

Subpoenas, Testimony, Privilege, Confidentiality, and SA Survivors:

Protecting Records and Other Personal Information

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A Word About Language

- Telling you things you already know:
 - Men *are* victims
 - If I use female pronouns, it is because women *report* more often and are the majority of SALI's cases
 - I will use “victim” and “survivor” interchangeably; I prefer the term “survivor,” but “victim” is used in the statutes

Overview

- Confidentiality and Privilege
- Release of Records
- Advocate Testimony
- One Client, Many Clients – How One Case Affects Other Cases

Confidentiality vs. Privilege

What is the difference?

Confidentiality

- Protects survivor from disclosure of communications between professional and competent client/patient **to any third party in any context**

Privilege

- Protects survivor from disclosure of communications between professional and client/patient **in court or depositions**

Confidentiality vs. Privilege

If a communication is privileged, it must also be kept confidential.

If a communication is confidential, it is **NOT necessarily privileged.**

Confidential vs. Privileged

Protected Communications

Confidentiality

- Medical providers
- Mental health providers
- Advocates
- Attorneys
- Some grant recipients

Privilege

- Licensed psychologists and psychiatrists
- Licensed clinical social workers
- LCPCs -Professional Counselors
- Attorneys
- Accountants
- Clergy
- Spouses
- Self-incrimination

Confidentiality vs. Privilege

Source of protection

Confidentiality

- Professional ethics rules
- Professional licensing
- Organization's internal policies
- Grant requirements (VAWA, VOCA, regulations on RCCs and DV programs)
- State law
- Federal law

Privilege

- State law
- Federal law

Violence Against Women Act

VAWA 2013 strengthened
confidentiality protections

“In order to ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families, grantees and subgrantees under this subchapter shall protect the confidentiality and privacy of persons receiving services.”

New VAWA Provisions

NO exception for grant reports (take care when using examples)

NO exception for “collaboration”

NO “internal data sharing”

May NOT require sharing as condition for providing services

Releases must be written, reasonably time limited

Parent or guardian can provide release for unemancipated minor, but NOT if they are alleged abuser (other laws may give children stronger protection)

New VAWA Provisions

- New VAWA provisions do NOT protect against court orders and subpoenas
- If information must be disclosed, VAWA requires that providers attempt to notify the client

Confidentiality vs. Privilege *Waiver*

- Confidentiality and privilege belong to the patient/client (NOT the advocate)
- In general, only the patient/client can waive confidentiality or privilege
- Exceptions:
 - Mandatory reporting of child abuse or abuse of a vulnerable adult
 - People under 18 depending on situation
 - Other exceptions vary by profession (e.g., patient is a threat to self or others, malpractice claims)

Confidentiality vs. Privilege *Waiver*

- Waiver of confidentiality or privilege is **all or nothing**
- Example:
 - Maria wants the RCC advocate to give expert testimony that Maria's husband physically and sexually abused their 6-year-old daughter but **NOT** that Maria waited a month to go to the police after she found out

Some Privilege is More Privileged

Competing Public Policies

- Encourage free and effective communication
- Protect children
- Constitutional right to confront witnesses (fair trial)

Reality

- Records of Attorneys and Clergy are “super-privileged”
- Records of clinicians (counselors, social workers, etc.) are easier to obtain, especially in criminal cases and custody cases

Release of Advocate Records

Why do advocate records get released?

- Written release from a survivor
- Request from survivor's attorney (e.g., to use in a peace order or family law case). Must include written release of survivor
- Request (with written release) or subpoena from Assistant State's Attorney
- Subpoena from perpetrator's attorney
- Court order

Release of Records

Responding to a request for records

- What does the survivor want?
- Informed consent – pros and cons
- Voluntary release
- May not require a client to release information in order to receive services
- Written

Written Releases

- Use HIPAA compliant model release
 - Drug treatment – federally protected; needs specific release; may not refer to its absence (i.e., no “I left something out”)
 - HIV/AIDS status – needs specific release
 - Other providers’ records. Providers often have records from other providers – address this separately
 - Reasonably time-limited (e.g., one year)
- Do not accept releases from other agencies
- Consider requiring conversation with client to ensure voluntary and informed consent

Release of Advocate Records

Pros

- Advocate's records may be important evidence to support survivor's or State's case against perpetrator
- Survivor's refusal to waive confidentiality may lead court to infer that records would be damaging to survivor's or State's case

Cons

- Loss of privacy for survivor
- Totality of waiver—survivor cannot pick and choose parts of records to release

Subpoenas and Court Orders

Responding to a subpoena or court order

- Notify supervisor/executive director/legal counsel immediately
- Immediately means NOW – treat this as urgent
- Do NOT turn over records even if the person with the subpoena tells you to
- What does the survivor want?

