



# **CONFIDENTIALITY**

## **AN ADVOCATE'S GUIDE**

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## Chapter One: General Considerations<sup>1</sup>

### A. Critical Role of Confidentiality and Privilege

Confidentiality and privilege are key to keeping battered women safe and represent the cornerstones of all successful advocacy and shelter programs. At its most basic level, confidentiality equals safety. In order to maximize and safeguard confidentiality, advocates must be familiar with a variety of laws, policies and requirements.

Understanding confidentiality and the laws governing privileged communications made by battered women is essential to effective advocacy. A range of privileges may apply to battered women in the quest for services and justice,<sup>2</sup> the most pertinent in this case being the victim-advocate privilege.<sup>3</sup>

Confidentiality and privilege are core principles that directly impact safety and justice for battered women. When private information is shared, there is a shift in the balance of that relationship from the person sharing the information to the person receiving it. How that information may be used or revealed to others directly impacts the battered woman's safety and ability to seek justice. Sharing information about a specific battered woman threatens her autonomy and may threaten her safety, as well as her confidence in the domestic violence advocate and program.

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<sup>1</sup> Statutes, case law, funding requirements, and local policy/practice vary from state to state. Advocates should not use these materials as the final word on confidentiality. Rather, these materials are intended to serve as a helpful guide and offer suggested best practices. If advocates have any questions, it is best to consult with the local program's attorney before taking any action.

<sup>2</sup> For example, some or all of the following privileges may apply to a domestic violence program or its service participants in a given jurisdiction: DV victim/advocate privilege; SA victim/advocate privilege; crime victim/advocate privilege; attorney/client privilege; social worker/client privilege; therapist/client privilege; medical/patient privilege; spousal privilege; and clergy/penitent privilege.

<sup>3</sup> These confidentiality papers use the term "victim advocate privilege" to denote statutory privileges covering battered women and their DV advocates. These privileges may also be labeled as "victim counselor privilege" or other similar language. A chart listing the victim advocate privilege laws by state is included in the appendix materials to this guide.



Remember:

- The privilege belongs to the battered woman – it is her information.
- She chooses what information to share with the advocate/program.
- She chooses what information not to share with the advocate/program.

*Advocates must remember that the information belongs to the battered woman and, subject to limited exceptions specified by law; she must consent before her information can be shared with anyone else.*

## B. What are Confidentiality and Privilege?

A **confidential communication** is a statement made under circumstances demonstrating that the battered woman intends her words to be heard only by the person she is addressing.

A **privileged communication** is a statement made by a certain person within a recognized, protected relationship, which the law protects from forced disclosure.<sup>4</sup> Such privileges can be created by statute, regulation, case law, ethical rules or other ruling of a court.

A confidential communication may be privileged, depending on the relationship between the parties and the circumstances in which the statement is made.

**Evidentiary privileges** are legal rules governing the disclosure or admissibility of evidence in a judicial proceeding.

Information can be **discoverable** in a civil or criminal case, even if that information is not or will not be admissible at any subsequent trial.

An **in-camera review** can be a private review of records or information by a judge in chambers or a hearing in a courtroom that is closed to the general public.

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<sup>4</sup> In determining whether a privilege exists (if not already created by statute) and how far it extends, courts and legislatures often refer to the four criteria propounded by Professor J. Wigmore, a leading authority on the law of evidence. Professor Wigmore identified four fundamental conditions necessary for the creation of privileges to protect communications from disclosure:

- 1) The communication must originate in confidence that it will not be disclosed;
- 2) The element of confidentiality must be essential for the full and satisfactory maintenance of the relationship between the parties;
- 3) The relationship is one which, in the opinion of the community, ought to be sedulously fostered; and
- 4) The injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thus gained for the correct disposal of litigation. 8 Wigmore Evid. §2285.



When and how confidential information is protected varies among the states. Different protections, and levels of protections, apply to confidential communications depending upon a number of factors, including:

- To whom the communication was made;
- Who else was present or where was the communication made;
- What was the information communicated; and
- How is information about that communication protected.

#### **PRACTICE TIPS**

##### ***Protecting Confidential Communications***

What information is protected? (kind of privilege involved)

When was the information shared with the advocate? (relationship and communication made in confidence)

Where was the information shared? (confidential setting, presence of 3<sup>rd</sup> parties)

How is privilege maintained? (record-keeping, confidentiality policies)

#### **C. Limits of Confidentiality and Privilege**

Privilege may be limited by:

- Duty to warn of imminent threats of bodily harm or that a violent crime is to be committed
- Suspected child abuse or neglect (mandatory reporter)
- Presence of others when communication is made
- Waiver by the privilege holder
- Law enforcement or prosecution-based advocates, who may have no confidentiality coverage or a very limited privilege
- The death of the privilege-holder, depending on jurisdiction, for all circumstances or for limited purposes such as fatality reviews authorized by state statute
- Court cases where court orders an in camera review of privileged materials
- Freedom of Information Requests (FOIA) in some jurisdictions
- Program's need to defend itself in a lawsuit brought by the privilege-holder



## PRACTICE TIPS

### *Recommended Policies*

Creation of written program policies encompassing confidentiality, informed consent for waiver/release and methods for informing clients of such policies

Written policies delineating any training or certification process for advocates, along with records documenting such training, certification, and/or supervision

Written policies describing appropriate substantive content of client records

Consider a written policy for verification from a client if the program receives an authorization to release information from another agency for the client's information, such as provisions to ensure the client understands informed consent prior to completing any release of information



# CONFIDENTIALITY

## AN ADVOCATE'S GUIDE

### Chapter Two: Record-Keeping and Information-Sharing<sup>5</sup>

#### A. Record-Keeping Philosophy – Less is Best

Domestic violence programs must keep case files and program records related to the delivery of services to participants. Records are useful tools for planning, to document services provided, and to meet reporting requirements for funding sources. Additionally, some records may be needed for research or to audit program operations. Record-keeping, however, can endanger service participants by increasing the risk that confidential information will be revealed. Thus, all domestic violence programs must develop sound record-keeping policies that facilitate and enhance program operations, while also preserving client confidences to the greatest extent possible. Domestic violence programs must balance the need to keep certain kinds of information for programmatic reasons against the need to protect the confidentiality of information about clients.

- *What records are truly necessary?*
- *What is the best way to maintain those records?*

Even the most careful record-keeping practices coupled with zealous protection of program files cannot create an inviolable wall against disclosure of confidential information in all cases. Eventual misuse of such information cannot be predicted. One thing that can be predicted, however, is that even the most neutral and objective information, if disclosed, can compromise the privacy, safety, and legal interests of battered women. Information that appears helpful to a battered woman could be used – unforeseeably – to her substantial detriment. Even in states with victim advocate privilege statutes, courts may overrule the privilege's application and order the release of specific information. Accordingly, programs must be prepared for the potential court-

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ordered release of sensitive information by balancing the need to maintain certain kinds of information against the need to protect the confidentiality of a battered woman.

Fewer and more minimally constructed records limit the potential harm which could result from their release. Programs should develop policies allowing staff to create and maintain records necessary to operate successfully, while reducing the risk posed by potential disclosure.

### **PRACTICE TIPS**

#### ***Questions to Ask Before Creating a Written Record***

- What is the purpose of writing down this information?
- Can that purpose be addressed in another way?
- Is recording this information essential to meet survivors' needs?
- Does recording this information enable program staff to do their jobs?
- Is a written record required by a funding agency and how much information is absolutely required?
- Is a written record of this information required for statistical reporting purposes?
- Is a written record of this information necessary to protect the program or staff from liability?
- Is there a way to record the information without including identifying information?
- What is the potential harm if this information is released?
- How would the battered woman react if she read these written notes?
- How would other battered women/clients react to knowing that disclosure of this kind of information is possible?

#### **B. Records Needed for Domestic Violence Programs**

Domestic violence programs generally keep records and documentation for four reasons:

- 1) To meet the requirements of funding agencies
- 2) To meet survivors' safety and strategic planning needs
- 3) For statistical purposes and to evaluate program services and needs
- 4) To maintain program functions, including to protect the program from potential liability





1) To meet the requirements of funding agencies

Domestic violence programs should know exactly what funding agencies mandate in terms of record-keeping and provide only the information required. If you have any questions or concerns, contact your funders. Many funding agencies are sensitive to protecting information regarding battered women and make confidentiality requirements a condition of receiving grant funds. In fact, recent changes to the Violence Against Women Act (VAWA) (H.R. 3402; PL 109-162) strengthen victim confidentiality by imposing stricter requirements on federally-funded grant programs.

