



Protecting Privacy to Enhance Safety Pro Bono Attorney Manual

DEFENDING NON-PROFITS SERVING VICTIMS OF DOMESTIC AND SEXUAL VIOLENCE
AGAINST SUBPOENAS THAT VIOLATE LAW AND PUBLIC POLICY

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Confidentiality Institute, Inc.



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ABA Subpoena Defense Project Website
http://www.americanbar.org/groups/domestic_violence/subpoena_defense_project.html

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This manual was created to support licensed attorneys providing pro bono services to non-profit organizations. **Nothing in this manual should be construed as legal advice**, and licensed attorneys should use this manual as guide to facilitate their own research and problem-solving.

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I.

INTRODUCTION TO PROTECTING PRIVACY TO ENHANCE SAFETY PRO BONO PROJECT

WELCOME! And thank you for getting involved.

There are over 3,000 local rape crisis and domestic violence programs in the United States and territories. These are often referred to as “victim service providers” or “victim advocacy programs.” These are non-profit, non-governmental organizations, and each of them is struggling to leverage enough resources to fully serve the victims of sexual and domestic violence in their communities.

You want to help. But you don’t practice family law, or criminal law, or have the time required to take on the trauma-informed legal services that victims of violence badly need. The Protecting Privacy to Enhance Safety Pro Bono Project is another way you can assist violence survivors and facilitate their access to recovery services.

As a lawyer, you probably take your client’s right to confidentiality and privilege with you as an absolute given. And so do the systems around you. That’s not surprising since attorney-client confidentiality has been around since the Roman Empire. But, do you and the systems around you take confidentiality between victims and victim advocates as a given?

You should. Depending on your state, victim service providers might have stronger confidentiality and privilege protections than lawyers do. But, because the privilege and the profession itself are pretty new (less than 30 years old), systems and the players in those systems routinely *ignore* the privilege and confidentiality between victim service providers and victims of violence.

Imagine that: confidentiality between a lawyer and client handling the most mundane, routine matter is taken for granted by all, judges included. But, when a woman is raped and shares intimate details while trying to make sense of the assault, the court would allow the parties to invade the communications with the express intent of undermining her credibility, *even though the legislature expressly protected the communications*. The Protecting Privacy to Enhance Safety Pro Bono Project is here to shift the dynamic by vigorously defending the right of victim service providers to keep private their interactions with victims of violence.

By way of example, let’s look at the 2005 case of *Albuquerque Rape Crisis Center vs. Blackmer*, 120 P.3d 820 (N.M. 2005). New Mexico has a statutory privilege for victim counselors parallel to their privilege for psychotherapists. In a prosecution for criminal sexual penetration, the defendant sought to force the local rape crisis center staff to participate in an interview with his defense counsel. After being fully briefed on the statutory law and the public policy at stake, the trial court ordered the program to “reveal any assertions, in whatever form, the alleged victim may have made to the counselors regarding: the events of [the assault], relevant events six months before and after the date of [the assault], the alleged victim’s relationship with Defendant before, during and after [the assault]; and any statements the alleged victim may have made regarding her bias, prejudice or anger toward Defendant.” *Id.* at 821.

The process is straight-forward:

1. The ABA and the Confidentiality Institute train you on the law around victim advocate confidentiality.
2. A local victim advocacy program receives a subpoena for records or testimony.
3. We connect the local program with you, and you agree to provide pro bono legal services to fight the subpoena.
 - a. It likely starts with a phone call or a letter to the issuing attorney.
 - b. If that is not enough, a motion to quash is filed in court, and where appropriate a Motion for Sanctions follows.
 - c. The Protecting Privacy to Enhance Safety Project is available to provide you technical assistance as you work on the case.

When you quash the subpoena, the program is relieved, the survivor is grateful, and the court system is educated on the issue.

As we saw in the New Mexico case above, trial judges sometimes have difficulty applying this law. In the event of a trial court loss, you will contact ABA immediately to discuss resources available to assist the program in the event it wants to appeal. If that point is reached, you can choose whether to continue on as pro bono at the next stage. There have been some terrific appellate successes in states like New Mexico (specifically, *Albuquerque Rape Crisis Center* where the New Mexico Supreme Court reversed the lower court ruling), Colorado, Indiana, Pennsylvania, Illinois, and Michigan.

Win, lose or draw, when you fight the subpoena, you teach everyone involved that confidentiality between violence survivors and victim service providers is real and has teeth. Our goal is to make sure every judge, attorney and investigator understands that if you want to go after this kind of information, you can expect strong resistance and an uphill battle. That understanding alone will substantially reduce the number of subpoenas issued and increase survivor's comfort level in sharing information with victim service providers.

Protecting Privacy to Enhance Safety is a national pro bono project. In this manual, you will learn about issues and law particular to the field of victim advocacy and find a framework for developing your response to a subpoena to a confidential victim service provider. This manual is intended to accompany live training which will be offered both in-person and via webinar. While working on this pro bono project, you are never alone because the ABA Commission on Domestic & Sexual Violence and the Confidentiality Institute are available to provide technical assistance.

Good luck and thank you for donating your time and skills to this project!



II.

CONFIDENTIAL DOMESTIC & SEXUAL VIOLENCE VICTIM ADVOCACY

WHAT IS VICTIM ADVOCACY?

The victim advocacy profession is both similar to and fundamentally different from other helping professions. At its heart, all advocacy work is centered on empowering the survivor of violence to make sense of what has happened and make decisions about what to do next. Advocates do this by listening, believing, withholding judgment, explaining options, and preserving a safe space for the survivor. Their professional loyalty is to the survivor. Advocates are not officers of the court nor are they representatives of the public interest. In many jurisdictions, there may also be “victim witness assistants” or “specialists” who sometimes get called advocates. They work for the prosecutor, their professional role is to support survivors in pursuing prosecution, and they do not have the same kind of confidentiality with survivors. It is always important to be clear about the unique role of victim advocacy, and clarify the distinctions between advocates and other helping professionals.

Under the umbrella of advocacy, a program can provide a broad array of concrete services: emergency shelter and resources, 24-hour crisis hotlines, transitional housing, peer counseling (individually and in groups), employment counseling, and court and medical accompaniment. Some advocacy programs are even adding other professional services under their umbrella by hiring attorneys and mental health therapists (who are covered by their own professional ethics and privilege.)

As a profession, advocacy is younger and less consistently regulated than other helping professions. Terminology varies from state to state. Professionals providing advocacy may be called “advocates,” “victim-counselors,” “crisis counselors” or some other variant in the statutes. Some states have a certification process, but most do not and certification is generally not required to work in programs. To qualify for state-based privilege, an advocate must meet the basic requirements laid out in the state statute – usually a number of hours of training or supervision by someone with that minimum training. Under federal statutes, all personally identifying information collected in any manner by anyone at a funded program is to be protected from unauthorized disclosure by the program.

The fundamental underpinning of all victim advocacy work is the restoration of control to a victim of violence so that s/he can be a survivor of violence. It is not in anyone’s power to undo the violence, but it is possible to restore privacy and personal decision-making to the person victimized. Advocates aim to give someone who has been assaulted a safe space to examine the event, express feelings of fear and doubt, weigh options for responding to the abuse, and decide for him or herself what to do next. The particulars of the day-to-day work will differ between domestic violence and sexual assault programs, as well as between different agencies and locations.

Practice Point: When you take on a subpoena issue for an advocate, spend some time asking about the daily work so that you have an improved understanding of your client's approach to working with survivors of domestic and sexual violence, and the kind of information that gets shared.

WHY DOES ADVOCATE CONFIDENTIALITY MATTER?

Physical Danger

Somewhat counter-intuitively, abusers routinely escalate violence when the victim separates or just seeks help.¹ Many people who seek help from advocacy programs are quite literally in hiding from a potential murderer. To reveal their location is to expose themselves and their families to severe risk of harm. With an eye to the future, victims work with advocates to map out a safety plan which identifies where they will go, who will help them, and how they will stay safe. If that information is not kept confidential, then abusers could get access to the information and use it to find and harm the victim and family.

This danger does not necessarily wear off with time. Attorneys specializing in domestic violence divorce and custody can attest that the murder sometimes comes months or even years later, when the abuser is participating in the court process and the situation appears calm.² Divorce clients have been murdered “out of the blue” during a pending divorce where the abuse appeared to be “in the past”.³

Social Stigma & Victim-blaming

Survivors of sexual and domestic violence often avoid being identified for fear of being blamed or ostracized. We don't have to look very far to find evidence that victims of sexual and domestic violence are stigmatized and punished after an assault. When high school boys raped an unconscious 16-year-old girl in Steubenville, Ohio, local folks and the nation as a whole struggled to make sense of it. Tennis star Serena Williams gave Rolling Stone a quote that sums up an all-too-common reaction: “Do you think that was fair, what they got? They did something stupid, but I don't know. I'm not blaming the girl, but if you're a 16-year-old and you're drunk like that, your parents should teach you: don't take drinks from other people. She's 16, why was she that drunk where she doesn't remember? It could have been much worse. She's lucky. Obviously, I don't know, maybe she wasn't a virgin, but she shouldn't have put herself in that position[.]”⁴

Celebrities have not cornered the market on victim-blaming and ostracism. When pop star Chris Brown beat his pop star girlfriend Rihanna in 2009, even MTV News seemed disturbed by the posted comments blaming Rihanna and excusing Chris Brown, prompting them to run a full article on the issue. “I don't think Chris would just hit a girl like that,” wrote reader Nika2hot. “She had to do something or say something out the way for him to really hurt her.”⁵ Many posters claimed Rihanna had done something to deserve this or just bemoaned the injustice of “ruining” Chris Brown's career. And victim-blaming can manifest itself much more concretely than hurtful on-line posts. In 2010, a high school boy in Texas raped his classmate in the band room. She reported it immediately. Her high school then sentenced her to disciplinary school *with her assailant* for the infraction of “public lewdness”.⁶

Neither Rihanna nor the young woman harmed in Steubenville had the option to keep their status as a victim confidential. However, exposure opened up all of them to ridicule, shame, and blame. Confidentiality at domestic and sexual violence advocacy programs allows other survivors to get help without the fallout of public disclosure.

Reluctance to Incur Risk

Victims of violence are always weighing and managing risk. Every action or inaction carries some level of risk. When victims turn to a crisis line or a shelter for help, they are also taking a risk by exposing themselves to a stranger and creating a record of events. Confidentiality reduces the risk that survivors seeking help will lose control of their own information and story.

