

Confidentiality Concerns in
Criminal Proceedings for Victim
Advocates and Victim Witnesses:
*What Defense Attorneys Can
Discover*

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What is Discovery?

- In criminal cases, pretrial discovery is governed by rules of procedure based on the right of the defendant to obtain information from the prosecution and other sources in order to prepare a defense. Some jurisdictions have “reciprocal” discovery rules where the defendant is required to reveal certain information to the prosecution, e.g. – notice of defenses (alibi, self-defense, insanity); list of witnesses, etc.

Where does the Defendant's Right to Pretrial Discovery come from?

- Due Process Clauses of 5th and 14th Amendments to U.S. Constitution
- 6th Amendment Right to Confront Witnesses and Compulsory Process
- State Constitutions
- Indian Civil Rights Act

What is "Privilege"?

- Confidential communications based upon public policy considerations
 - may be waived by holder of privilege

Types of Recognized Privileged Communications

- Husband – Wife
- Attorney – Client
- Priest – Penitent
- Psychotherapist – Patient
- Doctor - Patient

Recently Recognized Privileged Communications

- Licensed Social Worker – Client
- Domestic Violence Counselor – Victim
 - *Absolute*: Requires Victim's Consent to Disclose
 - *Semi Absolute*: Disclosure in Public Interest, i.e., Child Abuse, Intent to Commit Crime
 - *Qualified*: Balancing Test – Value of Evidence to Defendant vs. Harm to Victim

What is Discoverable by the Defendant in Federal System

- Defendant's Prior Statements
- Defendant's Criminal Record
- Books, Papers, Documents, Photos, Tangible Objects, Reports of Physical or Mental Examinations and Scientific Tests or Experiments material to the presentation of the defense or intended for use in the Government's Case-in-Chief
- Summary of Expert Witness Testimony the Government intends to use in its Case-in-Chief

What is *Not* Discoverable by the Federal System

- Work Product of Government's Attorney or any Government Agent investigating or prosecuting the case (notes, memoranda, mental impressions for trial preparation)
- Statement of Witness before testimony on Direct Examination at trial

Discovery in Jurisdictions Not Following Federal Model

- Names and addresses and written or recorded statement thereof of all persons the Government intends to call as witnesses
- All Material or Information which tends to mitigate or negate the defendant's guilt or tends to reduce the defendant's punishment
- All other Pretrial Discovery under Federal System

Discovery in Tribal Courts

- Due to Sovereign Status of Tribes, Rules of Discovery will depend on whether the tribe follows the Federal Rules, Rules of the Neighboring State, or has Individualized Rules

Methods of Discovery

- Request
- Deposition
- Interview
- Subpoena
- Subpoena Duces Tecum
- Order to Show Cause/Contempt of Court

Methods to Prohibit or Limit Pretrial Discovery

- Protection Order
- Quashing Subpoena or Subpoena Duces Tecum
- Assertion of Victim's Right

Victims' Rights Legislation

- 28 States have enacted Victims' Rights Constitutional Amendments
- Federal Crime Victims' Rights Amendments to U.S Constitution Pending
- Arizona Victims' Bill of Rights – Art. 2 Sec.2.1
 - to preserve and protect victims' rights to justice and due process, a victim has the right to:
 - Refuse an interview, deposition or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant

Practical Applications of Discovery Rules for Victim Advocates

- Victim Advocates connected with Prosecutor's Office or Law Enforcement Agency
 - Non Work Product *Discoverable*
- Victim Advocates in Shelter
 - May be Discoverable

Tips on Record Keeping for Victim Advocates

- If information received is not privileged *be careful regarding what information you record*

What Do You Do If You Receive a Subpoena?

- Victim Advocate in Prosecutor's Office – Notify Prosecutor
- Victim Advocate in Law Enforcement Agency – Notify Prosecutor
- Victim Advocate in Shelter – Contact Prosecutor; Seek Legal Advice from Attorney, Legal Aid Office or State or National Victims' Rights Organization