Subpoenas

- Special requirements:
 - In criminal cases, defense counsel must notify both victim and prosecutor of a subpoena for medical records
 - HIPAA and state law require notice to patient and reasonable time to file a motion to quash when health care records are involved
 - Financial records also require notice of subpoena

Subpoenas, Orders, and Counsel

- Your agency needs a lawyer
- If you receive a subpoena or order, the lawyer will need:
 - A copy of the subpoena or order
 - A copy of the records
 - The service provider's credentials (LCPC, etc)
 - Supervisor's credentials
 - Grant supporting services
 - Date records or testimony is required
- Motions to Quash

Advocate Testimony

What can an advocate testify about?

- Expert witnesses vs. Fact witnesses
 - Expert witnesses can help to educate the judge or jury about domestic and sexual violence generally and can offer expert opinions about the specific case
 - Fact witnesses can only testify from their personal knowledge
- Advocates can often be **both**

Advocate Testimony

Helpful topics for expert testimony

- Cycle of violence
- Delayed reporting
- Effects of trauma

Advocate Testimony

Typical topics for Fact testimony

- Observations of client
- Observations of opposing party
- Observations of interactions between parent and child

Advocate Records – Often the Basis for Testimony

- Keep your records with an eye toward future subpoenas
- Give the appropriate context for “bad facts”—better to have it in the record than have to explain it on the witness stand
 - Example: “Client appears to be an alcoholic” versus “As is typical for many sexual assault survivors, client self-medicates with alcohol”

Advocate Testimony

Pros

- Advocate as fact witness can corroborate survivor's version of events
- Advocate as expert can help to explain survivor's behavior and minimize victim blaming by judge or jury

Cons

- Loss of privacy for survivor
- Advocate is subject to cross-examination by perpetrator's attorney
- Limitations on fact witness testimony (e.g., hearsay rules)

Advocate Testimony

Preparing to testify

- Review your records only if advised to by counsel
- Provide your resume or CV if testifying as an expert
 - Don't use your home address
 - Make sure resume or CV is up-to-date
- If appropriate, talk to the attorney calling you as a witness about what he or she plans to ask you. Your attorney may also do this.

Advocate Testimony

Tips for testifying

- Stay calm
- Just answer the question asked
- Don't guess—it's okay to say "I don't know" or "I don't recall at this time"
- Don't play lawyer
- Talk to the judge or jury

Advocate Testimony

Tips for testifying

- Stop talking if you hear “objection”
 - “Sustained” means don’t answer
 - “Overruled” means go ahead and answer
 - If you are not sure, ask the judge, “May I answer?”
- Make sure you understand the question—it’s okay to ask attorney to repeat or clarify

Advocate Testimony

- Examination in Court or a Deposition is NOT conversation
 - Be careful, be accurate
 - Do not agree to be polite
 - Example
 - Keep your eye on the ball – opposing counsel is NEVER on your side
 - Nice OC, Mean OC, Familiar OC
 - You are always being watched

One Client, Many Clients

How One Case Affects Other Cases

Setting a Precedent

- Releasing records or testifying in one case can affect victim/survivors in future cases
- Example:
 - In a county with only one judge, an RCC advocate agrees to testify as a fact witness about Valerie's sexual assault and as an expert witness about delayed reporting
 - What will the judge expect the next time she hears a sexual violence case?

Ethics

One Client, Many Clients

Who decides?

Contact SALI

- Victim/Survivors can call:
301-565-2277
877-496-SALI (toll-free)
- SALI also provides legal technical assistance for advocates and other professionals working with survivors