When survivors cannot trust confidentiality, they refrain or withdraw from contact with victim service providers. In 1981, the Pennsylvania Supreme Court ruled that a defendant in a rape prosecution could subpoena the records of a rape crisis center and could review statements of the victim related to the assault.⁷ After that case decision came down, rape crisis centers received requests from victims for the “return of their files”, and victims terminated counseling services altogether.⁸ Fortunately, the public outcry after that decision resulted in a legislative action to create a strong privilege in Pennsylvania that was upheld by the Pennsylvania Supreme Court in 1992.⁹

Counseling Candor

“The assumption of confidentiality is essential to fostering trust between the parties to the relationship.”¹⁰ As attorneys, we rely on confidentiality as central to facilitating a fully open communication with our clients. When clients feel free to share the whole story, attorneys are able to offer good advice and implement sound strategy. Victim counselors are in the same position. If victims edit or censor their thoughts and experiences, it is not possible to provide effective counseling and information.

Participation in Prosecution

There is a public interest in holding perpetrators of domestic violence and sexual assault accountable for their actions. For the most part, prosecutors are unable to obtain convictions if victims are unable to safely testify. When defense attorneys subpoena advocacy records (records that may contain private thoughts, fears and safety plans), many victims respond by asking prosecutors to drop the case or withdrawing their own cooperation in hopes that the case will go away. This is basic risk management on the part of victims. When the law protects the privacy of those records, the law also reduces risk of harm to the victims and encourages victims to participate in the public accountability of criminal prosecution.

WHY IS A STRONG PUBLIC STANCE ON CONFIDENTIALITY IMPORTANT?

Trust is gained in drops and lost in buckets. Advocacy programs gain trust by maintaining confidentiality and actively displaying a commitment to confidentiality. Survivors may not directly ask how private their information is; instead, they will read the cues and draw conclusions. When one client’s records are exposed, word will get out (at least within that survivor’s personal network), and the bucket of trust will be dumped out for that program.

A strong stance on confidentiality also trains the community on what to expect when advocacy records are sought. Attorneys enjoy an enormous amount of respect for their privilege with clients. People assume that any request for client information from a lawyer will be met with a resounding, “NO!” Therefore, they usually don’t bother asking the attorney at all. Because people don’t ask, lawyers don’t share, and the strength of attorney-client privilege is reinforced in the public understanding.

The confidentiality of victim service providers does not enjoy anything approaching this level of respect. Advocates are routinely asked for private client information, and requesters are affronted or angry when

told no. Advocates are all too often threatened with arrest or prosecution for following state privilege laws. By taking a strong stance against a subpoena for information, the advocate is protecting the client and educating the community. Your motion to quash teaches the law to the judge in the case, and it teaches the attorneys in the courtroom that a request for client information from a victim service provider will be met with a resounding, “NO!” That resounding no will chill future requests for client information, thereby increasing the protection of all client files and reducing the resources that programs must expend to protect confidentiality.



III.

STATE LAW ON PRIVACY BETWEEN SURVIVORS AND VICTIM SERVICE PROVIDERS

More than half of the states have enacted some level of protection for communications with and records of victim service providers. But, no two state protections are exactly alike. Included in this section is an overview of the types of protection commonly afforded, and you will find a link to a chart of specific state statutes in the Appendix.

Practice Point: Many states protect both domestic violence and sexual assault programs in the same statute. Many do not. Pay attention to what type of program you are assisting and check whether the program and/or the person subpoenaed meets the state's definition of a protected person or entity.

Practice Point: Definitions matter and they differ. Read the state's definition of "records," "communications," "confidential," "advocate," "victim-counselor," and any other potential term of art in the statute.

COMMUNICATIONS & RECORDS PRIVILEGE

"In the law of evidence, certain subject matters are privileged, and can not be inquired into in any way. Such privileged information is not subject to disclosure or discovery and cannot be asked about in testimony."

Legal Information Institute, available at <http://www.law.cornell.edu/wex/privilege>
(accessed 12/3/2013)

Absolute Privilege

Some states have enacted a statutory "absolute privilege" to confidential communications between victim service providers and victims of violence. "Absolute" means no exceptions, not subordinate to criminal defendant's right of confrontation, not subject to a balancing test, and not open for an *in camera* review by the court. In 2011, the constitutionality of Indiana's absolute privilege was put to the test and affirmed by the Indiana Supreme Court.¹¹ This case provides an excellent analysis of a statutory privilege, and firmly rejects the appellate court's attempt to impose an *in camera* review process that was not included in the statute. Beware though: sometimes the courts do insert judicial discretion into an absolute privilege. The Michigan Supreme Court effectively modified the absolute privilege by allowing for an *in camera* review where the defendant articulates a particularized need for the information.¹²

Practice Point: The state statute chart in the Appendix is a starting point for researching your state law on privilege. Always run a search on the statute to confirm whether recent legislation or case law has changed anything. If you don't have access to Westlaw or Lexis, Google Scholar is a good, free resource for caselaw and Cornell Law School's Legal Information Institute is terrific for linking to state statute sources.

Qualified Privilege

Some states have granted a "qualified privilege" so that confidential communications are generally protected from forced disclosure, but a court can grant a specific request for disclosure. Typically, there is a requirement for an *in camera* review and a specific finding that the information is sufficiently probative to outweigh the harm to the victim. Washington provides an interesting example of qualified privilege. The statute does allow a judge to order disclosure of records but only after:

- a written pretrial motion is filed,
- which includes affidavit(s) setting forth specific reasons for requesting the records, and
- an *in camera* review is conducted where the court determines whether:
 - the records are relevant
 - the probative value of the records outweighs the privacy interests of the victim, taking into consideration the potential for further trauma, and
- the court issues a written order.¹³

In a Washington state case, the Court noted that "vague assertions that the victim may have made statements...that possibly differ from the victim's trial testimony do *not* provide sufficient basis to justify ignoring the victim's right to rely on her statutory privilege."¹⁴ The Michigan Supreme Court took a similarly skeptical view of generalized assertions of need to review the victim's confidential records.¹⁵

When handling subpoenas in qualified privilege states, it is important to prevent the exception from becoming the rule. If the only test of materiality is that the victim might have said something that might be useful for cross-examination, then there is effectively no privilege in those states. Such a gaping exception undermines the statutory grant of privilege and should be argued against vigorously.

Practice Point: If your state has not ruled on the level of specificity required before an *in camera* review is allowed, pull from decisions in other states. You can start with the case summaries in the Appendix here, but always make sure to do a new search for more recent case decisions.

Waiver of Privilege

The attorney issuing the subpoena may claim the information sought is no longer confidential because the privilege was waived when a victim treated the information as public or otherwise behaved inconsistently with confidentiality. Some statutes specifically address what actions constitute waiver; others are silent. In most states, there is little to no case law on a waiver of advocate privilege. Remember, privilege is held by the person whose information was shared, and is protected by the professional with whom it was shared. If an advocate made disclosures without consent or ratification of the victim, then a court should not find that the *victim* made a waiver.

Practice Point: Research the cases on waiver of privilege in analogous situations such as attorney-client and therapist-patient relationships.

Even if there is some waiver, it is imperative that the impact be as narrow as possible. In cases where there might be a minimal waiver of privilege, programs have the greatest need for a strong legal argument and vigorous advocacy to minimize the disclosure of private survivor information.

CONFIDENTIALITY OF INFORMATION: RECORDS ONLY

A few states have statutory language that only addresses the confidentiality of “records” of rape crisis or domestic violence programs.¹⁶ In a situation like this, a litigant might attempt to subpoena the counselor to testify, claiming that the records protection is not implicated. In 1992, the Supreme Court of Pennsylvania considered the effect of a statutory protection that does not explicitly address both records and testimony.¹⁷ In that case, the criminal defendant issued a discovery subpoena for the records of a rape crisis center, claiming that the privilege statute only referenced testimony. According to the court, records were necessarily protected as well, because the protection from testimony would be “inconsequential” and the confidentiality would “cease to exist” if records were open to inspection.¹⁸ The same logic should hold true where records are explicitly protected, but no mention is made of testimony.

Practice Point: A motion to quash in a “records only” state should argue that the records protection is meaningless if testimony about the same information in the records is not protected.

COMMON STATUTORY EXCEPTIONS TO CONFIDENTIALITY & PRIVILEGE

Be forewarned that even in states where the privilege is characterized as “absolute”, staff or volunteers at the victim service provider may be specifically required to disclose certain types of information. Some of the most common mandatory disclosure categories are child abuse, abuse of vulnerable adults, and duty to warn of imminent physical harm. Some states even require disclosure of information after death to fatality review boards.

Though these statutory “mandatory reporter” requirements are separate from court-based privilege, it is best to be aware of whether your state has them and how they apply to the person named in the subpoena. Sometimes local law can require any “mandatory reporter” to testify about the substance of the report or to share information in strictly defined circumstances that might trump privilege.

Practice Point: Get the actual language of the statutory requirement for disclosure, and don't rely on anyone else's assertion about what it requires a victim service provider to do or not do.

RAPE SHIELD LAWS

In all state and federal jurisdictions, there is some form of “rape shield” law restricting evidence in a sexual assault prosecution. These statutes vary between jurisdictions, but the general intent is to prevent the introduction of evidence about the sexual conduct of the victim when that evidence is unrelated to the

alleged crime being prosecuted. If the purpose of the subpoena issued is to expose information about past sexual conduct, the rape shield statute may give a basis for exclusion. Even if broader information is sought and technically allowed under state privilege laws, the rape shield statute may require redaction of some information before the file is shared or even viewed during *in camera* review by the judge.

Practice Point: If you are handling a subpoena related to a prosecution for sex offense, check the rape shield statute in that jurisdiction. A compilation of statutes current through March 2011 can be found at http://www.ndaa.org/ncpca_state_statutes.html.

VICTIMS' RIGHTS AMENDMENTS

As additional support for any motion to quash, it may be useful to cite state law regarding the privacy rights of victims of crime. In 33 states, crime victim concerns have been added to the state constitution through a Victims' Rights Amendment. The VRA typically addresses a right to dignity and privacy for victims.

Practice Point: If you are handling a subpoena which impacts a crime victim, check the state's constitution for any statements on privacy, whether for crime victims specifically or for the general population. A link to look up existing VRAs state can be found at <http://www.nvcap.org/states/stvras.html>.

ATTORNEY GENERAL OPINIONS

In some states, though no court has formally addressed the statutes affecting privacy between survivors and victim service providers, the state attorney general has issued a formal (or sometimes even informal) opinion. Most states catalogue attorney general opinions on the attorney general's website, and internet search engines as well as commercial research sites are very good at pulling up relevant opinions.