At the same time, funders need to be assured that a program's records reflect that services are being provided in accordance with the requirements of a grant award. Generally, such information can be made available through information or records that do not identify specific individuals who received services, such as using an assigned code, a date of birth, or first name. Social security numbers should not be used as these numbers identify specific people and can be used to access personal data.

If funders insist on reviewing information that identifies the battered woman who received services, the responsibility of the program staff is to maintain confidentiality and in addition, educate the funder about the importance of their mandate to do so.

2) To meet survivors' safety and strategic planning needs

In client files, program staff should keep enough information to verify dates and activities of contact/services, as well as any referrals or advocacy with a battered woman. Public records such as parts of police reports or court orders may be included in client files without compromising confidentiality. Staff also may wish to include physical descriptions of batterers and their vehicles to assist with safety planning at the shelter or program.



## PRACTICE TIPS

### *Contents of Client Files*

- Never write subjective comments
- Share information with other staff (as appropriate and needed) orally rather than in writing and if information must be shared by written memorandum, the document should be destroyed after reading
- Do not include a battered woman's verbatim statements or any of her own written materials (letters, reports, etc.)
- Do not include details of any safety plan developed with a battered woman
- Have only one client file; do not create separate client files as it is not an effective means of avoiding the disclosure of information if ordered

Battered women may expect program staff to keep detailed records of the services and advocacy they receive. Staff must explain to survivors the program's confidentiality policies, including the vital practice of keeping limited records. Advocates may assist battered women to secure safe storage places for any important papers or documents, such as court papers, journals, social security cards, etc.

Staff and battered women might feel that advocates should keep detailed notes to establish the work being done, to fully and accurately respond to survivor's needs, or to document the history of violence. Notes might also remind staff of particular safety issues and help differentiate between numerous service participants and even relieve survivors from repeating information. Despite these potential benefits, such record-keeping creates a risk that the information may be disclosed or accessible to those for whom it was not intended.

- 3) For statistical purposes and to evaluate program services and needs

Statistics provide no justification to violate confidentiality. Any necessary statistical data can, and should, be kept without identifying information of individual battered women. This statistical information can be used for program planning, educational, or fundraising purposes, but does not require the use of identifying or personal information.



- 4) To maintain program functions, including protecting the program from potential liability

There is no doubt that domestic violence programs, especially those with shelter facilities, need some records for effective, consistent, and efficient management of services. Again, these records must always be balanced against the vital need to maintain confidentiality and safety of clients and staff.

Shelter records should be separated from a battered women's "client" file, since battered women often receive services that do not include shelter. These shelter records are needed for the operations of the program, and do not focus on the issues or safety concerns of a specific client. Shelter records may include:

- Intake forms
- Telephone logs
- Program or shelter logs
- Exit forms
- Chart of who is in shelter and any special instructions for the day
- Statistical forms that do not include identifying information
- Program policies
- Business records

### **Forms to Limit Program Liability**

- ***Release of Information*** – signed by survivor for a specific purpose and allows the release of particular information to certain persons for a restricted period of time
- ***Acknowledgement of Receipt of House Rules*** – signed by the survivor, this form documents her receipt of all DV program and shelter rules and policies, including penalties for violations of such rules or policies.
- ***Entry Forms*** – verifies that survivor entered shelter voluntarily and may leave the shelter at any time
- ***Appeals Process for Denial of Service/Discharge from Shelter*** – documents that the battered woman is aware of the rules and procedures relating to a denial of service or discharge from shelter and how to challenge such a decision
- ***Waivers*** – signed by survivor, such forms release the DV program from liability for loss of personal property and/or injury to shelter residents or service participants



- **Permission Forms** – signed by survivor on behalf of her children, these forms give program staff permission to have children participate in DV program activities
- **Child's Medical Authorization Form** – signed by survivor, this form provides information about a child's medical needs and gives program staff the authorization to approve emergency treatment
- **Release for Obtaining Medical Care** – also signed by the survivor, this form authorizes the DV program to seek emergency medical care for the survivor
- **Release Allowing Notification of Family** – signed by the survivor, this form permits program staff to notify a survivor's designated family members (not the batterer) in the event of any specified emergency

#### PRACTICE TIPS

##### *Note-Taking with Battered Women*

- Keep accurate notes about services provided and referrals made
- Include factual notations that indicate dates and types of services provided
- Do not keep verbatim statements from survivors
- Do not include comments about drug or alcohol consumption
- Do not include comments about a survivor's general parenting or specific parenting skills
- Do not include diagnoses or assessments or legal conclusions about the survivor or her case/s
- Use language that service participants can understand and include only notes that you would be comfortable sharing with survivors
- Do not include the names of other battered women in an individual's client file
- Use only the first names of service participants in telephone or shelter logs, whenever reasonable
- Do not include opinions, evaluations, or impressions in client files, telephone or shelter logs or other program records



## C. Mechanics of Record-Keeping

### 1) Maintenance

Domestic violence programs should maintain the limited records they do keep in secured filing cabinets, providing access only to designated staff. Program records, such as financial documents or personnel files, should be kept separately from case files (i.e., shelter intake files). Only designated staff should have authority to review case files and/or make notations in case files. Board members should not have access to case files or program records, except in specific situations determined by the Executive Director along with the program's attorney, if applicable. Funders and researchers should have access only to aggregate statistical information and the domestic violence program should consider having such people sign confidentiality agreements as an added protection. Whatever kind of coding system the domestic violence program uses to designate and organize files, a designated staff person should maintain the key to the coding system. If the domestic violence program is required to turn over any battered woman's file, use of a coding system will not protect a case file from disclosure.

If volunteers or students are working as advocates, they should make case file entries only under the supervision of staff with authority to write in case files. If a student is required to make notes for the purpose of training or supervision by faculty at an educational institution, all identifying material must be deleted, including names of staff, volunteers, survivors, and child.

Program and telephone logs serve a different purpose than service participant case files and should be maintained in separate books or files. Again, the program should determine which staff members have access to such logs and the authority to make entries in them. Additionally, the domestic violence program must have written policy, which is strictly followed, regarding the retention and destruction of such logs.

### 2) Retention and Destruction

When a battered woman is no longer using any of the domestic violence program's services, certain records regarding her situation should be destroyed. This purging should not occur until she has ceased using all of the program's services, not just after leaving the shelter. The program must have a written policy for the retention and destruction of client case files and other sensitive program records, delineating a length of time such records are kept and how they are destroyed. Funding agencies may have specific time period requirements for retention of records, or of certain types of records; programs should verify this information with all of their funding agencies. Once adopted, it is important that this written policy be adhered to by all staff members for all



client case files. Destruction or purging of any files, however, should not occur if there is ongoing litigation. ***If program staff has received a subpoena for documents, or has notice that such a subpoena is about to be served, the program has a duty to preserve all records subject to that subpoena; this would be an exception to the program's policy for destroying records.***

The record retention and destruction policy should include specific provisions addressing telephone and shelter logs. Again, contracts with funders may require a certain time period in which such records must be retained. Like client case files, telephone and shelter logs must be destroyed according to their own regular and documented schedule and the same exception for subpoenas (served or known) and litigation applies.

The destruction of all files should be done in such a way as to maintain confidentiality and should be done under the supervision of the director or her designee. Staff should adequately shred all paper files and destroy any tape, video, or electronic records in a manner that ensures they are not recoverable.

#### PRACTICE TIPS

***After the time period specified in the program's written policy, staff should destroy a client case file, except for the following documentation:***

- Exit form
- Releases or similar records necessary for program liability purposes
- Other documents required by funders or by law to be maintained

### 3) Battered Women's Access to "Client" Case Files

Battered women using program services are entitled to examine their own case files in the presence of program staff. No files should be removed from the office, nor should any documents be removed from the files. Battered women may request the correction or removal of inaccurate, irrelevant, outdated, or incomplete information from their case files. Additionally, they should be permitted to add information to their case files but only information that the domestic violence program's policy authorizes for inclusion in such files. Documents that a battered woman wishes the program to store for safekeeping



should not be placed in her client case file, but rather in some other secure location, and such papers should be returned to her upon exiting the shelter.

