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

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*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. Discovery in Criminal Cases**

### **A. Definition/Explanation**

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

ORS 135.815(5) 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(2) 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 DA 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. Victim Information Commonly Provided in Discovery**

Because discovery is “compelled by statutory or court mandate”, disclosures made pursuant to discovery statutes do not require a signed, written release from the victim under either the VOCA or DOJ/CVSSD funding requirements. The following are examples of information commonly provided by victims that is disclosed as part of discovery:

1. **Victim Impact Statements:** Victims may provide information about the impact of the crime via a written victim impact statement. These documents are discoverable if they come into the possession of a DA employee or the court.
2. **Restitution:** Victims may 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. **U-Visa Application:** Generally, these applications are received once a case is closed. However, if you receive this type of request on an open case the U Visa request forms are typically considered discoverable and exculpatory.

4. Statements to Police: Police reports and evidentiary pictures are discoverable. Police reports usually contain victim contact information. Defense attorneys are prohibited by law (ORS 135.815(5)) from disclosing personal identifiers of a victim to the defendant. If the defendant is representing themselves, the victim's personal identifiers are required to be removed from the information provided.
5. VAP file: If your VAP keeps files separate from the DA's file, this may be viewed as discoverable depending on what information the file contains.

## II. 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. District Attorneys are required by law to disclose to the defense exculpatory statements. Because victim advocates are considered agents of the district attorney (DA), and DAs are deemed to know what the advocate knows, advocates are required to disclose to the DA exculpatory statements made by the victim to the advocate. Because this disclosure is "compelled by statutory or court mandate", this disclosure does not require a signed, written release from the victim under either VOCA or DOJ/CVSSD funding requirements.

a. Examples of exculpatory statements might include:

- i. "I lied to the police."
  - ii. "I hit him first and he was defending himself."
  - iii. "The crime didn't happen."
  - iv. "The defendant is not really the person who assaulted me."
  - v. *Any other statement from a victim that directly implicates a victim's truthfulness regarding the crime.*
  - vi. *Any other statement from the victim that provides information that could be helpful to the defendant's case.*
2. As required by VOCA and DOJ/CVSSD funding requirements, if disclosure is required the program shall make reasonable attempts to notify the victim affected by the disclosure and take whatever steps are necessary to protect their privacy and safety.

### C. Guidelines/Suggestions

1. Talk with your DA to ensure you clearly understand their interpretation and expectations regarding discovery and exculpatory evidence and how it relates to victim advocates. It is important that you know the kind of information that falls within this requirement.
2. Work with your DA to create a policy/practice for all VAP staff and volunteers that addresses the limits of your confidentiality.
3. Suggested best practices:
  - a. Inform victims at initial contact that VAP is under the umbrella of the DA's Office and you are, therefore, bound by rules that govern DAs.
    - i. Develop a short, simple explanation to use with victims to communicate your responsibilities (i.e.. don't use the word exculpatory)

**Example:** Because I work for the District Attorney sometimes the law requires that I share information with the District Attorney. The District Attorney may then be required to share that information with others. If you talk to me about information that could be helpful to the defendant or is relevant to the facts of the case I would need to share that information with the District Attorney and they would be obligated to share it with the Defense.

- ii. Consider including a simple statement in the initial contact letter or notice explaining limitations.

**Example:** If you talk to your advocate about information that could be helpful to the defendant or is relevant to the facts of the case the law requires that this office share that information with the defense. Your advocate can provide you with further information about your privacy rights.

- b. Determine how and when advocates will remind victims of the limits of VAP confidentiality throughout the process (e.g.. whenever the facts of the case are discussed).
    - c. Identify what documentation an advocate might come into contact with and whether the DA considers it discoverable.
      - i. Victim Compensation Forms
      - ii. Victim impact statements
      - iii. Restitution documentation
      - iv. Advocates SHOULD NOT accept documents including quotes or verbatim statements from victims, treatment plans, safety planning details, opinions, conclusions or criticisms.

- d. Determine a process for clearly marking documents that are not discoverable to ensure they are not inadvertently disclosed. For example, use a red stamp that says, “Do Not Discover.”
- e. Inform the victim at the time they make a disclosure that constitutes exculpatory evidence that you must disclose the information to the DA. If you are unsure as to whether disclosure is required, you should ask the DA for clarification and, if required to disclose, notify the victim.
- f. Explain the implications of providing a victim impact statement in writing to the DA’s office vs. bringing it with them to court to read. (see VIS best practice)
- g. Develop relationships with community partners in order to make effective referrals. Inadvertent disclosures by a victim that become exculpatory evidence may be averted if VAP advocates know what community resources are available. Referrals and warm handoffs to certified advocates with victim privilege can be a way to ensure victims receive additional trauma informed advocacy without compromising confidentiality.
- h. Communicate with your community partners about your obligations and boundaries regarding exculpatory evidence. If they know your policy they can help set realistic expectations with the victims with whom they work.
- i. Establish how exculpatory information will be communicated to the DA.

### **III. Mandatory Abuse Reporting**

Although abuse reporting statutes do not designate prosecutor-based victim advocates as mandatory reporters of abuse, many district attorneys have policies and expectations that their victim assistance advocates report abuse of children, elders, and vulnerable adults. It is important for you to communicate with your DA regarding this issue and develop practices within your office to reflect your DA’s policy. If your DA considers VAP advocates mandatory reporters, this information should be communicated to the victims with whom advocates work so that victims can make informed choices regarding the information they choose to disclose.