Typically, formal attorney general opinions are characterized as "highly persuasive" interpretations of the law, but not binding on courts considering the issue. Informal attorney general opinions carry even less weight and should be viewed with great skepticism. Sometimes, a written statement from staff at the attorney general's office may be cited as the basis for a community understanding of "the rules" even though few have read it or even know what it says. No victim service provider should turn over victim information solely because an attorney general opinion allegedly authorizes the disclosure. The issue should be brought before a court where a full argument regarding law and public policy can be considered.

Practice Point: Know whether the attorney general has addressed your issue. Do a web search for your jurisdiction. If the opposing party cites an AG opinion in support of disclosure of information, be sure to get a copy of it. Consider proactively addressing the opinion and countering its arguments in your motion to quash.



IV.

FEDERAL LAW ON CONFIDENTIALITY FOR VICTIM SERVICE PROVIDERS

A great majority of domestic violence and sexual assault programs receive funding through the federal Violence Against Women Act (“VAWA”), Family Violence Prevention and Services Act (“FVPSA”), and/or Victims of Crime Act (“VOCA”). All three of these funding streams carry requirements around confidentiality which programs must follow, and which represent a consistent federal approach to confidentiality. When you consider the federal confidentiality scheme and the preponderance of states that provide advocate confidentiality, you have an excellent argument for a federal common law privilege. We will consider each source of law in turn.

Practice Point: Find out whether your client receives funding from any of these sources. The Executive Director may need to check with the state coalition or the state grant administrator because federal money under these statutes is often distributed under a different name by state entities.

VIOLENCE AGAINST WOMEN ACT (“VAWA”)

“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 [VAWA] shall protect the confidentiality and privacy of persons receiving services.”

42 USC §13925(b)(2)

No Disclosure by Grantees

Per VAWA, grantees shall not disclose, reveal, or release *any personally identifying information* or individual information collected in connection with providing services. The prohibition is as broad as it sounds. There are no exceptions in VAWA for disclosure to funders, auditors or law enforcement (such as you see in HIPAA.) To the extent programs need to share information with funders or auditors, they can only disclose non-personally identifying aggregate information (such as the number of people served in a year or the number of clients between ages 20 and 30.)

There is an exception for disclosure *by* law enforcement since constitutional and open government principles routinely require law enforcement and prosecutors to share information with criminal defendants and other entities. Therefore, law enforcement, prosecution and court-generated information can be shared. Do not get confused; the law enforcement exception does not mean that non-governmental VAWA grantees are allowed to disclose *to* law enforcement.¹⁹

Personally Identifying Information

VAWA defines “personally identifying information” as 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, regardless of whether the information is encoded, encrypted, hashed or otherwise protected, 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, driver license number, passport number, or student identification number; and
- e. any other information, including date of birth, racial or ethnic background, or religious affiliation, that would serve to identify any individual.²⁰

Any information held by a program about an individual should be protected from disclosure because of the risk that it *could* become individually identifying and put the person at risk of harm.

Practice Point: Merely disclosing that a program has a file on someone violates federal confidentiality rules. Be sure that you do not confirm or deny the existence of a file in your formal and informal advocacy in response to subpoenas.

Written Release by Victim

The victim can ask the program to disclose information on his/her behalf by completing a written, informed, reasonably time-limited release authorizing disclosure. Per VAWA, if a minor or person with a guardian can receive services without consent of a parent/guardian, then that minor/person can sign the consent form alone. When minors do need adult consent to receive services, the consent form must be signed by both the minor and the parent or guardian. Similarly, the form for the disabled adult must be signed by the court-appointed guardian.

Sometimes, the person named as an assailant might try to get a program’s information with a signed consent form for records of a minor or person with a guardian. VAWA is very specific that an abusive parent (abusive to either the child or the other parent) or abusive guardian does not have authority to consent to release of information held by a grantee. Programs are allowed to make their own judgment as to who is abusive when considering a signed release form.

Practice Point: If the subpoena comes with a release form signed by an abusive parent or guardian, use VAWA to show the court why that release does not waive confidentiality and privilege.

Under VAWA, programs may never require a release of information as a condition of service. That means programs cannot “resolve” the subpoena issue by demanding that a victim sign a release form to disclose the requested information. They also cannot demand such releases be granted as a matter of course before agreeing to provide services.

The goal of releases under VAWA is to serve the needs of the victim, never the needs of the program. Some victims may make an informed decision to consent to release of information sought by subpoena, but they should always have an opportunity to assess the risks and to consider alternative methods of sharing information to achieve their goals. If the victim does want to release information requested in subpoena, the program should be very clear what the limits of that release are and should take precautionary measures with the court and attorneys to ensure the release is restricted to the boundaries set by the victim signing the release.

Statutory or Court Mandate

VAWA does recognize the possibility that state law or a proper court order might mandate disclosure of information held by a grantee. However, VAWA allows programs to disclose **only** when actually *mandated*, not just permitted, and VAWA requires protective steps when disclosure is mandated. Specifically, grantees must:

- make reasonable attempts to provide notice to the victims affected by disclosure, and
- take steps necessary to protect privacy and safety of persons affected by the disclosure.

This raises the question: does the subpoena itself count as a proper court order? The answer is sometimes, but often not. Subpoenas are typically signed by attorneys with a vested interest in release of information, usually have not been considered by a judge, and routinely do not comply with relevant law. VAWA does not require programs to disclose information upon mere receipt of an overreaching subpoena that infringes on privileged information. In fact, the commandment to “take steps to protect privacy” seems to impose a duty on programs to challenge subpoenas when they are issued without court oversight. Programs may need to prepare for a long road to get the inappropriate subpoena quashed because higher court review has been necessary in the past. Programs in New Mexico, Colorado, Pennsylvania, Illinois, Michigan, and Indiana have all taken trial orders for disclosure to their respective Supreme Courts with great success.

No Data in HMIS

This issue is unlikely to come up in a subpoena context, but this portion of VAWA reinforces the seriousness of the confidentiality provisions in the law. The Homeless Management Information System is a national database framework intended to track every person who seeks homelessness-related social services. The goal of HMIS is to individually identify each person and all of their personal characteristics so that the information can be freely shared between programs, and the outcomes for individuals can be tracked.

In 2005, VAWA amended the McKinney-Vento Homeless Assistance Act to specifically prohibit grantees that are victim service providers (domestic violence shelters and rape crisis centers) from entering personally identifying information into HMIS.²¹

FAMILY VIOLENCE PREVENTION AND SERVICES ACT (“FVPSA”)

“In order to ensure the safety of adult, youth, and child victims of family violence, domestic violence, or dating violence, and their families, grantees and subgrantees under [FVPSA] shall protect the confidentiality and privacy of such victims and their families.”

42 U.S.C. §10406(c)(5)

In 2010, FVPSA was amended to have the same language about confidentiality and non-disclosure as VAWA. However, VAWA was amended three years later so there are now subtle differences in the language

between the two statutes. It is generally agreed that the VAWA 2013 amendments were clarifications of existing language, not changes. Therefore, practitioners should be able to point to VAWA 2013 whenever there is a dispute about the intended effect of FVPSA's language.

No Disclosure by Grantees

Per FVPSA, grantees shall not disclose, reveal, or release any personally identifying information collected in connection with providing services. The prohibition is as broad as it sounds. There are no exceptions in FVPSA for disclosure to funders, auditors or law enforcement (such as you see in HIPAA.) To the extent programs need to share information with funders or auditors, they can only disclose non-personally identifying aggregate information (such as the number of people served in a year or the number of people between the ages of 20 and 30.)

There is an exception for disclosure *by* law enforcement exactly like the one in VAWA, and discussed above (p. 12).

Personally identifying information

FVPSA explicitly adopts the definition of “personally identifying information” laid out in VAWA.²² See Personally Identifying Information on page 12 for further description of that definition.

Written Release by Client

The client of a program can ask the program to disclose information on his/her behalf by completing a written, informed, reasonably time-limited release authorizing disclosure. FVPSA states that when the client is a minor, both the minor AND the parent/guardian must sign the release form. If an individual has a court-appointed guardian, then the guardian must sign the release form. FVPSA does not address the situation where a minor or person with a guardian can receive services without consent or knowledge of the parent or guardian.

FVPSA and VAWA have the same rules regarding releases by abusive parents and guardians. See above section on VAWA for further discussion.

Requiring a release of information as a condition of service is fundamentally inconsistent with voluntary and informed waiver of privilege so FVPSA does not allow it. If practitioners need support for this proposition, it has been specifically clarified in VAWA 2013.²³

The goal of releases under FVPSA is the same as that under VAWA: to serve the needs of the victim, never the needs of the program.

VICTIMS OF CRIME ACT (“VOCA”)

The Victim Compensation and Assistance Program (part of the Victims of Crime Act of 1984)(“VOCA”), 42 USC §10601 *et. seq.*, includes language which requires programs, as a condition of funding, to have policies and procedures that assure the confidentiality of served individuals. Under VOCA, grantees must certify that they will comply with the regulations set out in 28 CFR Part 22. If the regulations are not adhered to, the program may have sanctions imposed, including the termination of VOCA funding. Any person violating the confidentiality provisions may be fined an amount not to exceed \$11,000 plus any other penalty imposed by law.²⁴ Service participants must be notified that any identifying information will only be used or revealed for statistical or research purposes.²⁵

The actual language of the statute could be read to provide a broad and blanket protection of personally identifying information collected by a service provider for the purpose of assisting a victim of crime. The statute states:

(a) Research or statistical information; immunity from process; prohibition against admission as evidence or use in any proceedings

No officer or employee of the Federal Government, and no recipient of assistance under the provisions of this chapter shall use or reveal any research or statistical information furnished under this chapter by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this chapter. *Such information and copies thereof shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings.*²⁶

(emphasis added.)

Furthermore, the supporting regulations for VOCA specifically state that one of the regulatory purposes is to “[i]nsure the confidentiality of information provided by crime victims to crisis intervention counselors working for victim services programs receiving funds provided under the Crime Control Act, and Juvenile Justice Act, and the Victims of Crime Act.”²⁷

FEDERAL COMMON LAW PRIVILEGE

Federal Privilege from Common Law

The Federal Rules of Evidence do not specifically list the testimonial privileges recognized in federal court. The drafters intended to allow flexibility in the area of privileges so as to, “continue the evolutionary development of testimonial privileges.”²⁸ F.R.E. 501 specifically states,

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

If a domestic violence or sexual assault program is confronted with a federal subpoena, counsel for the program should consider and develop the following arguments:

1. If the claim or defense is governed by state law, then any state-granted privilege should be applied in federal court.
2. The court should recognize a federal common law privilege for domestic violence and sexual assault programs and staff.

