A Fresh Look at Confidentiality:

New tools for protecting survivors' personal information

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Does this **respect** the survivor's decisions?

Does this advance the **accountability** of individuals and groups to stop domestic violence?

Does this **change** the conditions that allow domestic violence to happen in our communities?

Advocacy-based counseling means the involvement of a client with an advocate counselor in an individual, family, or group session with the primary focus on **safety planning** and on **empowerment** of the client through reinforcing the client's **autonomy** and **self-determination**. Advocacy-based counseling uses **non-victim-blaming problem-solving methods** that include: (1) Identifying the barriers to safety; (2) Developing safety checking and planning skills; (3) Clarifying issues; (4) Providing options; (5) Solving problems; (6) Increasing self-esteem and self-awareness; and (7) Improving and implementing skills in decision making, parenting, self-help, and self-care.

-Washington Administrative Code 388-61A-0145

We've Got Great News!

This spring the Washington State Legislature passed a new law to provide more protections for domestic violence victims' personal information, including privileged communication with domestic violence victim advocates.

After many years of advocacy by the domestic violence movement to pass such a law, this year the Legislature recognized the importance of protecting the confidentiality and privacy of domestic violence victims and voted House Bill 2848 into law. The law goes into effect on June 7, 2006.

Part of the new law (which also contains some other provisions related to confidentiality in various ways) gives domestic violence survivors and advocates at community-based programs the ability to assert privilege to protect their conversations and records from disclosure in court. In legal terms, "privilege" applies to special relationships recognized by law in which the persons involved cannot be forced to testify in court about what they said to each other in a private conversation.

What Is Privileged Communication?

Federal and state laws have recognized for years that communications within certain relationships are considered to be so private that even when the information is relevant to a court decision, the court cannot require that it be disclosed. In Washington, these relationships have included an attorney and a client, a member of the clergy and a confessing individual, a mental health therapist and a patient, a husband and a wife, and a sexual assault advocate and a victim. With the new law, a domestic violence advocate and a victim have now been added to these categories.

This privilege will apply when domestic violence survivors work with staff and volunteers at community-based agencies, but *not* with domestic violence advocates employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office or Child Protective Services (CPS).

In order to maintain the privileged nature of any information disclosed by a domestic violence survivor, the conversation must take place between an advocate and survivor only, or with a spoken language or sign language interpreter present. If an interpreter is used, their role has to be clear: to facilitate communication between the survivor and advocate. If they are also providing support to the survivor (for instance, if they are a family member or friend who is acting as an unofficial interpreter in the situation instead of a contracted interpreter for your agency), then the communication is not privileged.

If the survivor has a friend or family member present, the conversation cannot be considered privileged, but it would still be protected by broader confidentiality laws and your agency's confidentiality policies. If survivors want to have another person in the room with them for support while disclosing private information to an advocate, you should explain to them how that changes the level of protection for their story (namely, that the information will *not* be privileged communication under the law, but your agency has policies in place to keep it as confidential as possible) and let them decide how to proceed.

Sometimes attorneys or other outside parties "fish" for information from the survivor, or perhaps their friends or family members, to try to find out if the communication she had with an advocate is indeed privileged. This can happen in circumstances where there is already a court case taking place. Examples of such situations could include when a domestic violence victim is charged as a defendant in an assault, or involved in a child custody case or an immigration deportation hearing. Attorneys are familiar with the laws around privileged communication and may want to determine if the conversation a victim had with you wasn't disclosed in private after all, but took place with her sister in the room. In that case, the victim's sister could be

asked to testify in court about what she said, even if you as an advocate are not willing to break confidentiality and discuss your conversation.

How Does This Change My Work?

Most of your agency's policies and procedures around records, confidential communications and how to handle subpoenas will be unaffected by this new law. You should continue to keep the same policies in place around respecting the confidential nature of all communications with survivors. The only change in this area is that now verbal communications and many of your written records can be protected as privileged.

For advocates working at dual domestic violence and sexual assault agencies, the new privilege provision is almost identical to what sexual assault advocates already have. One difference is the definition of a "sexual assault advocate" includes a broader group of individuals than those working only in community-based programs.

