

# Ethics, Confidentiality, and Advocate Testimony

Rebecca Berkowitz, Esq, Staff Attorney

Sexual Assault Legal Institute (SALI)



# *Objectives*

You will be able to...

- Define “confidential” vs. “privileged”
- Decide when to release client records
- Know the difference between an expert witness and fact witness
- Feel more comfortable testifying in court
- Know how NOT to commit the unauthorized practice of law

# Confidentiality v. Privilege

## Confidentiality

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

## Privilege

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

# *Confidentiality v. Privilege*

## Confidentiality

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

## Privilege

- Mental health providers
- Attorneys
- Clergy
- Spouses
- Self-incrimination

# *Confidentiality v. Privilege*

## *The source of protection*

### Confidentiality

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

### Privilege

- State Law
- Federal Law

# *Violence Against Women Act*

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

# *Violence Against Women Act*

- NO exception for grant reports (take care when using examples)
- NO exception for “collaboration”
- NO “internal data sharing”
- May NOT require sharing as condition for providing services
- Parent or guardian can provide release for unemancipated minor, but NOT if they are alleged abuser (other laws may give children stronger protection)

# *Violence Against Women Act*

- **No privilege:** VAWA provisions do NOT protect against court orders and subpoenas
- If information must be disclosed, VAWA requires that providers attempt to notify the client



# *Confidentiality vs. Privilege*

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

# *Confidentiality vs. Privilege: Waiver*

- Waiver of confidentiality or privilege is **all or nothing**
- Example:

Maria wants the RCC advocate to give expert testimony that Maria's husband physically and sexually abused their 6-year-old daughter but **NOT** that Maria waited a month to go to the police after she found out

# Privilege

## Why have privilege?

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

## Uber privilege

- Records of Attorneys and Clergy are “super-privileged” v.
- Mental health/SW records are easier to obtain (especially in criminal cases and custody cases).

# Release of Advocate Records

Why would an advocate release confidential client records?

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

# *Release of Advocate Records*

## **Responding to a request for records**

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

# *Written Release*

## Use HIPAA compliant model release

- Drug treatment – federally protected; needs specific release;
- HIV/AIDS status – needs specific release
- Other providers' records. Providers often have records from other providers – address this separately
- Reasonably time-limited (e.g., one year)
- Consider requiring conversation with client to ensure voluntary and informed consent

# Release of Advocate Records

## Pros

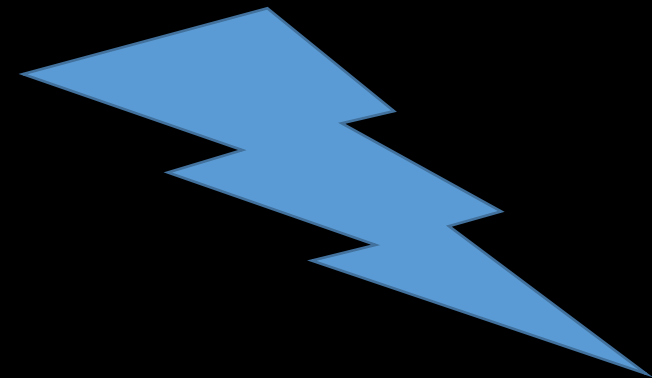
- Advocate's records may be important evidence to support survivor's or State's case against perpetrator
- Survivor's refusal to waive confidentiality may lead court to infer that records would be damaging to survivor's or State's case

## Cons

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

# *Responding to a Subpoena*

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





# *Responding to a Subpoena*

## Special requirements:

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

# *Responding to a Subpoena*

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

# Advocate Testimony



# Advocate Testimony

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

# Advocate Testimony

Helpful topics for expert testimony

- Cycle of violence
- Delayed reporting
- Effects of trauma

# Advocate Testimony

## Helpful topics for FACT testimony

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

# *Advocate Records*

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

# *Why might you want to testify?*

## Pros

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

## Cons

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



# *Preparing to Testify*

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

# *Tips for testifying*

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

# *Tips for testifying*

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

# *Tips for testifying*

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

# *One Client, Many Clients:*

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

# ETHICS

The unauthorized practice of law .....

# *What CAN you do?*

- Non-attorney advocates can...
  - Provide victims with basic information about the existence of legal rights and remedies;
  - Provide victims with basic information about the manner in which judicial proceedings are conducted.

# *What CAN you do?*

- Non-attorney advocates can...
  - Assist a victim to prepare a legal pleading/legal document on her own behalf by defining unfamiliar terms on a form, explaining where on a form the victim is to provide certain information, and if necessary transcribing or otherwise recording the victim's own words verbatim, and
  - Sit with a victim at trial table, if permitted by the court.



# What *CAN'T* you do?

- Provide advice relating to a victim's rights or remedies, including suggesting the pursuit of a particular remedy;
- Provide information about the legal aspects of judicial proceedings, e.g. how to present a case, call witnesses, introduce evidence;
- Use the advocate's own language in preparing or filling out form pleadings or other legal documents; or
- Engage in advocacy before any governmental representative on behalf of an individual victim.

# Maryland Coalition Against Sexual Assault & Sexual Assault Legal Institute

## MCASA

(301) 328-7023

## SALI

(301) 565-2277

## Website

[mcasa.org](http://mcasa.org)

*CONTACT INFO*