And when you sit down to start drafting the argument for a federal privilege, your first step is to read *Jaffe v. Redmond*, 518 U.S. 1 (1996).

Practice Point: *Jaffe* has a majority and a dissent. Read them both and prepare to respond if any arguments from the dissent are made in your case.

Jaffe v. Redmond: Psychotherapist Privilege Recognized

In 1996, the Supreme Court explicitly recognized a psychotherapist-patient privilege for licensed clinical social workers in the case of *Jaffe, supra*. The reasoning behind *Jaffe* has been repeatedly cited by state supreme courts when endorsing state privilege for domestic violence and sexual assault victim counselors. The reasoning in *Jaffe* is very helpful to an argument for victim service provider privilege.

Protecting a Transcendent Public Good

The key to arguing for a common law privilege is to convince the court that the privilege protects a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”²⁹ In *Jaffe*, a police officer shot and killed a man in the course of duty, then received counseling services from a licensed clinical social worker. The man’s family brought a civil suit against the officer and sought discovery of all the social worker’s clinical records. Because a counseling relationship is “rooted in the imperative need for confidence and trust,” the “mere possibility of disclosure may impede the confidential relationship necessary for successful treatment.”³⁰ Therefore, a federal privilege for psychotherapist counselors was warranted because successful treatment of individuals with mental health concerns facilitates “the mental health of our citizenry” and is a “public good of transcendent importance.”³¹ All the public policy arguments about the need for confidentiality with psychotherapists apply with equal or greater force to the relationship between victims of domestic and sexual violence and the victim service providers responding to their needs.

One argument not raised in *Jaffe*, but potentially persuasive is that a privilege for domestic violence and sexual assault counseling services supports the mental health interests of all individuals who might be involved in a case. If a man has been abusive to his wife and is involved in a custody dispute with her, he may have sought mental health services between the time of the assaults and the trial. His willingness and ability to seek help and honestly address his past behavior is society’s best shot at curtailing his violence toward his wife, his children and his future partners. If he knows that an admission of past violence to his counselor will be exposed to court scrutiny, he will be chilled from making the admission at all, and it will become impossible for him to assess and take responsibility for his behavior.

Practice Point: If you are looking for data on domestic and sexual violence as well as the need for the services of victim advocates, the Bureau of Justice Statistics maintains the National Crime Victimization Survey at bjs.gov. The National Network to End Domestic Violence conducts an annual one-day census of victim service providers called “Domestic Violence Counts” which is accessible at nnev.org.

Minimal burden on search for truth

Granting a privilege to counselors imposes little burden on a court’s mission to ascertain truth. As the Court recognized in *Jaffe*, if there is a fear of later disclosure, individuals will be chilled from sharing any information that might cast them in a negative light (either by curtailing their communications with counselors or by eschewing counseling assistance all together). Once people refrain from actually sharing

information, there is no information to be gotten from requiring testimony and disclosure of records from counselors. “This unspoken ‘evidence’ will therefore serve no greater truth-seeking function than if it had been spoken and privileged.”³²

Justifications for Privilege Specific to Victim Service Providers

In the domestic violence and sexual assault context, the chilling effect plays out in two different ways. Victims often feel shame for having been assaulted and may harbor internalized notions of victim-blame. Sharing the self-doubt with a counselor allows a violence victim to assess and ultimately reject the idea that anyone but the assailant is responsible for the choice to commit violence. However, if a victim of violence is fearful that the expression of self-doubt will be read by the assailant and used to discredit her in a public forum, the victim is likely to take one of two actions: refuse to share her thoughts and concerns about her victimization *or* refuse to participate in the court process as a litigant or witness. Either way, the public suffers a social cost when survivors of violence are forced to choose between full access to recovery and counseling services or justice in the criminal or civil courts.

Choice Between Prosecution or Privacy

This impossible choice between prosecution or privacy is especially acute for sexual assault survivors. Society continues to put sexual assault victims on trial when they are complaining witnesses, especially when the victim is sexually assaulted by a person known to her or him (78% of all sexual assaults against women according to the National Crime Victimization Survey.) Sexual assault victims know they will be scrutinized by prosecutors, defense attorneys, judges and juries. When they learn that the court may force disclosure of their private communications, one very common response is to opt out of the criminal justice process and refuse to testify. Even if a conviction is likely, the scrutiny of their private thoughts and fears may be too great a price to pay. And then society pays the price because it is unable to hold assailants accountable for violence in the community, or to prevent possible future crimes by the same perpetrator.

Confidentiality Equals Physical Safety

Additionally, domestic violence survivors need confidentiality to stay alive. This is not hyperbole. Victims of domestic violence often experience more severe violence, kidnapping, and murder *after separation*.³³ When a victim arrives at a domestic violence shelter, she may be physically hiding from the partner who has routinely promised to kill her if she leaves or discloses the violence. She may be seeking other services and have access to safe, secret shelter. If a perpetrator is allowed to subpoena her records and use them to learn her location, either in shelter or in private accommodations, he can use that information to assault, kidnap or kill her. Aside from physical violence, stalking is an issue of great concern post-separation.

Sometimes, the disclosure of violent behavior to a third party without actually separating can trigger extreme violence. An abuser may not assault his victim just for seeking assistance, but then will escalate his abuse upon learning that she shared the details of sexual, physical and psychological violence with someone outside of their relationship.

Relatives, friends, and domestic violence program staff are also at risk of harm. A particularly effective tactic of abusers is to threaten to kill others to punish the victim. These threats commonly extend to family members or friends who offer assistance to the survivor. Forced disclosure of survivor records at a domestic violence program could put a safety plan in the hands of a perpetrator and tell him exactly where the survivor will go in case of emergency and who will help with safety. Those individuals are at risk of

harm. Additionally, the mere fact that a survivor is working with a particular domestic violence advocate or program can put the advocate at risk of harm. When abusers learn that a victim has been at a shelter, they may do things like make bomb threats. If they know the identity of the advocate helping the victim, they may threaten or actually do harm to the advocate. To effectively achieve the “transcendent public good” of specialized services to survivors of domestic and sexual violence, the privilege should protect the right to refuse to confirm or deny the existence of any service relationship between the survivor and the program.

Survivor Services are Free and Specialized

It is undisputed that the federal court extends privilege to confidential communications with medical doctors, psychiatrists, psychologists, and licensed clinical social workers. Access to these professionals costs money, and requires resources that millions of domestic and sexual violence victims lack. Even when people do have the financial resources, they may find that traditional mental health professionals do not have the specialized knowledge to adequately meet the needs of this particular population of crime victims.

In response to that reality, the United States has created an infrastructure of non-profit programs providing crisis assistance, long-term advocacy, resources and counseling to survivors of domestic and sexual violence entirely free of charge to the victim. It would be fundamentally unfair to suggest that wealthier victims must choose either confidential expensive mental health services with generalist mental health professionals *or* non-confidential free specialized services that appropriately address the impact of sexual and domestic violence trauma. For poor or even modest means victims, the choice would be even worse: privacy for your response to trauma or mental health services- but never both.

Courts have explicitly recognized that it makes little policy sense to give privilege to expensive mental health providers and withhold it from low-cost and non-profit providers, especially when those providers specialize in the services most needed by these survivors.³⁴

States Support Common Law Privilege

The existence of a victim advocate privilege in the individual states has bearing on the federal common law privilege question.³⁵ In *Jaffé*, the Court noted that the appropriateness of a federal privilege was “confirmed” by the fact that 50 states and the District of Columbia had extended some form of psychotherapist privilege. Regarding domestic violence and sexual assault victim service providers, a majority of the states have passed legislation extending confidentiality or privilege to the information shared by victims. If we include confidentiality conditions attached to state funding contracts, then an overwhelming majority of states have decided to protect a confidential relationship between domestic and sexual violence victims and the programs serving them. In the Appendix, you will find a link to a state chart summarizing the law in all 50 states and the District of Columbia.

Balancing Tests Undermine Confidentiality

Federal courts should not set up a system for invading confidential relationships on a case-by-case basis. Some states try to institute a “balancing test” where the court can review privileged records *in camera* and decide whether the information is sufficiently relevant to outweigh the public interest in protecting the privacy of the communications. The U.S. Supreme Court directly rejected the idea of a balancing test in *Jaffé*. Quoting an earlier decision in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), the Court reiterated that, “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”³⁶



V. DIFFERENT PROCEEDINGS AND PARTICULAR ISSUES

CRIMINAL PROSECUTIONS

Defense Subpoena for Discovery or Trial Testimony

When a criminal defendant subpoenas a victim service provider, that subpoena is ripe for legal challenge. The 6th Amendment Confrontation Clause affords a right to effective cross-examination at trial, but “[t]he ability to question adverse witnesses ... does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.”³⁷ “There is no general constitutional right to discovery in a criminal case[.]”³⁸

Federal Rule of Criminal Procedure 17 controls the issuance of subpoenas, whether for trial testimony, for inspection of documents, or for deposition. Most importantly, any subpoena seeking personal or confidential information about a victim from third parties may only be served pursuant to court order.³⁹ Absent exceptional circumstances, the court must order that notice be given to the victim so that the victim can make an objection to the disclosure.⁴⁰ Similarly, all deposition subpoenas must be approved by the court before issuance.⁴¹

Practice Point: For state court criminal matters, check your local rules of procedure. Double-check whether any subpoena complies with local procedural requirements, and consider strictly enforcing technical defects.

Many state supreme courts have considered and rejected attempts to conduct unfettered discovery of privileged victim service provider records.⁴² Where states have an absolute privilege (meaning there is no provision for an *in camera* review or discretionary decision by the court), counsel should vigorously defend against any attempt to inject an exception into the statute. A recent Indiana Supreme Court case provides excellent and clear reasoning as to why *in camera* review of entirely privileged material is inappropriate.⁴³ Where states explicitly allow *in camera* review only if defendant makes a particularized argument that the records contain information necessary to the defense, be very wary of the generalized “we are looking for inconsistent statements” claim. This flimsy claim to break privilege was considered and rejected by supreme courts in Illinois and Michigan in the cases cited above.

Prosecution Subpoena for Discovery or Trial Testimony

Prosecutors are subject to the same rules as the defense in a criminal matter. They are not entitled to any greater access to information than the defense. In fact, the *Brady* rule requires that the prosecution share potentially exculpatory information with the defense. It is a safe bet that any information turned over to the prosecution in discovery or even informally will absolutely be turned over to the defense. For this reason alone, survivors may not feel safe cooperating with the prosecution. Prosecution could result in painful cross-

examination during trial or even unwanted media attention. In addition, the prosecution goal of conviction and accountability might unintentionally make a survivor less safe. Conviction and incarceration of the primary wage-earner can leave a family at risk of hunger and homelessness. Each survivor is managing risk after being abused or assaulted, and sometimes the criminal system unintentionally imposes too much risk.

