Navigating Collaboration without Compromising Confidentiality

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After today, you will be better able to:

• Determine the potential boundaries of confidentiality & privilege in your jurisdiction.

• Learn the boundaries of confidentiality & privilege for other professionals with whom you collaborate.

• Communicate with clients about their options regarding communication between professionals.

• Access resources to defend confidentiality from subpoena.
Hypothetical

• You are representing a survivor of domestic violence in a complex custody case.
• You have a meeting with:
  • the client’s DV court advocate,
  • the clinical social worker providing therapy to client and children
  • the paralegal from your office
What are **you** allowed to discuss?
What are **they** allowed to discuss with you?
A Definitive Answer:

• It Depends

• It Differs
Privacy Concepts

**Privacy**
I decide who knows my information.

**Confidentiality**
You have a duty to protect my information.

**Privilege**
They can't make you share my information.
Attorney’s Duty of Confidentiality

• Model Rule Professional Conduct 1.6
• A lawyer shall not:
  • Reveal information related to the representation
  • Unless the client gives informed consent
  • Or it is impliedly authorized to carry out the representation
Attorney-Client Privilege

• Legal advice of any kind is sought
• From a professional legal adviser
• Communications made in confidence by the client
• Protected from disclosure
• Unless the protection is waived

Wigmore on Evidence
Social Worker Duty of Confidentiality

• Social worker should protect the confidentiality
• Of all information obtained during service
• Except for compelling professional reasons
• May disclose with valid consent from the person
• Disclose minimum amount necessary

NASW Code of Ethics Rule 1.07
Mental Health Provider Privilege

• Patient can refuse to disclose/prevent disclosure
• Confidential Communications
  • third persons present to further the interest of the patient in consultation = still confidential
• Made for the purpose of diagnosis or treatment

Uniform Rule of Evidence 503
Advocate Privilege

• Varies significantly by state
• Start your research with:
  • Advocate Privilege Summary Chart
  • rainn.org – laws in your state
• May be stronger and stricter than attorney privilege
  • May contemplate third party presence
VAWA & FVPSA on Confidentiality

VAWA 2013 & FVPSA 2010

✓ To ensure safety of victims of family violence, domestic violence, dating violence, sexual assault, or stalking, and their families:

✓ Grantees shall protect the confidentiality and privacy of persons receiving services.
Grantees shall **NOT** disclose, reveal or release any

- personally identifying information [VAWA/FVPSA] or
- individual client information [VAWA]
- without consent that is:
  - **Written**
  - **Informed**
  - reasonably **Time-limited**
  - **Survivor-centered & Specific**
    - NEVER a condition of services
Ask Questions to Get Smart

• Ask other professionals what their rules are
  • Research what their rules are
    • Inform them about their rules
• Understand the potential risks & benefits
• Ask yourself:
  • What are my goals in having this meeting?
  • Am I serving my needs or client’s needs?
Client Decides
What to Share
Talk to your Client

• How do you talk to clients about privilege & confidentiality?
  • Do you talk to clients about privilege & confidentiality?
    • Only yours or collaborators too?
How do you communicate that?
• Make *actual* time for the discussion

• Have the conversation alone with client

• Releases are *never* the goal
  • *Informed decision-making* is the goal

• Get clear instructions & check-in regularly
W.I.T.S. Releases = Clear instructions

- Written
- Informed
- Time-limited
- Specific
How would you respond to a subpoena for your records/testimony?
Demands to Disclose

How would your collaboration partners respond to a subpoena for records/testimony?
Advocate/Social Worker Privilege?

“I Don’t Get No Respect.”
Prepare for Demands to Disclose

1. Plan for most protective way to share
   • *Before launch collaboration & after getting consent*
2. Articulate in writing how information is legally protected
   • *So you are ready to articulate it to others*
3. Get trained on protections available to your team
   • *e.g. Pro Bono Subpoena Defense Project on-demand webinars*
4. Educate the members of your team on being protective
   • *So they won’t fold like a house of cards*
5. Line-up a pro bono attorney to help
   • *Consider doing this in advance*
• ABA/Confidentiality Institute Subpoena Defense Project
  • *Training & technical assistance to attorneys*
  • *To resist subpoenas & orders*
  • *That demand private information of survivors of:*
    • *Domestic violence*
    • *Dating violence*
    • *Family violence*
    • *Sexual assault*
    • *Stalking*
    • *Trafficking*
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• Communicate with clients about their options regarding communication between professionals.

• Access resources to defend the confidentiality when subpoenaed.
Questions? More Assistance?

• ambar.org/subpoenadefense

• alicia@confidentialityinstitute.org

• review resources in NNEDV Technology & Confidentiality Toolkit on confidentiality for violence survivors:
  • tools.nnedv.org
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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?
Protecting Privacy to Enhance Safety
Pro Bono Subpoena Defense Project

The Issue:
Subpoenas
• Victims of sexual and domestic violence turn to community-based advocates for help.
• Federal law and most states protect the confidentiality of victim/advocate communications.
• Nevertheless, advocates get subpoenaed routinely in a wide variety of court matters.
• Under-resourced non-profit advocates need & cannot afford a lawyer to quash subpoenas.

The Solution:
Trained Pro Bono Lawyers
The American Bar Association and the Confidentiality Institute have partnered to develop the Protecting Privacy to Enhance Safety Pro Bono Project, which will:
• Deliver in-person and webinar-based training on advocacy & confidentiality.
• Provide a nationwide pro bono manual on protecting privilege & quashing subpoenas.
• Manage a listserv of participating attorneys to facilitate peer support for best practices.
• Offer individualized technical assistance from the Confidentiality Institute.
• Post legal updates and emerging trends to the project website.

The Project:
Pairing Up Attorneys & Advocates
• Advocacy programs request help from the ABA Commission on Domestic & Sexual Violence
  o www.ambar.org/subpoenadefense
• ABA will intake & screen advocates requesting assistance with subpoenas.
• ABA will contact trained attorneys practicing in the advocate’s jurisdiction.
• Attorneys accepting cases will have support from ABA, Confidentiality Institute, and listserv.

The Attorney Training:
On-Demand Webinar Training
Previous live webinar has been recorded and is available on demand for pro bono attorneys to review the training or to get trained to take on a case.

Project Manual, Samples and Resources
All attorneys joining the project will receive the Protecting Privacy to Enhance Safety Pro Bono Attorney Manual (in pdf or book form), as well as access to the project resources page, which includes samples, tipsheets, and regulated updated legal resources.

To Join the Project & Get Resources: www.ambar.org/subpoenadefense

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