

Confidentiality and Information-Sharing Within a Coordinated Community Response
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Presentation Outline

I. Introduction

A. Privileged Communications

This is an important concept for advocates because communications recognized as privileged can be protected from forced disclosure by subpoena.

1. The concept of privileged communications can be easily confused with confidentiality and data privacy. "Privilege" is granted to certain *communications* between people, and insulates those communications from forced disclosure by a court of law. "Data privacy" laws regulate *information sharing* between individuals and organizations. Confusingly, the word "confidentiality" is used within both areas.
2. The notion of "privileged communications" stems from the English common law, and originates from the determination to protect attorney-client communications from judicial disclosure. Generally speaking, the legal system is resistant to classifying some communications as privileged, because it runs counter to the "optimal" situation where all evidence is before the court for it to fairly dispose of a case. Further, it raises 4th, 6th and 14th Amendment issues.
3. There are many sources for privileged communications, but three primary ones. Firstly, by common law, as stated above. Besides the attorney-client privilege, the only other common law privileges granted are for communications between husbands and wives and between jurors. Secondly, there are privileges denoted by statute. Thirdly, privilege can be established through court decision, or case law. Other sources for privilege/confidentiality include professional rules and codes of ethics.
4. The Late Professor Henry Wigmore outlined the four criteria for determining whether a privilege should be granted to the communications of a particular relationship:
 - a. The communications must originate in confidence that it will not be disclosed.

b. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.

c. The relationship must be one which, in the opinion of the community, ought to be sedulously fostered.

d. The injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation.

5. There are also several different types of privilege: absolute, qualified and semi-qualified. Absolute privilege means no exceptions. Qualified privilege means limited protection, such as in-camera review. Semi-absolute means specific exceptions in rare circumstances for compelling reasons.

6. Insofar as privileged communications goes, the client (subject of the information) almost always owns the privilege. The client can claim it or waive it.

7. Examples of relationships enjoying privilege: attorney-client, physician-patient, husband-wife, clergy-communicant. *See FRE 501.*

8. In some states, communications between battered women and battered women's advocates have been granted some form of privilege from forced disclosure, either by statute or judicial determination. Extension of Jaffe vs. Redmond, 116 S. Ct. 1923 (1996).

B. Segue into Data Practices

1. Again, "privilege" generally refers to a status granted to certain communications that insulates those communications from forced disclosure by a court of law. On the other hand, data sharing laws regulate data kept by public agencies.

2. This area of law is extremely jurisdiction-specific. Everything detailed below could vary from jurisdiction to jurisdiction.

C. Data Sharing/Confidentiality

This is an important concept for advocates because it impacts how easily advocates can access information held by a governmental agency, and it

impacts the status of information collected by advocates working for governmental agencies.

1. Categories. Data is divided into one of three categories: public, private and confidential. Public data can be accessed by anyone for any reason. Private data can be accessed by the subject of the data, but not by the public. Confidential data cannot be accessed by the subject of the data or the public.
2. Data is categorized by both: 1) the type of data, and 2) the agency maintaining the data.
3. The status of information collected by some types of system-based advocates is discussed below.

D. Mandatory Reporting Laws

II. Considerations Particular to Community Collaborations

- A Many states have enacted laws that encourage or mandate the formation of multidisciplinary teams to encourage coordination in communities around domestic violence (e.g. coordinating councils, dv/cps teams). Often these teams are structured so as to share information with each other about specific cases.
- B. Two arguments can be made regarding the data sharing done by these teams: 1) Regardless of the statute, the data sharing might not withstand a legal challenge, and 2) that this kind of data sharing does not necessarily further the safety interests of battered women and their children. Advocates need to think carefully about whether and how to participate on these teams and establish and publicize protocols before doing so.

III. Considerations for Advocacy Programs With Regard to Privileged Communications and Data Practices

The proper creation, maintenance and handling of records and information obtained from and about victims of domestic violence is a critical function of any advocacy program, regardless of whether the program is governmental (police or prosecutorial victim witness program) or external (usually non-profit) in nature.

- A. Improper handling of victim information and records can cause great harm to individual victims.