Practice Point: Be aware that the client of the program may be the complaining witness or a criminal defendant. Even if the prosecutor's end goals are typically aligned with those of the victim service provider, the decision whether to share the information always lies with the victim of the program, and subpoenas should be challenged if that victim does not want to share.

GRAND JURY SUBPOENAS

Subpoenas to share information with a grand jury present special issues for privilege and confidentiality law. Federal and state governments convene grand juries to investigate and charge crimes. There is a veil of secrecy around grand juries which may or may not apply to the subpoenaed witnesses depending on local rules.

Federal grand juries are controlled by Fed. R. Crim. P. 6, and the witness subpoenas must comply with Fed. R. Crim. P. 17. The secrecy of grand juries described in Fed. R. Crim. P. 6(e) applies to the grand jurors, prosecutors, and court staff necessarily present at proceedings. The secrecy requirement does not apply to witnesses subpoenaed to testify before a grand jury. However, it is a common practice for prosecutors to request that the witness observe secrecy or to warn the witness about potential obstruction of justice charges. State grand juries may have actual rules requiring secrecy by grand jury witnesses or they may follow the federal practice of requesting secrecy in a letter accompanying the subpoena.

Secrecy poses particular problems for victim service providers who are required under VAWA and FVPSA to notify the survivor whose information is being compelled. Imagine a prosecutor subpoenas all client records from a domestic violence shelter in connection with a criminal investigation, and then tries to prohibit the shelter from notifying any of its clients that their records are being requested and disclosed. Now, there is a risk that the information will be disclosed to someone (a grand juror or court staff) who has ties to the abuser and may make inappropriate use of the information. Additionally, there is a risk that the disclosure of contact information will trigger unwanted police contact for the survivors. It will look to the community like the program ignored confidentiality requirements and did not even bother to warn the survivor that the police might call for an interview.

For these reasons, grand jury subpoenas for privileged or confidential information should be challenged just as vigorously as any other subpoena. Rules of privilege do still apply in grand jury proceedings, and a motion to quash grand jury subpoena can be brought.

Practice Point: Look up the rules. If a secrecy requirement is stated or implied, look up the law to confirm whether or not it is in fact a requirement or a request. If obstruction of justice is threatened, look up the elements of that crime, which typically require that a person take action for the deliberate purpose of interfering with law enforcement activities.

JUVENILE COURT ABUSE & NEGLECT PROCEEDINGS

Programs might receive subpoenas related to juvenile court abuse and neglect proceedings. Typically, the parties in a juvenile court case include the prosecutor, the parent(s), the guardian *ad litem* for the child, and the state child protection agency. Any of these parties might issue a subpoena for information. While the confidential nature of juvenile files avoids the problem of public disclosure, it still creates a breach in the promised confidentiality between a survivor of violence and the victim service provider. Additionally, the files will likely be shared among all the parties in the case (one of whom may be the victim's assailant) and used against the interests of the survivor.

Before litigating the subpoena, check whether any statute or court rule requires the disclosure of otherwise privileged material in child abuse and neglect court cases. Don't be afraid to ask the issuing attorney what law s/he is relying on to force disclosure. Read the statute carefully and apply it strictly. For example, if the statute requires mandatory reporters to share information, check whether or not the subpoena at issue is directed at an actual mandatory reporter, and check the actual information sharing requirements. If the attorney issuing the subpoena is overreaching, there is a basis for a motion to quash.

CIVIL COURT

When a subpoena for advocate records is issued in a civil matter, it is most commonly in litigation between the victim whose records are sought and the abuser/assailant. This might be a divorce and custody dispute, a protective order case, or a personal injury suit. Privileged and confidential records should be aggressively protected in civil cases because disclosure would have such a deterrent effect on victims' ability to receive services and exercise their rights to redress wrongs in court.

In litigation between the victim and the assailant, the issuing attorney may try to claim that the privilege has been waived because the victim put his or her mental condition at issue as an element of the case. Check your state law to see if there are any statutes or rulings on point regarding any type of privileged material and civil cases. Even if the issue is unaddressed for victim advocate confidentiality, the state may have taken a strong position as to when mental condition has been put at issue. For instance, in Illinois, the Mental Health and Developmental Disabilities Confidentiality Act specifically states that mental condition does not become an element of the claim by the mere fact of participating in a divorce or custody action or alleging pain and suffering in a tort.⁴⁴

Occasionally, the civil subpoena is issued by the lawyer for the violence survivor. Unless your client (the program) has documented that the survivor is knowingly waiving confidentiality, these subpoenas should be challenged as well. Attorneys for survivors sometimes forget that subpoenaing the program records makes the information accessible to the opposing party. There is no guarantee that the attorney had a full discussion with his or her client about the risks and benefits of subpoenaing records from the victim service provider. If the victim really wants the civil attorney to have the information, it is much more private and protective for the victim to get a copy from the program and deliver records to the attorney *or* for the victim to request the information be given to the attorney pursuant to a VAWA and state-law compliant release. The good news is that a subpoena from the victim's own attorney should be easily resolved through informal means.

MILITARY COURT

With increased focus on sexual assault and domestic violence within the military, there are likely to be issues arising under the Uniform Code of Military Justice. In these cases, the Military Commission Rules of Evidence provide controlling law. Mil. R. Evid. Rule 501 specifically references the common law approach

to privilege found in Federal Rule of Evidence 501, but only so far as “practicable” and “not inconsistent” with existing military law. Privilege between patients and psychotherapists is expressly protected under Mil. R. Evid. Rule 513, though the exception under that rule is pretty large (i.e. “when the communication is evidence of spouse abuse, child abuse, or neglect, or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse.”) Confidentiality with victim advocates is not expressly addressed in the Military Commission Rules of Evidence.

Practice Point: In the event of a subpoena from a military court, prepare to argue for common law privilege as described in this manual, and address why this privilege is both “practicable” and “not inconsistent with military law.”



VI.

CHECKLIST FOR PREPARING TO RESPOND TO SUBPOENA

1. Whose information is sought in the subpoena?
2. Has the program communicated with the person whose information is sought?
 - Does that person want to give informed consent for disclosure by written release?
3. What is the forum and type of case?
4. Does the subpoena comply with all applicable court rules for subpoenas generally?
 - Sufficient notice?
 - Method of service proper?
 - Required witness fees included?
 - Signed by an authorized individual?
5. Who exactly is the subpoena directed at?
6. Is this a subpoena for testimony, documents, or both?
7. Is this a discovery or trial subpoena?
8. Who is seeking the information?
9. What is the relationship between the person named in the subpoena & the victim advocacy program?
10. What if any statutory privilege protects the information sought?
 - Domestic violence/sexual assault advocate privilege?
 - Social Worker privilege?
 - Therapist privilege?
11. Any there any relevant interpretations of the applicable privilege in case law or attorney general opinions?
12. Are there any defined exceptions to that privilege in the statute or subsequent case law which actually apply in this situation?
13. If there is a judicial review procedure for this type of subpoena, was that procedure followed completely and correctly?
14. Which if any federal statutory confidentiality protections apply here?
15. Are there any other established privacy or confidentiality protections for this information under federal, state, local, administrative, or common law?



VII.

LAYING FOUNDATION FOR MOTION TO QUASH

PHONE CALL

Calling counsel for the party who issued the subpoena is a very good first step to figure out what exactly you are dealing with. Make sure you prepare for the phone call. When you make that call there are three things you should do in every call:

- #1: Listen to understand
- #2: Explain federal and state advocate protections
- #3: Protect confidentiality

Listen

Ask follow-up questions to understand exactly:

- a) what kind of information counsel really wants, and
- b) why counsel thinks a subpoena to the program is the best way to get it.

Open-ended questions will help counsel on the other end of the phone feel heard and respected, which then makes it easier for you to respectfully assert a strong position for the program. There will be a wide variety of responses and justifications from counsel. You may be talking to the victim's attorney who never considered the need to seek a release of information and forgot that documents produced in response to a subpoena are at greater risk of disclosure to the opposing party. It is pretty easy to suggest that this person talk with his or her client about a safer, more private way to collect the information. You may be talking to a criminal defense attorney who believes that the right to cross-examination at trial includes a right to comprehensive pre-trial discovery (it doesn't: *see* Chapter V). In this situation, you will want to take the pulse of the attorney and get a sense of how hard she or he wants to push for this discovery before the court.

Practice Point: You can better tailor your response to opposition if you listen and understand their position first. For more resources on listening as a basis for negotiation, the *Getting to Yes* series from Roger Fisher and William Ury of the Harvard Negotiations Project is an excellent resource.

Explain

It is highly unlikely that the issuing attorney fully understands the federal, state and public policy reasons why the program does not and cannot share the information sought. Be prepared to forward the law; very few people have quick access to the complete law around confidentiality.

Practice Point: In the Appendix, you will find a summary of VAWA and FVPSA on confidentiality. You can share these summaries with others to help you explain the law.

If counsel claims that a different law trumps privilege, ask for a citation or copy of that law. You don't have to resolve the whole problem in that first phone call. It is reasonable and productive to exchange your respective law in the initial conversation, and then give each other a chance to read, research and understand before talking again.

Protect

Regardless of how much you trust or can work with the issuing attorney, you have a responsibility to protect confidentiality of the victim's information in that informal phone call. As attorneys, we may routinely make formal objections and informal partial disclosures as a way of solving an issue. *However*, under federal standards and many state standards, the program cannot even confirm or deny that it has ever worked with the person whose information is sought, nor can a program describe the kind of information which it does or does not have. By way of example, you cannot call and say, "If you really want photos, I looked in the file and they don't have any." The fact of contact alone is confidential because it can mark a person as an abuse or rape victim or even reveal location. Sometimes that can feel frustrating if you are going multiple rounds with an opposing counsel who is trying to get information which the program does not even possess. Part of your role in protecting the program and the victim of violence is to hold the line firmly.

It is extraordinarily important that we defend confidentiality in the same manner whether or not the program ever worked with the victim. Here is one example why. Some counties have two shelters. Imagine the abuser sends a subpoena in the divorce case to both. One shelter says "We can neither confirm nor deny whether we have worked with that person." The other shelter says, "Because we never worked with that person, we have no file to turn over." The abuser now knows with reasonable certainty which shelter the spouse is staying in. Never assume that you can guess whether a little disclosure in the immediate case is "safe."