If the “client” case file should contain information from an outside source, the battered woman may not review such documents (except court papers) and should be directed to the originating source of such information. Battered women or their attorneys may request copies of the contents of the client case file. Program staff should not permit anyone to make photocopies of case files or other program records. However, the battered woman or her attorney (with executed release of information) may make handwritten notes about the contents of the file. Staff should advise battered women that such notes may be dangerous, depending on who has access or learns of their contents. Additionally, staff should advise battered women not to show such notes to a third party, such as a relative or friend, because doing so may constitute a waiver of any privilege related to the case file or any communications that it references.

#### D. Electronic Records

Electronic records, especially any maintained on a network system, might be more vulnerable than paper records to inappropriate access. Computer records, like paper records, are subject to discovery and should be maintained with similar protections. Domestic violence programs should ensure that computerized client files or information are password-protected and that only designated staff members have access to the passwords and authority to enter data. Computer records, however, raise additional concerns regarding their destruction or purging. A computer-generated or electronic record may continue to exist on the hard drive, even if the records appear to have been deleted from a system or disk. In fact, as part of discovery processes, courts have ordered that computer hard drives be made accessible to opposing parties (or their computer experts) so that electronic mail messages or other records could be retrieved.

E-mail creates further concerns about confidentiality and privilege. In some domestic violence programs, staff members use one common electronic mail account; the confidentiality of communications is compromised when there are shared e-mail accounts and access. There is also the tendency among many people to be less cautious in their e-mail communications than they are with other written or spoken communications. In fact, the ease of transmissions (intended or inadvertent) and the difficulty of purging mandate the use of heightened caution and restraint when using e-mail. At a minimum, domestic violence program staff should not use e-mail to discuss individual cases or to communicate with battered women about confidential matters.

Computers that are networked or have Internet access also pose challenges to confidentiality, given the increased risk of inappropriate access or hacking. Any records



that are stored on computers with Internet access may inadvertently be shared and are at risk of disclosure and/or modification by hackers. Thus, client case files should be

password-protected at a minimum, and it is recommended that client case files and other sensitive program records be kept on computers that do not have Internet access.

For all of these reasons, it is vital that domestic violence programs carefully review their record-keeping practices for paper and electronic files and information.

#### **PRACTICE TIPS**

##### ***Record-Keeping Considerations for Electronic Files***

- What is the purpose of writing or recording this information?
- Is there any other way to accomplish this purpose?
- What is the potential harm if the information were to be released or disclosed?
- How would the battered woman react to this information?
- How is the information protected from data entry by, or inadvertent disclosure to, unauthorized persons?
- Is security for the system/network sufficient to prevent unauthorized or “hacker” access?
- How would other battered women react to knowing that disclosure of this kind of information, through this medium, was possible?

#### **E. Waivers/Releases and Informed Consent**

Battered women may ask program staff to release information from their client case files to persons or agencies outside of the domestic violence program. As long as program staff thoroughly discuss the potential consequences of such a release with battered women, and obtain a written release form, staff may comply with such requests. It is vital that program staff fully discuss with a battered woman what happens, and what could happen, after a waiver or release is signed. Domestic violence programs should not engage in a practice of asking for routine waivers from battered women in order to share information with different agencies in the community; such blanket releases fail to acknowledge the individual ramifications that such information-sharing might have for each battered woman. Any release should be specific in purpose and time-limited in duration.





### **PRACTICE TIPS**

#### ***Concerns with Releases***

- Battered women or family members may not be able to control the type or amount of information released or shared after a release is signed.
- Some or all of the information may be turned over to the defendant/batterer.
- Some or all of the information may be introduced as evidence in court during a civil, criminal or juvenile hearing.
- Program staff may be required to testify, including about their personal observations, beliefs, and opinions.
- Court proceedings generally are open to the public, thus making any evidence available to the public.
- Information discussed during any sessions after the waiver or release is signed and executed may not be or remain confidential.

Program staff should not honor blank release forms or blanket waivers that are generically addressed to any agency. Additionally, if program staff receives a release of information from another agency, staff should review that release with the battered woman prior to sharing any information or records. Preferably, staff should draft a new release with the battered woman after a discussion of the purpose, scope, and duration of the release, as well as potential risks or consequences associated with such a disclosure. It is vital to tell the battered woman that any information shared with another agency might be easily accessed or lose its confidentiality/privilege protections.

### **PRACTICE TIPS**

#### ***A valid release of information must:***

- Be in writing and signed by the battered woman
- Identify the person to whom the information is to be provided
- Identify the specific information to be released
- State the limited purpose for the release
- Identify the time period (or event) during which the release is valid



Various government agencies, such as welfare offices, public housing authorities, and child protective services ask battered women to permit the domestic violence program to verify her eligibility or receipt of services at the program. Verification of a battered woman's eligibility for services, or the fact that services were accessed, may be a pre-condition to receiving government benefits or avoiding further agency inquiry or investigation. Domestic violence programs should work carefully with such government agencies to limit the scope of verification required, and staff should also think strategically about ways to help battered women meet conditions required to receive benefits without jeopardizing confidentiality or waiving her privilege. It is important that domestic violence programs do not modify their record-keeping procedures or rules to accommodate such government agencies, but rather that staff negotiate verification procedures that are minimally intrusive on a battered woman's agency and privacy. Most importantly, domestic violence programs should not agree to demands from government agencies or courts to monitor compliance of battered women with outside case plans or court orders.

Battered women must also be fully informed as to their right to revoke any consent to release information, at any time. Although a release must be in writing, a battered woman may orally revoke her release and this oral revocation should be honored by the domestic violence program until she can sign a written document.

#### F. Releases without Consent

Under certain, very limited circumstances, domestic violence programs may release information about battered women without their written consent and, in some instances, must release information with or without a battered woman's consent. These disclosures should be based on a thorough consideration of the applicable state and federal laws, and should be approved by the Executive Director or her designee. These limited circumstances include the following:

- 1) Emergencies which are life-threatening or could result in serious bodily harm.

State laws differ on when or if disclosure is required in this circumstance. Some states limit disclosure requirements to situations that are life-threatening, while other states do not include such an exception. Additionally, some states may permit disclosure without consent when there is a clear and imminent danger that is viewed as life-threatening or likely to result in serious bodily harm to an individual. If staff learns of such intentions by a battered woman, they should first attempt to persuade her not to take the harmful action, and if that is unsuccessful, staff must advise the battered woman that



a report will be made to the appropriate agency or authority for her protection and the protection of others.

- 2) Report to child protective services in cases of child abuse and neglect.

In many states, domestic violence program staff are “mandatory reporters” of child abuse and neglect and, in such states, exceptions to confidentiality and privilege may be made in accordance with the child abuse reporting requirements. State laws vary as to the circumstances under which staff must report child abuse or neglect, but in those circumstances, a battered woman’s consent is not necessary to release information needed to make the report. Preferably, if staff has decided that a child abuse/neglect report must be made, that decision should be shared with the battered woman first and she should be allowed the opportunity to make the report herself.

- 3) Death of the battered woman seeking/receiving services from the domestic violence program.

Again, state laws differ on the status of the privilege upon the death of the person holding the privilege – the battered woman. In states where the privilege survives her death, the executor of her estate may have the right and authority to waive the privilege and sign a release, thus allowing disclosure. If the executor or sole survivor is the batterer, however, programs should not accept a release of information from that individual without fully exploring their legal obligations and options.

- 4) Other exceptions particular to state law.

Some states have additional exceptions that permit or require disclosure without a written consent, including: 1) where the battered woman committed perjury and program staff have information affecting the determination of perjury; 2) where program staff testify only to their observations of the battered woman’s appearance, and her appearance is an issue in a court proceeding; 3) where program staff testify only to establish the chain of custody of relevant evidence; or 4) where the program is being sued by the battered woman or a state agency and the information is relevant to its defense. Regardless of the specific exception, program staff are advised to attempt to discuss the matter with the battered woman prior to completing any disclosure. Domestic violence programs should also consult with their program attorney as to the specific requirements of any disclosure specified by state law.