Sharing Information with Others

The new state law on privilege does not change the obligation of domestic violence programs to protect survivors' personal information from being shared with other agencies, even those with whom you have a collaborative relationship. Sharing any information with CPS, prosecutors, welfare caseworkers, law enforcement or others should only be done with a limited and specific release of information from the victim. The requirements for domestic violence programs to maintain confidentiality is now further strengthened by the new law. For more detailed discussions of the challenges advocates face in keeping confidentiality while collaborating with outside agencies, see previous WSCADV "Inside Scoop" articles on providing mandated services and working as a CSO advocate.[1]

Keeping Things Confidential

How is privilege different from plain old confidentiality? Think of the new privilege law as icing on the cake – most of the time, your existing advocacy strategies and practices will work just fine to protect the victims you work with, but it will help in those occasional cases where there's a danger you might otherwise have to turn over confidential information.

[1] You can read and print these articles from our website at www.wscadv.org/Bulletin/index.htm.

We recommend that you review the WSCADV model protocols on confidentiality and on record-keeping that were produced and distributed to member programs in 2003.[2] They both contain examples of recommended agency policies on keeping records and other communications with survivors confidential, as well as specific suggestions on procedures that can be set up in various situations (such as when working with survivors on the phone or what to keep in agency files).

For a practical discussion of confidentiality and how it works in advocacy situations every day, see the confidentiality section in Chapter 3 of WSCADV's *BERTHA* manual[3] – there should be at least one copy of this binder at your agency.

New Confidentiality Protections in Federal and State Law

In December 2005, Congress reauthorized the Violence Against Women Act (VAWA) and it contains new language to protect confidentiality of victim data. Now all domestic violence agencies receiving federal funding through VAWA and the Family Violence Prevention and Services Act (FVPSA) must ensure that they do not disclose "personally identifying information" about victims of domestic violence, dating violence, sexual assault or stalking.

Here's the text of the new definition in VAWA:

> (18) PERSONALLY IDENTIFYING INFORMATION OR PERSONAL INFORMATION.
> The term "personally identifying information" or "personal information" means individually identifying information for or about an individual including information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking, including—
>
> (A) a first and last name;
>
> (B) a home or other physical address;
>
> (C) contact information (including a postal, e-mail or Internet protocol address, or telephone or facsimile number);
>
> (D) a social security number; and

[2] Available on our website at www.wscadv.org/Resources. Sections of the protocol on confidentiality were adapted for this article. Both protocols will be revised by Dec. 2006 to reflect the recent changes to state and federal law on privilege and confidentiality.

[3] *Basic Educational Resource To Help Advocates: A practical guide to working at a domestic violence program in Washington State,* Washington State Coalition Against Domestic Violence, reprinted January 2001. To purchase additional copies of *BERTHA*, use the order form on our website: http://www.wscadv.org/Resources/Order_Form.pdf.

> (E) any other information, including date of birth, racial or ethnic background, or religious affiliation, that, in combination with any of subparagraphs (A) through (D), would serve to identify any individual.[4]

On the state level, the same bill that contains the new privilege protections in state law (HB 2848) also prohibits the release of personal information by domestic violence agencies without written permission from the survivor:

> A domestic violence program, an individual who assists a domestic violence program in the delivery of services, or an agent, employee, or volunteer of a domestic violence program shall not disclose information about a recipient of shelter, advocacy, or counseling services without the informed authorization of the recipient.[5]

The new language in both state and federal laws will be very useful for domestic violence programs when there's pressure from outside agencies to share information about the survivors you serve.

Say another social service agency in town comes knocking at your door and asks you to provide a list of everyone who has stayed at your shelter in the past month, so they can help compile an unduplicated count of people in the community who need housing services. With these new laws specifying that domestic violence agencies cannot give out personally identifying information on the battered women they serve, you can turn down that request and offer both state and federal law to back up your reasons for not doing it. (There are provisons in both laws to allow programs to provide aggregate or statistical data for reporting purposes that does not identify individuals using your services.)

For those of you who have been following the progress of the Homeless Management Information System (HMIS) and how it applies to domestic violence agencies, the new definition of "personally identifying information" in VAWA requires you to opt out of providing specific personal data that could identify domestic violence victims through that system and potentially expose them to harm.

[4] "The Violence Against Women and Department of Justice Reauthorization Act of 2005," Public Law 109-162, Section 3(a)(18).

[5] This will be codified as a new section in RCW 70.123 by the end of 2006.