This is *not* to suggest that the opposing attorney is conspiring with the abuser to do harm to the victim. Reasonable information that an attorney would normally collect and share with a client could be misused by an abuser to do further harm. Simple information-sharing puts sexual and domestic violence victims at risk, which is one of the very reasons why privilege for domestic and sexual violence victim service providers exists in the first place.

LETTER

If you cannot resolve the matter over the phone, send a letter that formally introduces yourself to the party issuing the subpoena, asserts confidentiality, and announces the intention to quash the subpoena plus seek any fees, costs or sanctions that are available under state law. A basic sample letter is attached in the Appendix as a starting point, but should be augmented with the most relevant and persuasive law from your jurisdiction.

Practice Point: As in the phone call, you must preserve confidentiality in the letter. Do not confirm or deny whether the program has worked with or has any records on the person whose information is sought.

If you want to discuss the matter with the issuing attorney (which is a good idea), tell the attorney when you are available to speak or when you plan to call. Give a deadline for the attorney to respond to you, and describe the action you will take if the deadline is not met. Though a subpoena recipient is not technically bound by rules requiring parties to try resolving discovery disputes informally, these clear attempts to resolve the dispute short of a motion to quash will emphasize your reasonableness if you do go before the judge.

Practice Point: It is a good idea to set up timeframes for action in your letter, and then stick to them.

PROBLEM-SOLVE WHEREVER POSSIBLE

Tell the issuing attorney about program policy. Policy and procedure is something you can share without revealing confidential information. If you have followed the instructions above, then you have a sense of the kind of information that counsel is seeking. Talk to your client and find out what kind of information they collect, retain, and purge. If you know that the program has a policy of never collecting or retaining the information sought, you can share that policy with the opposing counsel so they know this is not worth a big fight.

Example: “You mentioned that you are seeking photos of injuries to the complaining witness in your case. While I can’t reveal whether the program ever worked with that person, I can send you the program’s written policy that any photos of injuries are the property of the client and the program never retains copies, either physical or digital. Given that, will you withdraw the subpoena or should we go before the court where I will seek costs and attorney fees?”

Example: “The program has a firm policy of destroying all personally identifying information about any client 30 days after the person leaves shelter. Your subpoena indicates the person was in shelter 6 months ago. While I can’t confirm or deny whether the person was in shelter, I can confirm that the program’s policy means it won’t have any records one way or the other. “

SLOW THINGS DOWN

It would be great to solve the whole thing in one phone call, but that is not always possible. The issuing attorney may have a trial deadline to meet, but you don’t. If you feel the need, don’t hesitate to slow things down to do research, get answers, or counsel your client. If the opposing party quotes law that seems to require disclosure by the victim service provider, ask for the cite (or a copy if it is something obscure like an informal attorney general opinion.) Thank them and buy some time to read and understand the law being cited. When an opponent is personally convinced of his or her right to subpoena the information, you want to take time to understand how s/he got to that belief and how you can sway opposing counsel (and if necessary the court) to be more protective.

FOLLOW-THROUGH

If you cannot resolve the issue informally, then you will need to file a motion to quash. Tell the issuing attorney that you are going to do so, tell the attorney when you are going to do so, and then do so on that date. If your local law allows for sanctions and fees, tell the issuing attorney if you plan to seek those, and then seek them. In the Appendix, you have a sample motion to quash that provides a beginning, but must be adapted to address your local law, rules of the forum, and case particular issues.



VIII. MOTION TO QUASH

If you are unable to resolve the matter informally, then it is time to prepare and file the motion to quash. A template motion to quash is attached, and you have permission within this project to adapt it for use on pro bono cases. Prior to using it, consider the following steps:

1. Read your local rules on subpoenas, paying attention to differences between civil and criminal procedure rules.
2. Identify any technical defects in the subpoena. There may be errors in amount of notice, method of service, payment of required witness fees, or procedure for seeking disclosure of advocacy/victim service provider records.
3. Check your state for statutory privilege. You can start with the chart you will find in this Appendix, but you must also check for updates, changes, and new case law.
4. Find out whether the subpoenaed program receives funding from VAWA, FVPSA, VOCA or any other federal, state, or local funding streams which include a confidentiality rider on the funding.
5. Based on the applicable law and the local jurisdiction, decide which is your strongest legal argument; lead with your best and include all the arguments available to you.
6. Preserve confidentiality and anonymity in the motion to quash. Don't disclose whether or not the program has worked with the named individual and don't describe the contents of any particular file.
7. Do disclose recordkeeping practices and protocols that could convince a judge that there is no relevant information held in the program's files.
8. Do quote case law, even if it is from other jurisdictions. In the Appendix here, you will find a summary of major state supreme court cases protecting privacy of victim advocate files. Use that as a starting point for your research into persuasive cases.
9. Get the motion to quash on file and get it before the court before the program makes any disclosure of documents or provides any testimony.



IX.

MOTION DENIED: NEXT STEPS

If the court will not honor confidentiality and orders that information be disclosed or be subjected to inappropriate *in camera* review, you will need to discuss next step options with your client (and they will likely need to have a discussion with the survivor.) You should reach out to the ABA Commission on Domestic & Sexual Violence and the Confidentiality Institute for technical assistance on what comes next. The options to consider are:

CONSIDER A PROTECTIVE ORDER

A good protective order can provide some kind of reassurance to a survivor that information will not be misused or dangerously shared. Protective orders limiting use of and access to files are common in other litigation and could be employed by victim service providers as a last resort. In a protective order, a court could:

- substantially narrow the type of information reviewed and/or released,
- redact the names any other person mentioned in the records,
- prohibit attorneys from sharing the file with their clients until further order of court,
- require counsel to get prior leave of court to use any piece of the file in evidence, and
- order counsel to physically destroy the file upon the conclusion of litigation.

CONSIDER AN APPEAL

As you have seen in this manual, some programs have had to take the case all the way to the state Supreme Court before privilege was properly protected. If your motion to quash is denied, you may have a case that needs to go up on appeal. You are not necessarily committed to accept the case for appeal, but you do have a responsibility to discuss that option with your client right away. You can also reach out to the ABA and Confidentiality Institute for assistance locating alternate counsel to handle an appeal if that is the route chosen by the victim service provider.

CONSIDER THE WISHES OF THE VICTIM

While the victim of violence is not your client, she or he is the real party in interest as the owner of the privileged information. Victims do decide to withdraw litigation or cooperation with prosecution when court cases become too invasive. Some victims may prefer to enter into a careful protective order rather than wait for the issue to go up on appeal. In short, the victim's opinion about next steps matters so it behooves you and your client to communicate with the victim appropriately. Unlike therapists (who can choose to fight release of information even when the patient wants it released), the victim advocate's loyalty is to the violence survivor, and the advocate's mission is to give control back to the victim. It is just as much an exercise of control to knowingly waive privilege as it is to assert privilege.

ENDNOTES

- 1 See Martha R. Mahoney, *Legal Images of Battered Women: Redefining Separation*, 90 MICH. L. REV. 1, 65-71 (1991).
- 2 See James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* 85 (Ne. Univ. Press 1999).
- 3 Personal experience of the author after 15 years in legal services representing victims of domestic violence.
- 4 Stephen Rodrick, *Serena Williams: The Great One*, Rolling Stone, June 18, 2013, <http://www.rollingstone.com/culture/news/serena-williams-the-great-one-20130618>.
- 5 Gil Kaufman, *Why Are Some People Blaming Rihanna for Alleged Altercation With Chris Brown?*, <http://www.mtv.com/news/articles/1605023/why-people-blaming-rihanna-alleged-altercation.jhtml> (last visited Dec. 30, 2013).
- 6 Department of Education, *Office of Civil Rights Investigation Letter Reference #06111487*, June 14, 2012, *available at* https://www.aclu.org/files/assets/2012.6.14_ocr_letter.pdf.
- 7 See *In the Matter of Pittsburgh Action Against Rape ("PAAR")*, 428 A.2d 126 (Pa. 1981).
- 8 See 1981 PA. LEGIS. J. 1738-39 (October 14, 1981) (statement of John Alden, Pa. House Representative).
- 9 See *Commonwealth v. Wilson*, 602 A.2d 1290 (Pa. 1992).
- 10 *People v. Turner*, 109 P.3d 639, 643 (Colo. 2005).
- 11 See *In re Crisis Connection, Inc.*, 949 N.E.2d 789 (Ind. 2011).
- 12 See *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994).
- 13 See WASH. REV. CODE § 70.125.065 (2012).
- 14 *State v. Kalkosky*, 852 P.2d 1064 (Wash. 1993)
- 15 See *Stanaway*, *supra* note 12.
- 16 See, e.g., TENN. CODE ANN. § 36-3-623(1) (West 2005).
- 17 See *Commonwealth v. Wilson*, 602 A.2d 1290 (Pa. 1992), cert. denied, 504 U.S. 977 (1992).
- 18 See *id.*
- 19 Beware of this issue. In at least one state, the attorney general's office has incorrectly used the law enforcement clause in VAWA to support an argument that shelters have to disclose files to detectives that are investigating a crime.
- 20 42 U.S.C. § 13925(a)(20) (2013).
- 21 See 42 U.S.C. § 11383(a)(8)(A) (2013).
- 22 See 42 U.S.C. § 10402 (2010).
- 23 See 42 U.S.C. § 13925(b)(2)(D)(ii) (2013).
- 24 42 U.S.C. 3789g(d) (2006); *see also* 28 C.F.R. 22.29 (1999).
- 25 28 C.F.R. 22.27 (1999).
- 26 42 U.S.C. 3789g(d) (2006).
- 27 28 C.F.R. 22.1(f) (1999).
- 28 *Trammel v. United States*, 445 U.S. 40, 47 (1980).
- 29 *Jaffe v. Redmond*, 518 U.S. 1, 10 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).
- 30 *Id.*
- 31 *Id.*

- 32 *Id.* at 12.
- 33 See Mahoney, *supra* note 1 at *6 ; see also Tina Hotton, *Spousal Violence After Marital Separation*, JURISTAT CAN. CENTRE FOR JUST. STAT., Vol. 21 No. 7 (2001), available at [http://violenceresearch.ca/sites/default/files/HOTTON%20\(2001\)%20SPOUSAL%20VIOLENCE%20AFTER%20MARITAL%20SEPARATION.pdf](http://violenceresearch.ca/sites/default/files/HOTTON%20(2001)%20SPOUSAL%20VIOLENCE%20AFTER%20MARITAL%20SEPARATION.pdf)
- 34 See Jaffe, *supra* note 29 at 15-16; see also *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820, 826.
- 35 See Jaffe, *supra* note 29 at 12-13.
- 36 Jaffe, *supra* note 29 at 18; see also *In re Crisis Connection*, *supra* note 11 at 802 (suggesting that victims are chilled by *in camera* review and this act undermines the policy goals of the privilege.)
- 37 *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (plurality opinion).
- 38 *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).
- 39 FED. R. CRIM. P. 17(c)(3).
- 40 *Id.*
- 41 FED. R. CRIM. P. 17(f).
- 42 See *In re Crisis Connection, Inc.*, 949 N.E.2d 789 (Ind. 2011); *People v. Turner*, 109 P.3d 639 (Colo. 2005); *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820; *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994); *Commonwealth v. Wilson*, 602 A.2d 1290 (Pa. 1992); *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988).
- 43 See *In re Crisis Connection*, *supra* note 11 at 795.
- 44 See 740 ILL. COMP. STAT. ANN. 110/10(a)(1) (West 2014).