Client case files and program files pose the risk that confidential information about battered women could be released, breaching their right to privacy, undermining their legal interests, and/or compromising their safety. ***Domestic violence programs have a fiduciary responsibility to protect confidential communications and records of battered women that they serve.*** While it is necessary that programs keep client case files and program records to provide effective services, manage shelters and advocacy programs, and satisfy funding agencies, it is equally critical that they do so in a manner that best protects battered women's information. Policies and practice guidelines should be adopted by domestic violence programs to establish clear record-keeping practices, set parameters for retention and destruction of client case files and program records, and safeguard the confidentiality of information about battered women who seek services.



# CONFIDENTIALITY

## AN ADVOCATE'S GUIDE

### Chapter Three: Subpoenas and Warrants<sup>6</sup>

#### A. Definitions

**Arrest Warrant** – an order from a court that gives law enforcement the authority to arrest specified person/s who are suspected of having committed a crime; law enforcement may also have authority, in some circumstances, to arrest a person without a warrant.

**Response Protocol** – a domestic violence program's official plan, prepared in advance, that spells out employees' response to service of various legal documents or presentation of warrants; with subpoenas, a domestic violence program will likely have time to go before a judge and argue why the subpoena should not be enforced; an arrest or search warrant, however, requires immediate program response.

**Search Warrants** – orders from a court that give law enforcement the authority to search a specified location for certain item/s or person/s; must be based on "probable cause," that is 1) a reasonable person, given the circumstances or facts of a situation, would believe that certain items or persons can be found in the specified location and 2) the items can be seized as evidence or contraband or the person can be located and thus subject to arrest (with an arrest warrant); law enforcement may also have authority, in some circumstances, to search a location without a warrant.

**Service of Process** – the delivery of documents with legal significance to the person who must be notified, such as a notice that a lawsuit or petition has been filed in court; accepting service of such documents places the named recipient in the position of having to obey any orders and to respond to the filings or risk negative legal actions.

**Subpoenas** – an order to produce information in a civil or criminal case (subpoena *duces tecum*); the information sought may include client case files, phone records, administrative records documenting services provided to individuals, letters,

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e-mails, or other materials developed when working with a battered woman; will specify the source and nature of the information sought, a deadline for response or surrender of the information, and a requirement for the presence of the individual responsible for the records (custodian) if no information is provided as ordered; may also be an order directing an individual to appear at a certain date and time to give testimony, whether in a trial, hearing, or deposition.

## B. Subpoena Response

Generally, there are two types of subpoenas: a subpoena of the person and a subpoena *duces tecum*. A subpoena of the person requires that specified individual to attend a court hearing or deposition and provide testimony. A subpoena *duces tecum* requires a person (custodian of the records) to produce specified records, documents, or other physical items. In some states, a subpoena must be signed by a judge or court clerk; in other states, individual attorneys may issue them. When a subpoena is first served upon a domestic violence program, the first step is to identify which kind it is and the type of proceeding it involves (criminal, civil, grand jury, deposition, etc.). The document should be read carefully to determine who signed or issued the subpoena, what action is required, and how the subpoena was served. Additionally, it is vital to obtain legal advice immediately.

A subpoena of the person must be served on the specified witness. In most states, any person who is at least 18 years old and has no connection to the legal case may serve a subpoena; in other cases, law enforcement may provide service. Generally, proper service of such a subpoena requires that a copy be personally delivered to the witness, but it does not require that witness to sign or cooperate in accepting the subpoena. In some situations, service may also be legally effective if the subpoena is literally dropped at the witness' feet. Other requirements may include providing an actual copy of the subpoena to the witness or reading the subpoena aloud in the presence of the witness. If a witness cannot be located, other methods of service are permitted, such as leaving the subpoena at the witness' employment, with another adult in the witness' household or through publication in a newspaper.

Service of a subpoena *duces tecum* (for documents) must be personally served upon the person having possession, custody, or control of the requested records or evidence. However, when records of an incorporated organization are subpoenaed, any board member or officer can be served. Programs should designate a staff member to act as the custodian of the records and thus be responsible for such subpoenas when served. It is important to note that refusal to comply with such a subpoena could result in contempt findings against the custodian of the records. Thus, if a domestic violence



program receives such a subpoena, staff should immediately consult with the program attorney to determine the validity of the request and how to respond.

### C. Search Warrants

A search warrant is a written order, signed by a judge or magistrate, authorizing law enforcement to search a specified location, person/s, or physical item/s that may be evidence in a later legal proceeding. The specific rules governing search warrants vary among states, however the following statutory and constitutional requirements generally must be met:

- The warrant must specifically describe the items or persons to be seized; general exploratory searches are prohibited.
- The warrant must specify the correct address and a description of the location to be searched.
- The search warrant must be properly dated and signed by a judicial officer who has evaluated the accompanying affidavit/s to determine that sufficient probable cause exists to issue the warrant; the date of the warrant should be fairly recent as well.
- Law enforcement must make an “announcement” of authority and purpose prior to entering the search location, although courts have found in some cases that “exigent circumstances” permit noncompliance with the announcement requirement.
- Law enforcement must present a copy of the search warrant, including attached affidavits, to the occupant of the location to be searched.

When conducted, the search has to be tailored to locate the items described in the warrant. For example, if the search warrant is for a vehicle, law enforcement cannot reasonably search through closets and dressers as these would not be locations where a vehicle is likely to be found. While conducting the search, if the police come upon other “contraband,” the item/s may be seized. Individuals at the search location may be allowed to leave or may be temporarily detained although they should not be subject to search themselves.

If law enforcement officers present themselves at a domestic violence program or shelter with a search warrant, staff should request the opportunity to surrender the item/s or person/s named in the warrant, in order to avoid disruption of others in the shelter and maintain their confidentiality. Additionally, staff members should accompany law enforcement officers as the search is conducted, again to minimize disruption to others in the program or shelter.



The general rule is that a search warrant is required before law enforcement may enter a private location. There are, however, several exceptions to this requirement, although they are strictly limited. These exceptions include: 1) voluntary consent by resident to search, absent other refusal; 2) exigent circumstances or “hot pursuit;” and 3) reasonable grounds to enter a location while doing a cursory safety check for potential security risks.

#### D. Arrest Warrants

An arrest warrant is an order authorizing law enforcement to place a specified person under arrest for possible commission of a crime. Arrest warrants alone do not give law enforcement the right to enter a shelter to arrest a battered woman named in the warrant, because the shelter is not the battered woman’s home. If law enforcement wishes to arrest someone they believe to be in shelter, officers must obtain a search warrant for the person at the shelter location or get the consent of the Executive Director or her designee (although some types of emergency or exigent circumstances may allow law enforcement to enter shelter without such a search warrant).

When law enforcement officers arrive at shelter with an arrest warrant, the staff member who answers the door should review the documents and then advise the officers that they will not be permitted to enter the shelter based only on an arrest warrant. If possible, staff should speak with the officers outside or away from the residential area of the shelter. Staff should then determine why the officers are there and verify their identities, as well as reviewing the warrant. If a search warrant is presented, along with the arrest warrant, staff should request the opportunity to discuss the matter with the battered woman and allow her to surrender herself, rather than have the shelter searched for her. At no time should staff advise the battered woman to flee or to otherwise resist arrest. If the battered woman refuses to surrender and there is no search warrant, law enforcement will obtain a warrant to search the shelter, securing the shelter premises in the meantime so that she cannot leave. Whenever any arrest or search warrant is presented, staff should immediately contact the Executive Director or her designee. Because many arrest warrants and search warrants have subsequent documents that are filed with the court (public record), the Executive Director should take every step necessary to ensure that the shelter’s location/address remains confidential in these documents.