Exceptions to Confidential Communications

There are a limited number of circumstances under which confidentiality does not apply, and these remain the same even with the new privilege protections. These exceptions are:

- When given express permission by the survivor to release information. (This may seem obvious, but it *is* an exception to keeping the survivor's information private.)
- Duty to report child abuse or neglect as a mandatory reporter.
- Duty to warn of an imminent threat of harm to self or others (this is sometimes known as a *Tarasoff* warning, based on the court case where it originated).

Using a Waiver or Release of Information[6]

Advocates can share information disclosed by a survivor with another advocate within your agency; however, you cannot share with others outside the agency without a release of information from the survivor. There are instances when it may be necessary to discuss a survivor's situation with someone else outside your agency. Before you do that, you have to get permission from the survivor in writing, since it must be her decision to disclose the information. It's good to remember that it's not your *agency* that "waives" privilege – you are in the position of facilitating the *survivor's* waiver of her privilege rights. Giving up privilege, even in limited circumstances, should only be done after the survivor has given her consent (discussed further in "Informed Consent" section below).

A waiver or release of information form should be specific about purpose, person or agency to receive the information and amount of time it can be used. As part of the new privilege law, there is now a 90-day limit on the length of time information can be shared if no end date is specified on a release form.

For example, if a survivor asks you to advocate on her behalf with a caseworker at the local welfare office, you should write a release of information for her to sign that waives privilege about certain facts that she has told you, in order for you to talk to the caseworker about getting her the economic support she needs. In this example, the release would specify what details you could share, that you can share them with the welfare caseworker (by name), and that you can use the information for the next thirty days so the specific issue can be resolved.

[6] This section is adapted from "Confidentiality, Privilege & Protecting a Sexual Assault Survivor's Right to Privacy" by Catherine A. Carroll, in *Legal Advocate Resource Guide Update: Advocating for Survivors of Sexual Assault*, Washington Coalition of Sexual Assault Programs, Vol. 2 – July 2003.

A "blanket waiver" should never be used – meaning a form that you ask victims to sign that indicates your agency can share as much information about them with outside parties as you find necessary, without saying specifically who, when or for how long.

To see a sample Release of Information form, look at the last page of the WSCADV *Model Protocol on Confidentiality when Working with Battered Women* (available on our website at www.wscadv.org/Resources). Another place to read a detailed list of items and examples of what a waiver should contain (things like naming the party to be released to, specific expiration date, how the information will be delivered), see the Washington Coalition of Sexual Assault Programs article "Confidentiality, Privilege & Protecting a Sexual Assault Survivor's Right to Privacy" ("Elements of a Waiver" section).

Informed Consent[7]

In order to release privileged information told to you by a survivor you're working with, you must ensure that she fully understands what she is giving up and what the consequences could be once the information is disclosed beyond your agency.

It is hard to predict what could happen in every instance once a victim's personal story or other information is shared with state agencies, a prosecutor's office or another social service agency. Some of the risks and consequences of waiving privilege you should help a domestic violence victim understand are:

- There is a state law that protects the information she shares with you in confidence.
- If she chooses to sign a release of information and gives up her right to protect her communication with you as privileged, thinking it is going to be used only in limited circumstances, she may be waiving it completely. Even if the release of information is very limited in scope, her story may still be used in the future in ways that cannot be predicted right now.
- Once she agrees to the disclosure and information is shared, she cannot take it back and make it private again. She can, however, withdraw her permission at any time and stop you from disclosing her information if it has not yet been shared.

[7] This section is adapted from "Confidentiality, Privilege & Protecting a Sexual Assault Survivor's Right to Privacy," Catherine A. Carroll, WCSAP.

It might also be useful to review the following questions before asking a survivor to sign a release of information:[8]

- Why do I want the survivor to sign this release form?
    - ◊ Is there pressure on our agency to share this information with others?
    - ◊ Is the survivor working with staff (caseworker, advocate) at another agency and making her own request that we discuss her story with them? Or was the request generated by the other agency for its own purposes?
    - ◊ Do the other agency's goals in this situation line up with what the survivor thinks is in her own best interest?
- What is the benefit to her?
- What is the risk to her? To our agency? What could happen to the information once it leaves our office?

Response to Subpoenas

If your domestic violence program is served with a subpoena, your first step should be to follow existing agency procedures for handling them. You can review some steps to take in WSCADV's model protocol on record-keeping.[9] As before, you should not provide any information voluntarily without the survivor's informed consent in writing.