1. Release of information about the victim's residence or location can make her accessible to the perpetrator from whom she is hiding. Such accessibility can endanger both the victim and the children.
 2. Release of some kinds of information about the victim or the children can provide ammunition to an abuser seeking to punish or intimidate the victim through child custody battles or child protection complaints.
 3. Release of certain information to the abuser can complicate or harm the state's case in any criminal proceeding brought against the perpetrator, thereby placing some victims in further jeopardy.
- B. Improper handling of victim information and records can harm the ability of the advocacy program to accomplish its goals in the community
1. External advocacy programs
 - a. Battered women often seek services of traditional external advocacy programs (such as shelters) instead of other types of services (such as governmental) for the reason that they need and want a confidential relationship with an advocate.
 - b. A crisis in victims' confidence in the local advocacy program, which causes victims to become reluctant to seek the program's services, can result from the improper release of information about a woman served. This reluctance to seek help can expose women to risk of further violence.
 - c. Some states have established limitations on the disclosure of information about the identity of victims served by state-funded programs, and some federal grants to domestic violence programs are conditioned upon compliance with rules requiring confidentiality of services rendered.
 - d. The goal of a domestic violence advocacy program should include both victim safety and victim autonomy; offender accountability to the criminal justice system may not be the goal of individual advocacy where the woman does not make that a priority. The centrality of victim autonomy to the role of advocacy programs makes the handling of information about the woman even more sensitive.
 2. Victim-Witness Governmental programs (within law enforcement or prosecutor's offices)

- a. The goals of each victim witness program should include victim safety as well as the enforcement of criminal laws. While offender accountability may be the critical role served by the criminal justice, victim autonomy may not be a value where such autonomy undercuts the ability of the system to hold the offender accountable. Record handling by such programs must balance victim safety considerations with the legal requirements for disclosure of information to the defendant.
- b. Victims seeking advocacy services from victim witness programs must be told clearly what the limits of confidentiality might be so that unreasonable expectations are not created.
- c. Victim witness programs which *are* separate from the prosecutor's or law enforcement agencies offices within which they are located must establish physically separate files and record keeping methods to ensure that their true independence is understood by victims and by agency staff.

C. Success in prosecuting abusers might be compromised if the data gathered/disclosed by the criminal justice system is handled improperly

IV. Adequate and effective policies governing the confidentiality of victim records and information must address several issues.

A. What types of information should be sought from victims at various stages of involvement with her case?

1. Differences Between Community-Based Advocacy Programs and Victim- Witness Programs

External domestic violence advocacy programs and victim witness programs generally differ in the information they seek and the purposes for which information on victims is maintained. Both types of programs should seek and maintain only information that is important to the function of the program; demanding information that is irrelevant or extraneous only increases the potential danger of subsequent disclosure.

2. Disclosures Required by Victim-Witness Programs

In determining what kinds of information should be sought from and about victims of domestic violence, victim witness programs

should take into account laws and principles that may require disclosure of information or may protect it from disclosure.

- a. The prosecutor has an obligation to disclose certain information, which has implications for the advocates' role, if any, in evidence collection.
 - i. Prosecutors must disclose exculpatory evidence (which may include recantations)
 - (a) Exculpatory evidence is generally evidence that is "favorable to an accused" and "material to guilt or to punishment". Brady v. Maryland (1963) 373 U.S. 83
 - (b) "Materiality" relates to whether the evidence undermines the prosecutors' confidence in the outcome" or if it "may make a difference between conviction and acquittal". United States v. Bagley, (1985) 473 U.S. 667.
 - ii. Prosecutors may have the obligation to disclose other relevant evidence, such as names and addresses of witnesses, statements of defendants, past criminal records of witnesses.
 - iii. The obligation to disclose is subject to certain exceptions, such as where the evidence is not relevant admissible evidence or will reasonably lead to relevant admissible evidence, where the defense has another way of obtaining the evidence, and where there is a valid governmental interest in confidentiality.
- b. The prosecutor's work product is protected from disclosure to the defense under the principles that hold that an attorney's legal research, opinion, conclusions and impressions are not generally discoverable by the other party to litigation.
- c. Victim witness programs, in conjunction with the prosecutor or law enforcement agency within which it is located, must decide exactly what the role of the program staff will be vis-à-vis victims and the prosecutor whose office hosts the program. The resulting roles must be

clearly defined for all staff in orientation and in-service trainings.

3. Limiting What Information Is Sought

- a. In determining what information should be sought from victims, external battered women's programs should: 1) Limit inquiries to critical matters,
- b. Avoid asking questions which call for answers which may endanger the victim if released, and 3) Be conscious of legal requirements for disclosure upon subpoena where there are no statutory privilege attached to the advocate-battered woman relationship.

4. Advocates and Victim-Witness Programs Must Coordinate, Recognize Differences

The quality of advocacy afforded victims is enhanced if the two types of programs in a community develop cooperative working relationships that reflect the differences in their functions relative to the victim.