#### E. Service of Process – Lawsuits

Courts (or clerk's offices) regularly issue documents that inform individuals about court actions or filings. These can include:

- Notice that a lawsuit has been filed against the individual
- Notice of a time scheduled for a court hearing
- An order to testify or provide information in a legal proceeding
- A copy of a temporary or final court order that impacts the person notified

For such documents to have legal effect, the person involved must have notice of their contents. The delivery of such documents to the person entitled to notice is called service of process. State laws vary, but may include some or all of the following ways to complete service of process:

- Giving the court documents directly to the person affected during or at the conclusion of a court hearing
- Giving the court documents directly to the person affected at some location outside of the court, for example at home or work
- Have a law enforcement officer, private agent, or any person over 18 years old deliver the documents to the person affected
- Having the court documents presented to the affected person's legal representative
- Delivering the court documents to the person affected through registered mail

If a battered woman is trying to keep her location confidential for safety reasons, the execution of service of process may reveal her whereabouts if presented or mailed to her at the shelter or other safe location. If a battered woman is aware that she is to be served court documents, program staff should strategize with her about the safest way to receive service under the state's law. She may wish to be served at work or through her legal representative, or she may be able to present herself at the clerk's office or law enforcement agency to be served there.

Domestic violence program staff, however, should not accept service on behalf of a battered woman at the program or shelter. If service is attempted for shelter or program client, staff should inform the battered woman and help her arrange for alternate, safe service. If the service of process is attempted for the program, staff should know of the attorney or designated agent who can accept service on behalf of the program and advise the process server of that person's identity.



#### F. Program Protocols for Subpoenas and Warrants

It is vital that domestic violence programs discuss how staff will respond to subpoenas and warrants, prior to the actual receipt of one; additionally programs should develop written policies to be followed by all staff members. The following considerations should be kept in mind when discussing and formulating the program's response policy:

- 1) Programs should review their record-keeping procedures. Carefully examine what kinds of records are maintained, how much factual information is kept, and whether verbatim statements of battered women and their children are recorded. Think about the potential harm that releasing any such records could cause to the battered women and the program. In some cases, program staff may wish to revise their record-keeping forms as well as the overall policies and procedures.
- 2) Programs should designate a "custodian of the records." The custodian is someone who is responsible for maintaining control over the program and client records, and if a subpoena is issued, responding to it and possibly bringing records to court. As the program's designee subject to a court's order regarding the records, it is the custodian who faces the responsibility and any possible consequences arising out of such an order. Therefore, one staff member (usually the Executive Director) should be designated as the sole custodian of the program's records.
- 3) Programs should develop a relationship with an attorney who is accessible and familiar with this legal area – before one is actually needed. It is very important to have the services of an attorney to handle the legal response if a subpoena is served and to advise the program on its potential civil liability in releasing any information. Preferably, the attorney shares a commitment to the program's response policy and an understanding of the vital role that confidentiality and privilege play in the safety of battered women and their children.
- 4) Programs must develop written procedures for responding to subpoenas and warrants and educate all staff, board and volunteer members. Procedures should be specifically spelled out, detailing exactly what anyone should do if a process server comes to the shelter, if the sheriff presents a search warrant, who is authorized to accept subpoenas, who is to be contacted, who will discuss the issue with the



battered woman and when, and finally when and under what circumstances any records should be released. It is especially important for anyone who functions in a receptionist-like position to know what to do and who to inform in these circumstances.

Programs can never accurately assess the impact that their records or testimony may have. Even if the subpoena is issued by the prosecution in a criminal case against the batterer or if the information in the records appears to be helpful to the battered woman, there is always the possibility that some or all that information could be used against her. Simply put, no one can tell in advance what judges or attorneys will do with such information.

Programs must obtain an informed consent from the battered women before releasing any records or testifying. It is difficult to advise battered women on whether to consent precisely because the effect of any release is unknown. In addition, the battered woman may give consent in an effort to protect the program or staff rather than because she truly agrees to it. It is vital to consult with an attorney prior to any such release.

Programs must require all staff and volunteers to sign confidentiality agreements with the program that state specifically that information gained about clients will be confidential, even after the staff or volunteer leaves the program. It is critical that workers be advised that, if they ever receive a subpoena regarding any program information or clients, they should contact the domestic violence program immediately.

Program staff should discuss thoroughly the extent to which the program will go to challenge subpoenas, warrants, or service of process. Depending on the particular situation, responses may include some, all, or a combination of the following:

- Full initial compliance
- No compliance with any subpoena, warrant, or service, even if it may result in a finding of contempt against the program, staff, or client
- Filing a motion to quash or resist the subpoena, warrant, or service and then honoring the court's decision
- Appealing any judicial order that requires the release of confidential information
- Appealing any contempt citation
- Requesting that a client sign a release of information prior to responding to any subpoena or warrant
- Revealing only certain records initially, but not revealing other information without a specific court order.

The program's written policy may state that all of the above options are open to consideration and further adaptation, depending upon the particular circumstances of



each situation. Confusion can result, however, if programs respond differently each time they are presented with a warrant, subpoena, or service of process. The program policy will provide consistency so that staff and clients know what to do and what to expect in each situation.

### **PRACTICE TIPS**

#### ***Handling Arrest and Search Warrants***

DV programs may also want to explore the viability of interagency protocols with law enforcement to address issues that may arise with the execution of search or arrest warrants. Such an interagency policy should include provisions that:

- Maintain the confidentiality of the program's or client's location, if necessary.
- Provide the program, through a designated staff member, with advance warning prior to the execution of any warrant.
- Require that warrants will be executed during regular, daytime business hours and served in the administrative areas (rather than shelter) of the program.
- Require law enforcement to knock and announce their presence and their intention to execute an arrest or search warrant.
- Give program staff an opportunity prior to execution of a warrant to surrender the person or items sought.
- Allow the program's legal counsel to be present during any search.
- Address if, when, and how any warrantless arrests or searches will be accomplished.



# CONFIDENTIALITY

## AN ADVOCATE'S GUIDE

### Chapter Four: Mandatory Reporting Requirements<sup>7</sup>

#### A. Mandatory Reporting in the Domestic Violence Context

The laws vary from state to state regarding who is required to report suspected child abuse or neglect. State laws usually identify specific professionals as mandated reporters of such abuse, such as physicians. Most states also require law enforcement, social workers, school officials and teachers, psychologists and other counselors to report suspected abuse. In some states, the category of mandatory reporters is so broadly stated that it includes anyone with knowledge of suspected child abuse or neglect.

Domestic violence programs need to know the current state law to determine, through their legal counsel, if any staff or volunteer members are considered mandatory reporters. Such individuals should be properly trained about when and under what circumstances a mandatory report is triggered, how to make the report and to whom, what information to include in the report and what information should remain confidential. The domestic violence program should also assess whether these individuals could serve as liaisons to child welfare agencies for the purpose of developing and implementing interagency protocols and policies.

Secondly, staff should know who else in the community may be a mandatory reporter as this information may be crucial in preparing a battered woman to work with professionals from other agencies or organizations. Conversely, it is also important for staff to know who is not a mandatory reporter. For example, attorneys generally are not required to report suspected child abuse or neglect where such information arises from attorney/client communications.

Finally, domestic violence program staff need to know what the mandatory reporting law really means. With the assistance of the program's attorney, staff should determine how broadly child abuse and neglect are defined, what "standard of proof" is

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<sup>7</sup> Statutes, case law, funding requirements, and local policy/practice vary from state to state. Advocates should not use these materials as the final word on confidentiality. Rather, these materials are intended to serve as a helpful guide and offer suggested best practices. If advocates have any questions, it is best to consult with the local program's attorney before taking any action.



needed before a report is required, whether children's exposure to domestic violence is considered child abuse or neglect, and what happens when a report is made.

The program's policy should define which staff or volunteers are considered mandatory reporters and which are not, how the state law defines child abuse and neglect, and how reports will be made. Mandatory reporting of suspected child abuse and neglect can create an ethical dilemma for advocates by interfering with the relationships they build with the battered women they serve. A successful working relationship with a battered woman requires adherence to a duty of confidentiality, as well as duties of loyalty and professionalism. Thus, the program's policies regarding mandatory reporting must take into account the duties that its staff owes to clients. ***It is vital that battered women know at the outset that ordinary duties of confidentiality may be suspended due to mandatory reporting requirements.***

Reports of child abuse or neglect can have serious consequences. Such reports may be made available to courts considering custody or visitation issues. Persons found "guilty" of child abuse or neglect may be listed on a state registry and prohibited from working with children as child care providers, teachers, or even as volunteers in youth programs. A report of child abuse may put a battered woman at risk of losing her children as well as other long-term consequences. Additionally, such a report may compromise a battered woman's promise of confidentiality by opening up her records or communications with an advocate for review by child protective services or other parties in an abuse, neglect, or custody proceeding.