APPENDICES

1. **Sample Subpoena Response Letter**
2. **Sample Motion to Quash for Adaptation**
3. **Summary of VAWA on Confidentiality**
4. **Summary of FVPSA on Confidentiality**
5. **Summary of Significant State Supreme Court Cases on Victim Advocate Confidentiality**
6. **Summary Chart of State Advocate Confidentiality Laws**

Appendix 1

Sample Subpoena Response Letter from Agency Attorney

RE: Request for information directed to [Agency Name]

I have been retained by [Agency Name] in regard to your recent demand for records related to _____.

We have left you a message/messages with this same information on (date/dates)_____. As you may already be aware, there is a privilege that attaches to all information regarding individuals who seek services at a domestic violence/sexual assault agency, including the identity of an individual who may have sought or received such services. The privilege and confidentiality protection is based on [cite your state's law], as well as federal law and regulations pursuant to the Violence Against Women Act, the Family Violence Prevention Services Act, and the Victims of Crime Act [cite whichever funding streams your client actually receives].

[If state law provides qualified privilege & the subpoena does not comply with the procedure for accessing records, consider pointing that out. Consider whether to point out technical defects in the subpoena. This is a strategy decision – simply fixed technical defects will slow them down, but might not resolve the ultimate issue. Not pointing out the defects could slow them down even more. Consider your local rules, law, judges and opposing counsel when making this determination. Look for defects such as 1) unauthorized signatory to subpoena – such as an administrative assistant to attorney, 2) insufficient notice under law/court rules, 3) failure to include statutorily required witness fee, and 4) improper service of the subpoena.]

Consequently, [Agency Name] can neither confirm nor deny whether any individual has had any contact with [Agency Name] – let alone provide records or details of what any contact might have entailed.

I trust that this information regarding the privilege in [your state] will end your demand for information regarding any individual who may have sought or used the [Agency Name] services. Please call me and also confirm in writing that you are withdrawing your request for information.

Because of the strict law regarding confidentiality and privilege that govern [Agency Name] victim advocates in federal and state law, if you do not withdraw your request for information and we are required to go to court to file objections or move to quash the subpoena, [Agency Name] will be seeking attorney fees and costs.

Thank you for your attention to this matter.

Sincerely,

Appendix 2 Sample Motion to Quash

[Name of DV/SA program] **MOTION TO QUASH SUBPOENA (DUCES TECUM)**

1. [Name of program] and its Executive Director, [by their attorneys,] move the Court to quash a subpoena duces tecum directed to [name of program and advocate] based on [state name] and federal law regarding privilege with victim advocates **[use local terminology such as victim-counselor or Domestic violence advocate]** and confidentiality requirements to which [name of program] and its workers are bound. [Name of program] is legally prohibited from responding to this subpoena. In support of its motion, [name of program] states:

2. On [date], a subpoena was received by [name of program] by [form of service, e.g., certified mail, delivery, etc.], which demanded that the program produce [all records pertaining to (name of alleged client)] on or before [date and time].

3. [Name] is the Executive Director at [name of program], which provides [describe briefly services, such as: assistance to battered women and their families through crisis intervention, medical and legal accompaniment, counseling and providing shelter.] [Name of program] is not a law enforcement-based agency. The information received by victim advocates is done so solely in the course of a confidential relationship, which is a necessary prerequisite to providing essential services, assistance and counseling. The primary function of [name of program]’s victim advocates is to render advice, counsel, or assist victims of domestic violence or family violence. All advocates who work with victims and their families have received at least [number] of hours of training as a victim advocate, and is a supervisor, or works under the direction of a supervisor, of [name of program].

4. Under [state name] law, the communications between victim counselors and victims of domestic abuse/sexual assault are protected from disclosure [cite state law here, e.g.:

“A victim’s advocate shall not be examined as to any communication made to such victim’s advocate by a victim of domestic violence, . . . in person or through the media of written records or reports without the consent of the victim.”]

[state law citation].

5. Certain federal statutes and regulations also require [name of program] maintaining confidentiality of a client’s records. [Name of program] receives funding under grant programs authorized by federal law: including the Violence Against Women Act, (hereafter “VAWA”), 42 USC § 13925(b)(2)(2006), the

Family Violence Prevention and Services Act (hereafter “FVPSA”), 42 USC 10401 et. seq., and the Victim Compensation and Assistance Program (part of the Victims of Crime Act of 1984) (hereafter “VOCA”), 42 USC 10601 et. seq. Each of those programs includes statutory or regulatory language that require [name of program], as a condition of funding, to have policies and procedures that will assure that confidentiality of served individuals will be maintained. See, e.g., VAWA, 42 USC § 13925(b)(2)(VAWA grantees and subgrantees “shall not...disclose any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees’ and subgrantees’ programs; or ... reveal individual client information without the informed, written, reasonably time-limited consent of the person.”); FVPSA, 42 USC 10406(c)(5) (same language as VAWA above). Under VOCA, [name of program] must certify that it will comply with the regulations set out in 28 CFR Part 22. If the regulations are not adhered to, the program may have sanctions imposed, including the termination of VOCA funding, and any person violating the confidentiality provisions may be fined an amount not to exceed \$11,000 plus any other penalty imposed by law. 42 USC 3789g(d). Service participants must be notified that any identifying information will only be used or revealed for statistical or research purposes. 28 CFR 22.27.

6. Defendant seeks to compel [name of program] to produce certain records that were allegedly obtained in the course of a confidential victim advocate/victim relationship.

7. Because the law prohibits [name of program] from disclosing even the identity of individuals who have sought or received services from the program, [name of program] can neither confirm nor deny whether it possesses any records for [named of alleged client.]

8. [Name of program] is not aware of [name of alleged client] having given consent to have privileged victim advocate records disclosed pursuant to this subpoena.

Therefore, if [name of program] does possess the records sought, [state name] law and federal regulations bar compliance with the subpoena.

9. [Name of program] is not a party to this case and has not been involved in any way in this litigation. [Name of program] has no idea why the records are sought by [party issuing subpoena], and no statement regarding relevance of such records has been proffered.

10. [If applicable and helpful: Although [name of program] does not confirm or deny whether it has had any contact with the client whose confidential records are sought or whether it has any records or information about the client whose records are sought, it is [name of program]’s policy to destroy records two years after the contact with a client.]

11. [Name of executive director], and any other supervisor or victim advocate, is prohibited from testifying and/or producing records concerning clients, and there is no exception to this privilege that would allow for any breach of this confidential relationship.

12. The subpoena is an unwarranted interference with the confidential relationship between the victim advocate and the victim. Compliance with this subpoena would undermine this confidential relationship and inhibit others from seeking assistance from victim advocates.

13. The absolute need of domestic violence/sexual assault programs to be free from the invasive, destructive, harassing effect of subpoenas is a matter of stated public policy, and overwhelming public importance, which must be protected by this Court, in accordance with [state law citation] and federal laws and regulations. See also, Report to Congress: The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation, December 1995 at page 16 (“there are persuasive policy arguments supporting the protection of victim counselor-victim communications.”).

WHEREFORE, [name of program] respectfully requests that this Honorable Court issue an order to quash this subpoena.

Respectfully submitted,

Attorney for [name of program]

Appendix 3

VAWA 2013 on Confidentiality for VAWA-funded Services to Domestic Violence, Dating Violence, Sexual Assault & Stalking Victims

VAWA grant conditions as of October 1, 2013

Section 3 of VAWA, 42 USC §13925(b)(2) provides, in relevant part:

(A) **IN GENERAL.** 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 title shall protect the confidentiality and privacy of persons receiving services.

(B) **NONDISCLOSURE.**—Subject to subparagraphs (C) and (D), grantees and subgrantees shall not —

(i) disclose, reveal, or release any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees' and subgrantees' programs, regardless of whether the information has been encoded, encrypted, hashed or otherwise protected; or

(ii) disclose, reveal, or release individual client information without the informed, written, reasonably time-limited consent of the person (or in the case of an unemancipated minor, the minor and the parent or guardian or in the case of legal incapacity, a court-appointed guardian) about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program, except that consent for release may not be given by the abuser of the minor, incapacitated person, or the abuser of the other parent of the minor.

If a minor or a person with a legally appointed guardian is permitted by law to receive services without the parent's or guardian's consent, the minor or person with a guardian may release information without additional consent.

(C) **RELEASE.**—If release of information described in subparagraph (B) is compelled by statutory or court mandate—

(i) grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the disclosure of information; and

(ii) grantees and subgrantees shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information.

(D) **INFORMATION SHARING.**—

(i) Grantees and subgrantees may share—

(I) nonpersonally identifying data in the aggregate regarding services to their clients and nonpersonally identifying demographic information in order to comply with Federal, State, tribal, or territorial reporting, evaluation, or data collection requirements;

(II) court-generated information and law-enforcement generated information contained in secure, governmental registries for protection order enforcement purposes; and

(III) law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.

(ii) In no circumstances may—

(I) an adult, youth, or child victim of domestic violence, dating violence, sexual assault, or stalking be required to provide a consent to release his or her personally identifying information as a condition of eligibility for the services provided by the grantee or subgrantee;

(II) any personally identifying information be shared in order to comply with Federal, tribal, or State reporting, evaluation, or data collection requirements, whether for this program or any other Federal, tribal, or State grant program.

(E) STATUTORILY MANDATED REPORTS OF ABUSE OR NEGLECT.—Nothing in this section prohibits a grantee or subgrantee from reporting suspected abuse or neglect, as those terms are defined and specifically mandated by the State or tribe involved...

(F) CONFIDENTIALITY ASSESSMENT AND ASSURANCES.—Grantees and subgrantees must document their compliance with the confidentiality and privacy provisions required under this section.