A subpoena can be issued for an advocate to testify in person about conversations with a survivor or it can be for your agency's written records to be disclosed. In either case, your agency now has stronger protections in both federal and state law to say these are confidential communications and cannot be released. With the help of an attorney, your agency can file a motion to quash the subpoena (meaning to have it overturned or invalidated) by asserting that the information is confidential or is privileged (if it applies) and cannot be turned over. The new privilege law is limited – only certain records and conversations will meet the narrow legal definition of privileged communications. Remember the idea of privilege being the "icing on the cake" and use existing laws on confidentiality to defend your agency's records whenever possible, which should do the job most of the time.

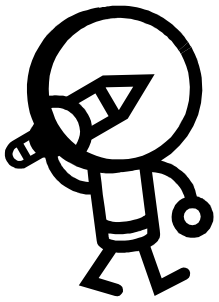
[8] Questions adapted from "Confidentiality: Beyond the Basics" presentation by Julie Kunce Field at "Civil Legal Advocacy for Battered Women: Enhancing Vision and Practice," Battered Women's Justice Project Civil Legal Institute, San Diego, CA, 10/14/04.

[9] Available on our website at www.wscadv.org/Resources.

If the subpoena is not successfully quashed, the steps outlined under RCW 70.123.075 still apply. With the assistance of an attorney, your agency should request an *in camera* review by a judge, which means the judge will look at the records privately in their office. The judge will determine what information is protected because it is privileged and/or confidential, and what information can be disclosed because its importance to the court case outweighs the survivor's right to privacy in keeping it confidential.

You may not be successful in keeping everything in the survivor's file confidential, as some things could be found by the judge not to be protected. In cases where any of your records have to be turned over to the court and are shared, it is important to explain to the survivor you're working with that this disclosure was the decision of the judge, and not done by you as an advocate or your agency. Additionally, domestic violence agencies are now required by law in instances where a survivor's personal information is disclosed by a court order to "make reasonable attempts to provide notice to the recipient affected by the disclosure of information."[10]

Regarding records on children, Child Protective Services, prosecution or law enforcement can request and receive records your agency may have about the child of a survivor who is the subject of a child abuse or neglect investigation, but *only relevant records relating to the child*.[11] Your agency should work with an attorney to figure out what records are relevant and should be turned over. For this reason, it's recommended that your agency maintain records separately relating to adult survivors and their children.



[10] New section to be codified in RCW 70.123.

[11] Required by RCW 26.44.030 (11).

Resources

Basic Educational Resource To Help Advocates (BERTHA) manual, WSCADV, reprinted January 2001. See Chapter 3, "What about confidentiality," p. 35-41.

"Confidentiality, Privilege & Protecting a Sexual Assault Survivor's Right to Privacy," by Catherine A. Carroll, in *Legal Advocate Resource Guide Update: Advocating for Survivors of Sexual Assault*, Washington Coalition of Sexual Assault Programs, Vol. 2 – July 2003.

Model Protocol on Confidentiality when Working with Battered Women, prepared by Lupita Patterson for WSCADV, May 2003. Available at www.wscadv.org/Resources.

Model Protocol on Record-Keeping when Working with Battered Women, prepared by Lupita Patterson for WSCADV, June 2003. Available at www.wscadv.org/Resources.

"Inside Scoop" articles:

"To Serve or Not to Serve: The pros and cons of providing mandated services," Tyra Lindquist, WSCADV, Nov. 2005. Available at www.wscadv.org/Bulletin.

"The Role of the DV Victim Advocate in Case Staffing at DSHS CSOs," Tyra Lindquist, WSCADV, Feb. 2006. Available at www.wscadv.org/Bulletin.

Full text of new federal and state laws on confidentiality:

Violence Against Women Act (VAWA)
"The Violence Against Women and Department of Justice Reauthorization Act of 2005," Public Law 109-162. Passed by 109th Congress as H.R. 3402.

Public Law text: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ162.109.pdf

HB 2848 – Protecting Confidentiality of Domestic Violence Information
Passed by the WA State Legislature in March 2006.

Bill text as Session Law (RCW references will be updated by the end of 2006 with each of the five new sections added to the relevant title and chapter):
http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Session%20Law%202006/2848-S.SL.pdf

Summary of bill activity: http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2848&year=2006#documents