- a. Both types of programs should hold joint meetings of their boards and staffs to examine their differing roles in supporting victims and in other related goals.
- b. Planning should result in the creation of mechanisms, including data collection and release practices, for enhancing cooperation and the best use of resources in the community's efforts to improve victim safety and offender accountability while changing the climate which permits domestic violence.

B. What information should be provided to victims about the nature of the victim/advocate relationship and any confidentiality implications thereof?

1. Most external domestic violence advocacy programs have strong confidentiality policies, and that fact is advertised as one of the advantages of their programming. As to their ability to successfully defeat subpoenas, state laws vary widely from the existence of a qualified "advocate/victim" privilege to no privilege at all. Funder's restrictions may also direct confidentiality policies. Victims must be fully informed of any potential disclosures to persons outside the program BEFORE they are asked to make statements of a sensitive nature. And program staff must have clear understandings of the process to be followed in the

event of a request for information about a battered woman, including receipt of a subpoena or a request to serve a resident of the shelter.

2. Victim-Witness as a Component of a Prosecutor's Office

Governmental advocacy programs (with the notable exception of certain California programs) may have limitations on the confidentiality of communications between victims and advocates, primarily because the advocacy program may be one component of a larger office which has a larger mandate, e.g. prosecution of crimes.

- a. The obligation to disclose exculpatory evidence (noted above) should be addressed by plans which limit the evidence-gathering function of the victim witness staff people in a prosecutor's office.
- b. If evidence gathering is one function of the victim witness staff, victims must be told about this function BEFORE they are asked to make statements that she may think will be held in confidence. Information about these functions and any limits on confidentiality should be the topic of written (in relevant languages) brochures and notices, as well as regular workshops in the larger jurisdictions whose numbers would support such information sessions.

3. State laws may mandate reporting of suspected child maltreatment (and prescribe criminal penalties for violation of the rule), regardless of the existence of any other testimonial privilege. Victims must be informed of such requirements before being asked to disclose information that they might believe will be held in confidence.

C. What information is recorded by the advocate and in what form should it be retained by the program?

1. Purposes for recording information include:

- a. Collecting data that documents program activities for funding and management purposes, including personnel management and supervision of staff;
- b. Ensuring consistency of service from one shift or worker to the next;

- c. Building and maintaining a record of injuries or abuse for future purposes; and
 - d. Preparing a case for trial, including witness information and both discoverable and work product records.
 2. Forms for recording information include:
 - a. Permanent written records
 - b. Temporary forms of recording (3M notes, for example)
 3. There are varying levels of security that can be provided to certain records, in terms of the location of the records and the access that is provided to certain staff.
- D. What should be the procedure for responding to any request for information, whether by letter, subpoena, phone call, law enforcement inquiry, or funder request?
 1. External domestic violence programs must have detailed policies that are drafted upon consultation with legal counsel. Policies must be the subject of ongoing training and review.
 2. Victim witness programs must have policies consistent with those of their governing or host agency, drafted with reference to legal requirements for disclosure or maintenance of evidence and victim location information.
- E. In Summary
 1. Policy must be informed by legal advice on state and federal law applicable to records handling by the program.
 2. Policy must be informed by the purpose of the program and be designed, in any event, to promote victim safety.
 3. Policy must be set out clearly in writing and be the subject of ongoing training and supervision, in light of the high stakes associated with its implementation.
 4. Policy must be made available (in an accessible format and language) to all victims in advance of conversations which will result in disclosure of sensitive information.

5. Policy must be subject to regular review. Staff's understanding of the policy and how to implement it must be the subject of supervision and training.
6. Resolve the following questions before establishing any policy:
 - a. What is the purpose for the collection of this information?
 - b. What harm could come to the victim/victim's children and family if the information was disclosed to the abuser or abuser's attorney?
 - c. In light of this risk, should the information be recorded at all?
 - d. If the information should be recorded, what is the best format to use for the record? How permanent a form of record? How detailed/summary?

APPENDIX

Federal Restrictions on Information-Sharing¹⁰¹¹

Victims of Crime Act

42 U.S.C. §10604(d), 28 C.F.R. Part 22

Funding recipients must honor confidentiality of battered women they serve

Family Violence Prevention and Services Act

42 U.S.C. §10402(a)(2)(E)

Funding recipients must protect records of clients served under this Act, and limit disclosure of the address or location of shelter facility.

42 U.S.C. §290dd-2, 42 C.F.R., Part 2.

Programs providing federally-funded drug and alcohol treatment must limit disclosure of patient information.

Exceptions: patient consent, medical emergency, child abuse

¹⁰¹¹ Research provided by the Virginia Poverty Law Center.