



ADVOCATES OWE A DUTY OF CONFIDENTIALITY TO THE VICTIMS/SURVIVORS WITH WHOM THEY WORK

In Minnesota, Sexual Assault Counselors may **generally** not be compelled to testify about any opinion or information received from or about the victim/survivor with whom they are working. See Minnesota Statute §595.02 subd. (k) and SVJI fact sheet on limitations to confidential communications between an advocate and a victim/survivor to learn more about exceptions to this general rule.

Do you meet the definition of a sexual assault counselor?

A sexual assault counselor must meet all of the following:

- have undergone at least forty hours of crisis counseling training
- work under the direction of a supervisor in a crisis center,
- the crisis center’s primary purpose must be to render advice, counseling or assistance to victims of sexual assault.

How Privilege is Waived:

If you meet the definition, then communication is deemed privileged unless that privilege is waived. Waiver of the privilege may occur in more than one way:

Victim/Survivor Consent

- If the victim/survivor consents to having the advocate testify, the communication that has occurred will no longer be deemed privileged.
- The privilege belongs to the victim/survivors and it is their right to waive that privilege if they choose.
- It is a good idea to discuss with the victim all of the possible ramifications of permitting an advocate to testify – including that all information the advocate possesses will be available for questioning, and that it might affect the reputation of the program within the community to have advocates testify, even with permission.
- If the survivor/victim does in fact wish to have the advocate testify, the waiver will need to be stated on the court record so the advocate is clear that (s)he is granted permission to testify.
- It would be wise for the advocate to communicate with the prosecutor on the case to verify that the waiver has in fact been made before they testify.

Child Abuse or Neglect Proceedings

- The privilege could be waived if the private information relates to child abuse or neglect or termination of parental rights.
- The court must do a balancing of the public interest and need for the disclosure against the effect on the victim, the relationship between the advocate and the victim, and the services provided if disclosure occurs.

It is also important to note that Minnesota Statutes §626.556 and §626.557 address issues of maltreatment of minors and vulnerable adults and these statutes should be consulted if your situation involves these issues. See the SVJI fact sheet on limitations to confidential communications between an advocate and a survivor, as well as the SVJI fact sheet on mandatory reporting of child abuse and for vulnerable adults, for further details.

Third Party Conversations

- Conversations between victim/survivor and advocate are no longer privileged if they occur in the presence of a third party. For example, a meeting between the advocate,

victim/survivor and law enforcement, or with the victim/survivor's parent or friend in the room.

- The privilege could also be waived if the conversations between victim/survivor and advocate are subsequently purposefully relayed to a third party, i.e. after victim/survivor meets with an advocate, the victim/survivor then tells someone else about the content of the meeting.
- The communication is not longer confidential because it has been shared with someone outside the confidential relationship.
- Once the information is disclosed to someone else even though it was by choice, the victim/survivor may not later assert privilege when disclosure is sought by another.
- This concept is not unique to the relationship between sexual assault counselors and clients. It also applies to other disciplines including lawyers and their clients.

Other Confidentiality Requirements

Data Practices Statute:

- If your sexual assault services program is funded by the Minnesota Office of Justice Programs, there has been a contract signed regarding the funding.
- In that contract, the program has agreed to fully comply with the provisions of the Minnesota Data Practices Act – Chapter 13 of the Minnesota Statutes.
- This is the statute that makes government information and data private – and it applies to your sexual assault services program, too. Thus, information received by your employees at the program is protected by the Data Practices Act.
- Data gathered about victim/survivors accessing a program's services should be non-identifying and in an aggregated format (i.e. statistics about general demographic information). This requirement is from the federal Violence Against Women Act (VAWA).

Agency By-laws:

- Check the by-laws of your sexual assault program. It is likely that they require the board and staff to maintain the confidentiality of information received from and about victim/survivors who access services of the program.

Domestic Abuse Advocate Privilege:

- See Minnesota Statute §595.02 subd. (I). Similar to the sexual assault advocate privilege except no requirement for 40-hour training and a domestic abuse advocate is defined as an employee or supervised volunteer from a community-based women's shelter and domestic abuse program eligible to receive grants under Minnesota Statute § 611A.32. Advocates working in dual programs should be aware of the differing requirements of both privilege statutes.

WHAT CAN I DO:

- If you meet with a victim/survivor who is being interviewed by law enforcement, remember the role of the advocate is to provide support for the survivor. Do not speak or take notes; the officer will likely be recording the conversation. This reinforces the notion that the advocate is a support person and not an investigator and prevents the advocate from having to disclose those notes.
- Discuss with the victim/survivor the ways in which the cloak of confidentiality may be waived so that they have knowledge of this issue from the beginning of the working relationship. This is known as "informed consent."
- Talk to the local prosecutors in the jurisdiction in which you work. Discuss the potential ramifications within your community if victim/survivors do not have a

confidential resource to talk to concerning sexual assault.

- Let your local prosecutor know that you would be willing to testify as an expert witness on the issue of sexual assault. This may alleviate some of the issue of having advocates testify concerning case specific information.
- If you are going to meet with the victim/survivor and someone else, ask that an additional person be present as well. That additional person may then be called as a witness. This will not be an absolute bar to you being called to testify, but it provides a strong argument that your testimony would be duplicative and thus unnecessary.
- Limited to specific person or agency
- Limited to a specific purpose
- Limited duration of time (new release signed once time limit is exceeded).
- Acknowledgement of risks and benefits of releasing confidential information
- Specify how information will be shared (phone, mail, email, etc) and the risks associated with doing so
- Notice of validity upon signature and right of revocation orally or in writing
- Witness signature

Elements of a Release Form

Resource: *Confidentiality and Sexual Violence Survivors*; Battered Women’s Justice Project, *Confidentiality: An Advocate’s Guide* (2007)

Policies

An agency should develop policies for responding to subpoenas, service of process and warrants. MNCASA can provide sample policies.

All policies should be reviewed and approved by the agency’s board of directors. When in doubt, obtain legal counsel to develop and review policies as well as respond to subpoenas and other third-party requests for survivor information.

DO NOT turn over confidential information to anyone without reviewing the reasons why the request is being made and the consequences for both the survivor and the agency. Confer with the survivor and legal counsel for your agency. And finally, be sure to regularly train employees and volunteers about policies and notify them of any changes.

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