Talk with your district attorney to ensure you have a clear understanding of his/her interpretation and expectations regarding exculpatory evidence and how it relates to victim advocates. It is imperative that you have a clear understanding of the kind of information he or she believes falls within this requirement.
2. Talk with your district attorney to develop a policy/practice that will work in your office.

3. A policy/practice may include:
 - a. Inform victims at initial contact that VAP is under the umbrella of the District Attorney's Office and you are, therefore, bound by rules that govern district attorneys. Explain that while you would not normally disclose their personal identifying information to outside agencies without their permission, if they provide this kind of information (exculpatory) you are required to disclose the information to the district attorney, who would then disclose to the defense attorney.
 - b. Inform the victim that any time the facts of the case are discussed this information may become discoverable (even if not exculpatory).
 - c. Inform the victim at the time they make a disclosure that constitutes exculpatory evidence that you must disclose the information to the district attorney. If the victim advocate is unsure as to whether disclosure is required, the victim advocate should ask the district attorney for clarification and, if required to disclose, notify the victim.
 - d. Train all staff and volunteers regarding your office policy/practice. It is important for all to be clear about the boundaries within which victim advocates within District Attorney's Offices must work so as not to mislead victims about exactly what level of confidentiality they can offer.
 - e. Establish how this information will be communicated to the district attorney.
 - f. Establish a system of documentation for this purpose.
 - g. Communicate with your community partners about your obligations and boundaries regarding exculpatory evidence. If they know your policy they can help reinforce accurate information with the victims with whom they work.

II. Discovery in Criminal Cases

A. Definition/Explanation

Compulsory disclosure of facts and evidence within the possession or control of the district attorney to a represented defendant as required by ORS 135.815(1).

According to ORS 135.815(1), discovery shall include:

- names and addresses of witnesses the district attorney intends to call at any stage of trial together with their relevant written or recorded statements;
- any written or recorded statements made by the defendant;
- any reports or statements of experts, made in connection with a particular case;
- any books, papers, documents, photographs or tangible objects that the district attorney intends to offer at trial and that were obtained from or belong to the defendant;
- if known to the district attorney, any record of prior criminal convictions of witnesses the district attorney intends to call at trial; and
- all prior convictions of the defendant known to the state that would affect the determination of the defendant's criminal history for purpose of sentencing.

ORS 135.815(2)(a) requires that if the defendant is not represented by a lawyer, the district attorney shall disclose to the defendant all of the information described above in ORS 138.815(1) except for the personal identifiers of the victim and any witnesses. ORS 138.815(2)(b) requires the district attorney to disclose the personal identifiers of the victim and witnesses if the trial court orders the disclosure. A trial court shall order this disclosure if it finds that the defendant has requested the information and the victim or witness is a business or institution and disclosure would not pose a risk of harm to the victim or witness or the need for the information cannot reasonably be met by other means.

ORS 135.815(3) requires that unless authorized by the trial court, a lawyer representing a defendant may not disclose to the defendant the personal identifiers of a victim or witness.

Exceptions to Discovery Requirements: ORS 135.873 allows the court, upon a showing of good cause, to order that specific disclosures be denied, restricted or deferred. As an example, this may be requested by the district attorney or the victim in criminal proceedings involving a sexual offense, an offense involving the visual or audio recording or sexual conduct by a child or invasion of personal privacy.

B. Potential Impact on Victim Confidentiality

* Because discovery is “compelled by statutory or court mandate”, this disclosure does not require a signed, written release from the victim under the VAWA 2005 law, or the requirements of the DOJ/CVAS.

1. Victims often provide information regarding victim impact statements. These documents are discoverable.
2. Victims often provide documentation regarding restitution. These documents are discoverable. It may be that not all the information provided for restitution purposes needs to be discovered (such as victim account numbers, contact information).
3. Police reports and evidentiary pictures are discoverable. Police reports usually contain victim contact information. Defense attorneys are prohibited by law (ORS 135.815(3)) from disclosing personal identifiers of a victim to the defendant. If the defendant is representing himself, the victim’s personal identifiers are required to be removed from the information provided.
4. If your VAP keeps files separate from the district attorney’s file, this may be viewed as discoverable depending on what information the file contains.

C. Guidelines/Suggestions

1. Talk with your district attorney to ensure you have a clear understanding of his/her interpretation and expectations regarding discovery and how it relates to victim advocates. It is imperative that you have a clear understanding of the kind of information he or she believes falls within this requirement.

2. Talk with your district attorney to develop a policy/practice that will work in your office.
3. A policy/practice may include:
 - a. Inform victims at initial contact that VAP is under the umbrella of the District Attorney's Office and you are, therefore, bound by rules that govern district attorneys. Explain that while you would not normally disclose their personal identifying information to outside agencies without their permission, if they provide information that is relevant to the case that you are required to provide it to the district attorney, who would then discover it to the defense attorney.
 - b. Inform the victim that any time the facts of the case are discussed that information may become discoverable.
 - c. If the victim advocate is unsure as to whether something is discoverable, the victim advocate should ask the district attorney for clarification and, if required to disclose, notify the victim.
 - d. If your district attorney considers certain paperwork discoverable, all paperwork of that type that is used to obtain information from a victim should contain a clear statement that the information will be provided to the defense so that the victim can make an informed choice about whether to provide it.
 - e. Develop a policy/practice regarding documentation practices. Make sure advocates know to only document information necessary for them to do their work as victim advocates. The practice should be that they are not quoting victims or writing long narratives.
 - f. If certain types of documentation are considered not discoverable by your district attorney, identify the way in which those documents will be clearly marked to distinguish them from those items that are discoverable. For example: Use a red stamp that says "Do Not Discover" or create sheets that are perforated and remove the nondiscoverable information before forwarding it to the district attorney.
 - g. If certain types of documents are considered discoverable by your district attorney, develop a policy/practice regarding the proper procedure to follow in handling these documents.
 - h. Develop a policy/practice regarding updating victim contact information victim advocates receive. You may choose to have your electronic case management system be the place where this information is stored and communicated. Your district attorney's file may contain a sheet that is considered nondiscoverable where you could record this information.
 - i. Train all staff and volunteers regarding your office policy/practice. It is important for all to be clear regarding the policy so as not to mislead victims about exactly what level of confidentiality victim assistance programs can offer.
 - j. Establish a procedure by which discoverable information will be passed along to the district attorney.
 - k. Establish a system of documentation for this purpose.

1. Communicate with your community partners about your obligations and boundaries regarding discoverable information. If they know your policy they can help reinforce accurate information with the victims with whom they work.

III. A Note About Child Abuse Reporting

Although ORS 419B does not designate prosecutor-based victim advocates as mandatory reporters of child abuse, many District Attorneys have policies and expectations that their victim assistance advocates report child abuse. It is important for you to communicate with your District Attorney regarding this issue and develop practices within your office to reflect your District Attorney's policy. If your District Attorney requires victim assistance advocates to report child abuse this information should also be communicated to the victims with whom advocates work so that victims can make informed choices regarding the information they choose to disclose.