“Personally identifying information” or “individual information” is generally defined in VAWA 2013, 42 USC §13925(a)(20) as:

(a)(20) 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, regardless of whether the information is encoded, encrypted, hashed or otherwise protected, 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, driver license number, passport number, or student identification number; and

(E) any other information, including date of birth, racial or ethnic background, or religious affiliation, that would serve to identify any individual.

Appendix 4

FVPSA on Confidentiality with FVPSA-funded Services to Family Violence, Domestic Violence & Dating Violence Victims

Family Violence Prevention and Services Act, 42 USC 10401 et seq.

§10402 (7) Personally identifying information. The term “personally identifying information” has the meaning given the term in section 13925(a) of this title [Violence Against Women Act].

§10406(c)(5): Nondisclosure of confidential or private information

“(A) IN GENERAL.—In order to ensure the safety of adult, youth, and child victims of family violence, domestic violence, or dating violence, and their families, grantees and subgrantees under this title shall protect the confidentiality and privacy of such victims and their families.

“(B) NONDISCLOSURE.—Subject to subparagraphs (C), (D) and (E), grantees and subgrantees shall not—

“(i) disclose any personally identifying information collected in connection with services requested (including services utilized or denied), through grantees’ and subgrantees’ programs; or

“(ii) reveal personally identifying information without informed, written, reasonably time-limited consent by the person about whom information is sought, whether for this program or any other Federal or State grant program, which consent—

(I) shall be given by—

(aa) the person, except as provided in item (bb) or (cc);

(bb) in the case of an unemancipated minor, the minor and the minor’s parent or guardian; or

(cc) in the case of an individual with a guardian, the individual’s guardian; and

(II) may not be given by the abuser or suspected abuser of the minor or individual with a guardian, or the abuser or suspected abuser of the other parent of the minor.

“(C) RELEASE.—If release of information described in subparagraph (B) is compelled by statutory or court mandate—

“(i) grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the release of the information; and

“(ii) grantees and subgrantees shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information.

“(D) INFORMATION SHARING.—Grantees and subgrantees may share—

“(i) nonpersonally identifying data, in the aggregate, regarding services to their clients and demographic nonpersonally identifying information in order to comply with Federal, State, or tribal reporting, evaluation, or data collection requirements;

“(ii) court-generated information and law enforcement-generated information contained in secure, governmental registries for protective order enforcement purposes; and

“(iii) law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.

(F) Statutorily permitted reports of abuse or neglect

Nothing in this paragraph shall prohibit a grantee or subgrantee from reporting abuse and neglect, as those terms are defined by law, where mandated or expressly permitted by the State or Indian tribe involved.

Appendix 5
Summary of Significant State Supreme Court Cases
Protecting Victim Confidentiality with Victim Advocates
(in reverse chronological order)

***In Re Crisis Connection, Inc.*, 949 N.E.2d 789 (Ind. 2011)**

Facts: Defendant was charged with child molesting, and he made a pre-trial demand to review the records of communications between the victim children, their mother and a non-governmental sexual assault crisis center. The records were explicitly protected by Indiana's absolute privilege statute for domestic violence and sexual assault victim advocate records. The Indiana Court of Appeals denied Defendant's request to see the records, but it also ordered an *in camera* review by the trial court to determine which records Defendant should receive. The program sought and obtained review by the Indiana Supreme Court.

Holding:

- (1) The courts are bound by the legislature's decision that the interest in confidentiality is sufficient to justify creation of the privilege codified at Ind.Code § 35-37-6-9(a).
- (2) An *in camera* review in this case would not reveal any unprivileged material, and the privilege statute does not give the court authority to review the records.
- (3) In line with the plurality holding in *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (plurality opinion), the 6th Amendment Confrontation Clause only requires that the court allow cross-examination of the accusers at trial, and does not include a right to pre-trial investigation or confrontation of the witnesses.

***Albuquerque Rape Crisis Center vs. Blackmer*, 120 P.3d 820 (N.M. 2005)**

Facts: Defendant was charged with criminal sexual penetration against the alleged victim. The victim was seen at a rape crisis center shortly after the assault. Defendant filed a motion to compel the rape crisis counselors to participate in pre-trial interviews with defense counsel. The rape crisis program argued that the communications were privileged under New Mexico's Victim Counselor Confidentiality Act, NMSA §§ 31-25-1 to 6. The trial court ordered disclosure of the records because the privilege was not found in the Supreme Court Rules of Evidence. Thereafter, the rape crisis center took out a writ to the New Mexico Supreme Court, which issued a decision.

Holding:

- (1) Victim counselor privilege is given effect because it is consistent with New Mexico's psychotherapist-patient privilege.
- (2) With approving reference to *Jaffe v. Redmond*, 518 U.S. 1 (1996), the Court cited the necessity of protecting communications to specialized counseling providers who can facilitate treatment of emotional conditions free of charge of victims.
- (3) The case was reversed and remanded for the lower court to determine whether the sought statements were made "in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault."

***People v. Turner*, 109 P.3d 639 (Colo. 2005):**

Facts: Defendant was charged with assault and harassment of his girlfriend. During pre-trial discovery, his attorney issued two subpoenas *duces tecum* to a domestic abuse advocacy program with which the victim had contact. The program refused to comply because the records were protected by Colorado's victim advocate privilege, C.R.S. 13-90-107. Defendant argued that records of assistance were not protected because the privilege statute references "communication made to such victim's advocate by a victim of domestic violence." The trial court agreed with Defendant, ordering the program to "provide a broad outline as to the type of assistance." The program petitioned the Colorado Supreme Court, which accepted original jurisdiction.

 Holding:

- (1) The plain language of the statute must be construed in a manner designed to serve the underlying objective of the privilege, which is to protect victims of domestic violence from further abuse.
- (2) "The mere disclosure that the individual received any services violates confidentiality because it implicitly reveals statements made by the victim to the victim's advocate."
- (3) The defendant may not obtain any records of assistance, advice or other communication by the victim advocate unless he proves that the victim has waived the privilege.
- (4) Neither the Confrontation Clause nor the Compulsory Process Clause are violated by the withholding of files held by non-governmental agencies and protected by an unqualified privilege.

***People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994)**

Facts: Defendant was charged with criminal sexual conduct with a 14-year old. Before trial, defendant sought access to the records of a sexual assault counselor (and other records covered by similar privileges), claiming that the records might contain exculpatory information or inconsistent statements. The trial court denied the access.

 Holding:

- (1) Through Michigan's sexual assault counselor-victim privilege statute, MCL 600.2157a(2), the legislature "intends to preclude defendants from having any access to communications made in these counseling settings."
- (2) "[I]n an appropriate case there should be available the option of an *in camera* inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense."
- (3) Defendants do not have a right to discover any potentially exculpatory evidence, and general fishing for evidence is not sufficient justification to overcome the privilege.

***State v. Kalakosky*, 852 P.2d 1064 (Wash 1993)**

Facts: Defendant was tried and convicted on multiple counts of rape. Defendant asked the court to conduct an *in camera* review of the rape crisis center counselor records of one of the victims. That request was denied, and defendant challenged the denial on appeal.

 Holding:

- (1) The federal Victims of Crime Act did not preempt Washington state law on access to rape crisis counselor records.

- (2) Washington has a qualified, not absolute, privilege for sexual assault counselor records.
- (3) “In order to make an adequate threshold showing to justify an in camera inspection, a defendant must make a particularized factual showing that information useful to the defense is likely to be found in the records.”

Commonwealth v. Wilson, 602 A.2d 1290 (Pa. 1992)

Facts: This appeal joins two cases where Defendants were charged with rape and issued pre-trial subpoenas *duces tecum* to rape crisis centers for records related to their victims. In both cases, the trial court quashed the subpoena based on Pennsylvania’s privilege for sexual assault counselors codified at 42 Pa.C.S. § 5945.1. On appeal, the Superior Court reversed in both cases, allowing defense review of “statements of the complainant in the file which bear on the facts of the alleged offense.” The Superior Court reasoned that the defense was not seeking to question the counselors, and the privilege statute only protected testimony, not records.

Holding:

- (1) The privilege is intended to be absolute and to prevent disclosure of all confidential communications, whether through testimony or records.
- (2) The state has a significant interest in extending the same confidentiality to those of “lesser economic means who are forced to seek counseling from a public center rather than a private therapist.”
- (3) In accordance with *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (plurality opinion), “the right to confront one’s witnesses is satisfied if defense counsel receives wide latitude at trial to question witnesses.”
- (4) Unlike the statute at issue in *Ritchie*, the legislature has granted an absolute privilege that is narrowly tailored and indicates a compelling interest in confidentiality therefore it will not be trumped by Defendant’s constitutional interests.

State v. Vincent, 591 A.2d 65 (Vt. 1991)

Facts: Defendant broke into the home of his estranged wife, and repeatedly sexually assaulted her while threatening her with a knife. When the victim reported the crime to the police, the police contacted a rape crisis program as part of standard procedure and a worker was dispatched to the hospital. Defendant filed a motion to compel disclosure of the rape crisis worker’s identity so that he could determine whether she had any information helpful in his defense. The trial court denied the request as a “fishing expedition.” (At the time, Vermont had no statutory privilege for communications between sexual assault crisis workers and victims.)

Holding:

- (1) The court declined to create a common law privilege.
- (2) The trial court exercised proper discretion to control discovery given that defendant offered no alternative other than deposition of the worker, the worker was not a witness to the crime, and the defendant presented no particular reason why he needed discovery from the worker.

People v. Foggy, 512 N.E.2d 86 (Mich. 1988)

Facts: Defendant was tried and convicted of aggravated criminal sexual assault. Defendant had filed a pre-trial subpoena *duces tecum* seeking records of a sexual assault counseling program. Upon motion to quash, the trial court quashed the subpoena because the records were privileged under the rape crisis

counselor privilege at 735 ILCS 5/8-802.1. After conviction, Defendant filed an appeal challenging the constitutionality of the privilege statute.

Holding:

- (1) The court found it significant that rape crisis counselors are not engaged in investigation of incidents so *in camera* inspection is unlikely to result in disclosure of material useful to the accused.
- (2) Where there is no specific indication by the defendant that disclosure of victim-crisis counselor communications would assist impeachment, there is no constitutional requirement to breach the privilege.
- (3) A system of *in camera* review by the court in every case would seriously undermine the value of the rape crisis services sought to be protected by the privilege

Appendix 6

Summary Chart of State Advocate Confidentiality Laws

The Protecting Privacy to Enhance Safety Pro Bono Project maintains an up-to-date chart summarizing advocate confidentiality laws in all 50 states and the District of Columbia.

http://www.americanbar.org/content/dam/aba/uncategorized/cdsv-related/Advocate_Confidentiality_Chart_2_2014.authcheckdam.pdf