Violation of the communications privilege clearly can have a significant impact on a battered woman. When a report of suspected child abuse or neglect is required, staff should carefully examine what is necessary to report under the mandatory reporting law and attempt to frame any communications with child protective services around what the law requires. Information beyond the statutory or regulatory requirements should only be shared when the battered woman has signed an informed consent or upon a specific court order.

Programs may also consider a policy of informing the battered woman of the need to make a mandatory report, prior to doing so, and of giving her the option to make the report herself. Child protective services often look more favorably on a parent who reports or self-reports abuse or neglect and accepts services than one who avoids services and contact. In helping a battered woman decide whether to report, staff should explain the reporting and investigative procedures of the child welfare agency and describe what may happen once the report is made. Staff also can assist her in making the report and advocate for her throughout the investigation process. Most importantly, advocates can help a battered woman who chooses to make such a report with safety planning and



financial planning, so that she is better able to show her ability to care for her child/ren safely and adequately.

#### **PRACTICE TIPS**

##### ***Mandatory Reporting Checklist***

- Know which, if any, program staff must make mandatory report, and who is not required to do so.
- Know which external agencies' staff must make mandatory reports.
- Know what the reporting law means and the information it actually requires to be reported.
- Understand what constitutes child abuse or neglect in your state to trigger mandatory reporting requirements.
- Train all staff and volunteers who are required to make mandatory reports.
- Develop appropriate record-keeping mechanisms for information used to report child abuse or neglect or to respond to child welfare and law enforcement agency requests for information.
- Designate program staff to serve as liaisons to child welfare and law enforcement agencies.
- Train all staff with reporting duties to be familiar with local enforcement procedures of your child welfare and law enforcement agencies.
- Develop a policy/procedure to clearly articulate to battered women about your program/staff role as mandatory reporters before she starts to speak with you.

#### **B. Post-Report Issues**

Each state has different rules about how child abuse and neglect reports are processed; some procedures may vary from county to county. The domestic violence program should be familiar with the practices of your local child welfare agency so that the program's post-report policies can be accurately developed and advocates can fully inform battered women what to expect.



### PRACTICE TIPS

After reporting, the domestic violence program should know:

- Who reviews initial reports?
- Will the reviewer contact the initial reporter?
- How long does it take, once an initial report is made, until the next step in the investigation process begins? (What is that next step?)
- How confidential are child welfare agency reports? Who has authority to see them or request them and to whom will the reports be sent?
- Does the initial reporter have an ongoing duty to cooperate with any further investigation?
- Will the reporter have to be interviewed as part of the investigation or testify in court?
- What information will the reporter be asked to provide and in what format?
- Are there any timelines that govern the investigation that might put the battered woman at risk of having her child/ren removed or permanently placed elsewhere?

Most state laws absolutely require only information relating to the name and location of the child at risk, the nature and extent of any injuries, the name of the reporter and information identifying the child's primary caretaker. Once this initial information is provided, initial reporters are usually required to provide little or no additional information. The reality, however, is that the program may be approached by law enforcement or child welfare staff undertaking an investigation based on the initial report. These investigators may request additional information, including information in program files that may or may not be confidential. State law governs how much additional information must be provided by program staff in this circumstance. The program's attorney should research the state statutes and any interpreting case law to determine what additional information can be compelled from the program and under what circumstances.





### C. Services to Children and Teens and Mandatory Reporting

Child or teen clients do not always have clear rights or protections under state law. For example, a teen who is abused by a dating partner or someone with whom she resides may seem as though she would best be helped by protections offered under state domestic laws. Her age or the nature of her relationship with her abuser, however, may make her ineligible for protection as a victim of domestic violence and her situation may be reportable under child abuse/neglect laws in the state. If the teen or child is not emancipated (and each state differs on how this is or can be achieved), her parent(s) may have to become involved in any reporting process. All of these issues may complicate the decision as to when and whether a child abuse/neglect report should be made.

A teen or child client should be told about confidentiality and the mandatory reporting exception in a way that youth can understand the information. Children/youth and their mothers should be kept informed about what kind of information will and will not be shared and with whom. If the advocate working with the teen or child is a mandatory reporter, both the child and mother should be informed of this as soon as possible. Generally, child advocates and other staff should assure children and teens that the detailed information offered by them to advocates while in shelter or services will not be shared without permission with anyone outside the program or with their mothers, except in cases involving safety concerns. Information about the child or teen should be shared with the mother if the advocate has reason to feel that a child is in danger of being hurt or of hurting another, so the mother can make appropriate safety decision for herself and the child. If age appropriate, the teen or child client may be encouraged to make the report herself.

#### **PRACTICE TIPS**

Domestic violence programs should develop policies that would allow staff to determine, in the case of a teen or child client, whether a report should be made to child protective services. Some issues to consider are:

- Are any staff mandatory reporters?
- Is there evidence of child abuse or neglect as defined by the law?
- What are the facts, reports, or other evidence that supports the belief of the staff member that there has been child abuse or neglect?
- Does that evidence meet the threshold that requires reporting under state law?
- What information must be reported and what information can remain confidential?



# CONFIDENTIALITY

## AN ADVOCATE'S GUIDE

### Chapter Five: Conflicts of Interest Issues<sup>8</sup>

Out of respect for battered women's privacy and in accordance with the duties of confidentiality, a domestic violence program must be aware that conflicts of interest can arise which could undermine a battered woman's confidence in the program's ability to be loyal to her interests. Domestic violence programs often must make a determination quickly and with limited information about a person's eligibility to receive services. Because programs want to provide services to those who are eligible, and to avoid conflicts of interest, the guidelines set forth in this section are intended to limit the potential for such conflicts.

Conflicts of interest can occur when the program provides services to both battered women and those who may be adverse to their interests. A domestic violence program's commitment in meeting the needs of domestic violence victims who are eligible for services may at times require a determination whether there is a conflict between two individuals who are requesting services. It is necessary for domestic violence programs to utilize some kind of screening tool to determine the eligibility of those who seek services. This screening, however, does not permit a domestic violence program to discriminate in the provision of services on the basis of age, race, sex/gender, weight, ethnicity/color/national origin, marital status, sexual orientation, disability, or religion.

#### A. Defining a Conflict of Interest

A conflict of interest may arise in several different situations including providing services to individuals with adverse interests that requires the sharing of confidential information, such as a battered woman and her batterer. Potential conflicts may occur in the following areas:

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<sup>8</sup> Statutes, case law, funding requirements, and local policy/practice vary from state to state. Advocates should not use these materials as the final word on confidentiality. Rather, these materials are intended to serve as a helpful guide and offer suggested best practices. If advocates have any questions, it is best to consult with the local program's attorney before taking any action.



- Between current clients
- Between former clients
- Legal services provided by the program
- Non-legal services provided by the program

Individuals who seek advocacy, counseling, shelter or other services from the domestic violence program should be screened to determine whether they are eligible for such services. Individuals who are not victims of domestic violence, as defined by the program's mission statement, are not eligible for services and may not be accepted as service participants in any part of the domestic violence program. Rather, such individuals should be referred to other appropriate services in the community.

Screening should also determine if an individual seeking services has a conflict of interest with a current or former service participant. If this new individual is eligible services as defined by the program's mission statement, there may still exist a conflict of interest which can limit what services a program can provide.

#### **PRACTICE TIPS**

##### ***Determining Eligibility for Services***

Eligibility for services, and the existence of a conflict of interest, will be determined on a case-by-case basis, based on application of the program's mission statement to each situation.

Initially, eligibility will be determined by the staff or volunteer who conducts the assessment interview, whether by phone or in person, with the potential service participant.

The program will not provide services to anyone who is not eligible. The program will not provide service to anyone it perceives to be abusers and not victims of domestic violence. The program will terminate services to anyone it perceives to be an abuser and not a victim of domestic violence.

Services are not necessarily provided on a first-come, first-served basis, but rather on the basis of eligibility for the program's services.

Any final determination of eligibility will be made by the designated staff person or supervisor, rather than by a volunteer or intern.



## B. Conflict of Interest Protocols

Whenever a potential service participant contacts the domestic violence program for any services, a conflict of interest check must be done as soon as feasible by the staff member assigned to the response. Safety of potential service participants is always the primary concern and necessary measure to keep such individuals safe may be undertaken without first requiring a conflict of interest check. If the individual requires emergency services, or requires assistance at a time when staff cannot complete a conflict check, such emergency services may be provided although a conflict check should be done as soon as possible. Furthermore, conflict checks do not need to be done for hotline calls when no services beyond that phone call are required or for public education participants when the information presented is of a general nature regarding domestic violence and the domestic violence program. Conflict checks do not need to be done before program staff provide individuals with information that is generally provided to the public, such as brochures or blank court forms, descriptions of services, general education information, or hotline numbers. If this information-giving steps over into service-provision, such as assisting with completion of court forms, a conflict check must be done.

Conflict of interest checks must be routinely done in every situation, other than those listed above. The designated staff member should check the list of service participants to determine if there is a current or former service participant who may be adverse to the individual now seeking services. “Adverse” parties include an abuser of the current or former client, as well as anyone whose interests are/were aligned with that abuser. After a conflict check has been completed, staff should make a notation identifying the date of the check. The actual mechanics of how this check is completed depends on how the domestic violence program maintains current and former client lists. It may be useful and more effective to have one staff member designated to conduct conflict checks. If a conflict is suspected to exist, the Executive Director or designated supervisor must be notified immediately. This supervisory staff should make the ultimate decision as to the existence of a conflict of interest.

If no conflict is found, the individual is eligible to receive services from the domestic violence program. If a program determines that a conflict exists and that services must be declined, staff must inform the potential individual. It is important, however, that the rejected service participant only be informed that the program cannot provide services because the individual is not eligible. No such rejected service participants should be told that there is a conflict of interest which prevents the program from providing services as this response can reveal confidential information.



If a conflict is identified between two current service participants or potential participants, services should continue with the eligible participant, if one is eligible and the other is not. Any information regarding the ineligible individual should be stored in a separate, locked file cabinet maintained by the Executive Director or designated staff person. No other staff member should have access to any of this information. If, however, there is a conflict and both parties are eligible for services, it is better for the program to decline services to both parties and make appropriate referrals to other community resources. The same practice should be employed if neither such party is eligible for services.

If a conflict check reveals a possible conflict between a potential service participant and a former participant, it is preferable for the Executive Director or supervisory staff to review the circumstances. If services were provided to the former participant which involved the sharing of confidential information, it may be necessary to decline services for the potential service participant and make appropriate community resource referrals. If, however, the former participant did not receive services, then no conflict exists and the potential service participant may be deemed eligible.

#### C. Confidentiality within Domestic Violence Programs under Umbrella Agencies – Preliminary Thoughts

Where domestic violence programs operate under an umbrella agency that provides services to both battered women and batterers, special conflict of interest rules may need to be developed. Such umbrella agencies should create a “confidentiality wall” to minimize the chance that confidential information will be shared between programs, staff, board members, or volunteers who provide services to individuals with adverse interests. Additionally, all service participants of the domestic violence program should be made aware of this issue and the protections created as soon as feasible.

All staff, volunteers, board members, and interns of both the domestic violence program and the umbrella agency must sign written agreements to maintain confidentiality and these agreements should explicitly prohibit the sharing of confidential service participant information within the umbrella agency and its other programs. Current and past files of service participants of the domestic violence program must be kept locked and separate from any general files of the umbrella organizations or the files of its other programs.



## **SAMPLE MOTION FOR PROTECTIVE ORDER**

This document is a sample motion to be submitted by a domestic violence program that has received a subpoena, either in a civil or criminal case, ordering it to disclose confidential information. If your program operates in a State that has no absolute statutory privilege against the disclosure of confidential communications, you may find this language useful to explain to the Court why your program should be permitted to uphold the duty of confidentiality created by your program's policy.

*The language in this sample motion is suggested language only.* Your legal counsel or program attorney will be able to assist you in deciding what is relevant and applicable and what sections should be written differently, in order to be consistent with your State's statutes and case law.



_____ ,	)	
Plaintiff,	)	Case No. _____
	)	
vs.	)	MOTION FOR PROTECTIVE
	)	ORDER ON BEHALF OF
_____ ,	)	[PROGRAM'S NAME]
Defendant.	)	

COMES NOW, the [Program's Name] and its Executive Director, [name], by and through its attorney, [name of attorney], and hereby moves the Court for a protective order and to quash a subpoena *duces tecum* directed to [name of person to whom subpoena is directed]. The subpoena was originally returnable on [time and date to submit to subpoena] at [place to submit to subpoena]. In support of its Motion, the [Program's Name] hereby states:

1. (CIVIL CASE) Plaintiff has brought suite in this matter, claiming [briefly describe the case].  
 (CRIMINAL CASE) Defendant is [awaiting trial/on trial] on charges of [list crime/s charged]. The charges arose from an incident that occurred on [date of crime/s] and involved [name of victim].  
 (CRIMINAL CASE) Defendant has been convicted of [specify crime/s convicted] and is awaiting disposition of post-verdict motions and sentencing.
2. On [date], a subpoena was served on [Program's Name], which demanded that the program produce all records pertaining to [name of battered woman listed in subpoena].
3. [If there were any problems with the service of the subpoena, either under state law or local rules, include a paragraph here that discusses those deficiencies as a basis for quashing the subpoena. For example: "The subpoena was not personally served upon the individual named as a witness in the subpoena, as required by State law." "The subpoena was served less than three days before the date the testimony is demanded, contrary to State law."]
4. [Name of person ordered to respond] is a [position/title of person] at [Program's Name], which provides assistance to battered women and their families through crisis intervention, medical and legal accompaniment, counseling, and shelter provision. Counselors/Advocates at [Program's Name] receive information from battered women solely in the course of a confidential relationship, which is a necessary prerequisite to providing essential services, assistance and counseling. [Describe



requirements for maintaining confidentiality as set forth by State statute or case law.] [If there is no State statute protecting confidentiality, refer to your program's policy regarding confidentiality: "On [date policy adopted], the Board of Directors of [Program's Name] adopted a policy of maintaining absolute confidentiality of communications between program staff and the battered women they serve. Battered women are advised of [Program's Name]'s confidentiality policy from the time they begin to receive services; as a result, [Program's Name] has a duty of confidentiality to its service participants." ] [Attach a copy of the program's confidentiality policy as an appendix at the end of your motion.]

5. [Name of party that issued subpoena] seeks to compel [Name of person subpoenaed] to appear as a witness and/or produce certain records which were obtained in the course of a confidential counseling relationship.
6. The [Program's Name] does not have the consent of [Name of battered woman listed in subpoena] to the release of her records, nor does [Program's Name] have her consent to allow any staff from the program to present testimony concerning her communications with the program. [If State statute or case law exists that requires the maintenance of confidentiality, add a sentence such as: "Without the consent of [name of battered woman listed in subpoena], release of the information sought under the subpoena is prohibited by [cite State statute or case]."] [If no State statute to protect confidentiality exists, add sentence such as: "Without the consent of [name of battered woman listed in subpoena], release of information sought under the subpoena will cause the [Program's Name] to violate its duty of confidentiality to [name of battered woman listed in subpoena]."]
7. The confidential communications between battered women's counselors/advocates and victims of battering should be protected from disclosure. The relationship between a battered woman and a domestic violence counselor/advocate is analogous to that of [describe whichever privilege is most similar under your State's statutes or case law, e.g., psychotherapist and patient privilege].
8. The subpoena in this matter is an unwarranted interference with the confidential relationship between the counselor/advocate and the battered woman. Compliance with this subpoena would undermine the confidential relationship and [cite any supporting language from statute/rules/cases prohibiting or limiting discovery, e.g., "it would cause unreasonable annoyance and oppression" as it "relates to matter which is privileged."].
9. If the Court should choose to conduct a balancing test of the victim's right to confidentiality and the defendant's [(civil case) right to any discovery/(criminal case) right to due process], the [Program's Name] respectfully requests that the Court





conduct that balancing process through an in camera review of the records or testimony requested. Moreover, the [Program's Name] asks that the Court require [Name of party who issued subpoena] to meet the standard set forth by [cite the State statute or case law that describes the procedure for having a judge review records or testimony prior to its admission in court proceedings], by filing a written motion that demonstrates the following: a) the information sought is relevant and material to the facts and circumstances involved in the proceeding; b) the probative value of admitting the evidence outweighs the harmful effects of disclosure; and c) the information cannot be obtained by reasonable means from other sources. Additionally, the [Program's Name] respectfully requests that the Court issue to all parties any such Orders as are needed to preserve the confidentiality of any information to be reviewed, until such time as the Court determines if any such information should be disclosed.

10. The Court should not allow the release of any information or compel any testimony regarding the address of the domestic violence shelter [if there is a specific State statute or case that protects shelter addresses, cite here], the names of other battered women who may have contacted the program for services, or the names of counselors/advocates. Release of this specific information may jeopardize the functioning of the program and the safety of all participants and staff.
11. The absolute need of domestic violence programs to be free from the invasive, destructive and harassing effects of subpoenas is a matter of public policy and overwhelming public importance, which must be protected by this Court.

WHEREFORE, the [Program's Name] respectfully requests that the Court quash the subpoena *duces tecum* in this matter and issue a Protective Order limiting the access that the requesting party may have to the [Program's Name] records and the testimony of program staff regarding confidential communications with [name of battered woman listed in subpoena].

Respectfully submitted,

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[Name of Attorney]

Original filed.

Copy to: attorneys for all parties



## **SAMPLE MOTION TO QUASH GRAND JURY SUBPOENA**

This document serves as a sample motion to be submitted by a domestic violence program that has received a subpoena in a grand jury proceeding, ordering it to disclose confidential information. This motion is specifically designed for use in the grand jury proceeding. Grand juries consist of 12 to 23 people called by the criminal courts to review the complaints and charges brought by the State against persons suspected of committing crimes. The grand jury has the responsibility to review the evidence to decide whether it demonstrates that probable cause exists that a crime has been committed. If the grand jury finds sufficient evidence to establish probable cause exists, it returns an indictment against the person suspected of the criminal activity. A grand jury may also refuse to indict if there is insufficient evidence presented. A grand jury serves as the body that initiates, or declines to initiate, criminal proceedings. Once it has fulfilled that function, the members of the grand jury are dismissed. Grand jury proceedings are usually confidential and not available to the public.

This sample motion outlines how to invoke State statutory privileges protecting confidential information that may be in the possession of a domestic violence program. It also outlines how you can explain to the grand jury why your program should be permitted to uphold the duty of confidentiality created by the state statute and your program's policy.

***This sample motion contains suggested language only.*** Your legal counsel or program attorney will be able to help you decide what is useful and applicable and what sections should be written differently to be consistent with your State's statutes and case law.



State/People of [State],	)	
	)	Crim. Case No. [if available]
vs.	)	
	)	
[Name of Defendant],	)	MOTION TO QUASH GRAND
Defendant.	)	JURY SUBPOENA

COMES NOW, the [Program's Name] and its Executive Director, [Name], by and through its counsel, [Name of Attorney], and hereby moves the Court to quash a grand jury subpoena *duces tecum* directed to [Name of person or program listed on subpoena]. The subpoena was originally returnable for [time and date to submit to subpoena] at [located to appear to submit subpoena]. In support of its Motion, the [Program's Name] states as follows:

1. On [date], a subpoena was served on [Program's Name] which demanded that [Name of person ordered to respond] testify before the grand jury and that the program produce all records pertaining to [Name of battered woman listed in subpoena].
2. [If there were any problems with the service of the subpoena, either under state law or local rules, include a paragraph here that discusses those deficiencies as a basis for quashing the subpoena. For example: "The subpoena was not personally served upon the individual named as a witness in the subpoena, as required by State law." "The subpoena was served less than three days before the date the testimony is demanded, contrary to State law."]
3. [Name of person ordered to respond] is a [position/title of person] at [Program's Name], which provides assistance to battered women and their families through crisis intervention, medical and legal accompaniment, counseling, and shelter provision. Counselors/Advocates at [Program's Name] receive information from battered women solely in the course of a confidential relationship, which is a necessary prerequisite to providing essential services, assistance and counseling. [Describe requirements for maintaining confidentiality as set forth by State statute or case law.] [If there is no State statute protecting confidentiality, refer to your program's policy regarding confidentiality: "On [date policy adopted], the Board of Directors of [Program's Name] adopted a policy of maintaining absolute confidentiality of communications between program staff and the battered women they serve. Battered women are advised of [Program's Name]'s confidentiality policy from the time they begin to receive services; as a result, [Program's Name]



- has a duty of confidentiality to its service participants.”] [Attach a copy of the program’s confidentiality policy as an appendix at the end of your motion.]
4. The subpoena in this matter seeks to compel [Name of person ordered to respond] to appear as a witness and/or produce certain records obtained in the course of a confidential counseling/advocacy relationship. All information contained in the records of [Program’s Name] was taken from [Name of battered women listed in subpoena] with the express agreement and understanding that such information was to be kept private and remain confidential. Furthermore, any such information is maintained by [Program’s Name] solely as a means of furthering the ability of [Program’s Name] to offer appropriate services to her as a victim of domestic violence.
  5. The [Program’s Name] does not have the consent of [Name of battered woman listed in subpoena] to the release of her records, nor does [Program’s Name] have her consent to allow any staff from the program to present testimony concerning her communications with the program. [If State statute or case law exists that requires the maintenance of confidentiality, add a sentence such as: “Without the consent of [name of battered woman listed in subpoena], release of the information sought under the subpoena is prohibited by [cite State statute or case].”] [If no State statute to protect confidentiality exists, add sentence such as: “Without the consent of [name of battered woman listed in subpoena], release of information sought under the subpoena will cause the [Program’s Name] to violate its duty of confidentiality to [name of battered woman listed in subpoena].”]
  6. The [Program’s Name] is financed by funds secured through [name funding source with confidentiality requirement, e.g., Family Violence Prevention and Services Act, 42 USC 10104 et seq.]. The receipt of these funds is conditional upon the [Program’s Name] assuring and maintaining the confidentiality of information received from victims of domestic violence. [Cite specific provision in funding statute, e.g., FVPSA, 42 USC 10401(a)(2)(e).] Disclosure of any confidential information would result in the termination of funding, and other possible penalties under federal law, to the [Program’s Name].
  7. Disclosure of such information as sought in this subpoena would effectively eliminate the [Program’s Name] as a referral agency and service provider for victims of domestic violence. If such victims thought that their information could be revealed to third parties, even in court proceedings, they would be distrustful of the [Program’s Name], inhibited from revealing information and less likely to turn to the [Program’s Name] for vitally needed assistance.



8. The subpoena in this matter is an unwarranted interference with the confidential relationship between the counselor/advocate and the battered woman. Compliance with this subpoena would undermine the confidential relationship and [cite any supporting language from statute/rules/cases prohibiting or limiting discovery, e.g., “it would cause unreasonable annoyance and oppression” as it “relates to matter which is privileged.”].
9. [If the subpoena uses very broad, “catch-all” language to describe the information being requested (e.g., “all records relating to any communications or activities undertaken by with [name of battered woman] at the [Program’s Name]”), add a paragraph stating the following: “Furthermore, the request within the subpoena is overbroad because it seeks information irrelevant to the matters before this Court or the grand jury, and is not designed to lead to the discovery of any admissible information.”]
10. The Court should not allow the release of any information or compel any testimony regarding the address of the domestic violence shelter [if there is a specific State statute or case that protects shelter addresses, cite here], the names of other battered women who may have contacted the program for services, or the names of counselors/advocates. Release of this specific information may jeopardize the functioning of the program and the safety of all participants and staff.
11. The absolute need of domestic violence programs to be free from the invasive, destructive, and harassing effects of subpoenas is a matter of public policy and overwhelming public importance, which must be protected by this Court.

WHEREFORE, the [Program’s Name] respectfully requests that the Court enter an Order quashing the subpoena in this matter.

Respectfully submitted,

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[Name of Attorney]

Original filed.

Copy to: Prosecutor