

# A Primer on Privilege & Confidentiality For Victim Service Providers



***\* The purpose of this document is to assist providers in thinking through the nuances of the generic concept of legal privilege in a court of law. Providers will be better able to protect confidential survivor information if they understand how courts analyze legal privilege, and educate survivors and staff on how to ensure the greatest protection from disclosure. However, privilege is controlled by statute so providers must read and understand their local law in order to best protect survivor privacy.***

## 1. Introduction

The terms privacy, confidentiality, and privilege are often used interchangeably, but they are distinct ideas. Think of them as siblings, not identical triplets. This memo generally clarifies these three concepts to help advocates and victim service providers design and implement best practices around the protection of information.

Here is a shorthand way to distinguish between privacy, confidentiality and privilege:

- *Privacy* is a personal choice whether to disclose information,
- *Confidentiality* is a responsibility to protect someone else's choices about disclosure, and
- *Privilege* is a legal rule prohibiting the disclosure of private information against someone's will.

## 2. What do we mean by "privacy"?

Privacy is often referred to as the right to control information and decisions about oneself. Businessdictionary.com offers this definition:

The right to... determine whether, when, how, and to whom one's personal information is to be revealed.

A core mission in working with survivors of domestic and sexual violence is to restore power and control over daily life to the survivor. This includes power and control over his or her information. A survivor should always have the opportunity to ask, "How does the sharing of this information by my advocate impact my control over information about me? Is there another way to accomplish my goals that gives me more long-term control?"

While there are different laws that recognize and protect privacy, the idea of privacy itself is broader and deeper than any individual law.

## 3. What does "confidentiality" mean then?

Confidentiality means a responsibility to protect the information that someone else has shared. It is a promise that (1) the advocate will not intentionally disclose information, (2) the advocate will take protective measures to prevent inadvertent or unlawful disclosure of information, (3) the advocate will vigorously challenge any attempts to take the information, and (4) the advocate will alert the owner of the information about attempts to take it. Borrowing a definition from the medical community, confidentiality is:

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The ethical principle or legal right that a professional will hold secret all information relating to a client, unless the client gives consent permitting disclosure.

*(Adapted from the definition in Dictionary.com; The American Heritage Stedman's Medical Dictionary, Houghton Mifflin Company)*

Confidentiality has long been a core element of effective domestic and sexual violence advocacy. In recent years, a number of laws have been amended to officially recognize the duty of advocates to practice confidentiality; specifically the Violence Against Women Act (VAWA) and the Family Violence Prevention and Services Act (FVPSA). Many state statutes have also been amended or passed. Formal legal recognition of confidentiality reinforces the long-standing ethical duty to protect survivor control over personal information.

One doesn't need to have legal privilege (as explained below) to practice and defend confidentiality. Privilege is useful in the legal context as it requires judges to respect confidentiality in the courtroom, minimizing the need to persuade individual judges and preventing judges from punishing survivors for protecting information. But, given that most demands and challenges to confidentiality come from outside of the courtroom, the presence or absence of privilege is not necessarily relevant to the daily issues around information. Strong confidentiality practices protect survivor privacy, and those confidentiality practices are now enshrined in federal and state laws. There are places, however, where the law does not address advocate confidentiality, so advocates draw on other sources of support to implement best confidentiality practices.

## 4. So what does it mean to have "privilege"?

Privilege typically means:

- 1) a court cannot force a survivor or her advocate to disclose information shared between the advocate and survivor, and
- 2) neither the advocate nor the survivor can be punished for a refusal to disclose the information.

If a judge's order requires an advocate to share legally privileged information, it may well be an invalid court order and should be challenged in the court system.

The privilege to not disclose confidential information is an exception to the general rule that a court is entitled to any information it wants in the search for the truth. *Jaffee v. Redmond*, 518 U.S. 1 (1996). For that reason, many courts are eager to find an excuse to rule that the holder of the privilege gave it up and therefore the court can demand disclosure. In the eyes of the courts, a person with a privilege that protects confidential communications must keep the information private or risk losing the ability to protect the information in court.

### A. Who does the privilege belong to?

Think of privilege as a possession. Who holds it? In the professional privilege context, the client/patient/survivor owns or holds the privilege, *not* the professional. Because the survivor holds the privilege, the survivor has the right to waive it or give it up. A survivor is allowed to decide that s/he wants the information to be shared in court and wants the protected professional to share it.

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The privilege does not belong to the professional or advocate. The advocate does not have the power to decide that a survivor should share the information. If the survivor instructs the advocate not to share privileged information, the advocate cannot testify about it.

## **B. Whose job is it to protect the privilege?**

Even though the privilege belongs to the survivor, it is the responsibility of *both* the survivor and the privileged professional to protect it. If the survivor gives no instructions at all, the advocate must assume the survivor would not want the information disclosed and must refuse to disclose it because it is privileged (*and* because the advocate practices confidentiality.)

## **C. What kind of information is protected under privilege?**

A privilege statute should define exactly what information is protected. Actually reading the controlling law is the best way to determine whether information is protected. Typically, to be privileged, information must have all three of the following characteristics:

- (1) a confidential
- (2) communication
- (3) shared within a special relationship.

## **D. What does “confidential” mean for privilege purposes?**

Information shared between survivors and advocates is typically “confidential”<sup>1</sup> for privilege purposes if (1) it is communicated privately between survivor and advocate, (2) the survivor reasonably expects the information to stay private, and (3) the survivor actually keeps the communication private. Some local laws may have a broader definition and even protect information shared with certain third parties.

In the domestic and sexual violence services context, even a victim’s name or the fact that s/he sought assistance from a program can be considered a confidential communication with the program. *See e.g., People v. Turner*, 109 P.3d 639, 645 (2005). However, if the victim wants the fact that she received services at a program to remain confidential for privilege purposes, it is important that she takes steps to keep that fact private.

For a communication to stay confidential, the victim has to make efforts to keep it that way. One example of failure to protect a communication came from Martha Stewart. When she was being prosecuted for illegal stock trading, she had an email exchange with her lawyer. That was a confidential conversation *until* Martha Stewart forwarded the e-mail to her daughter. She shared the communication beyond the attorney-client relationship (and since it was in email, there was easily obtained proof that she did so.) The federal court in New York ruled

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<sup>1</sup> The definition of “confidential” in privilege definitions is different from the ethical and legal promise of confidentiality discussed above. When an advocate promises *confidentiality* to a survivor, the advocate is saying, “Regardless of who else knows this information, I will fight to make sure no one hears it from me.”

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that Martha Stewart waived her privilege to protect that specific communication once she shared it with her daughter. *US v. Stewart* 294 F.Supp. 2d 490, 493 (S.D.N.Y. 2003).

Survivors should know that repeating their conversations with advocates to others *might* lead a judge to demand the conversations be repeated in court. Some statutes specifically extend protection even after sharing; other statutes are silent on the issue. Whenever a survivor is considering whether to disclose or allow an advocate to disclose information about their work together, the potential risk that privilege will be lost should be considered among other costs and benefits of disclosing.

Advocates also have a duty to protect the privacy of confidential communications, but if they fail to do so, the legal impact on privilege is different. If a victim does not keep information private, then s/he may have waived the privilege protection. If an advocate fails to keep the same information private, the privilege protection usually still stands (because it was not the advocate's right to give away the information), but the advocate may be sued or otherwise held responsible for any harm suffered by the victim because the private information was shared.

NOTE: Be careful of referral processes that request advocates to confirm a survivor is working with the advocate/program or processes that request the advocate to directly certify the history of abuse or assault. When the advocate signs a certification stating that s/he knows there is a history of abuse, there is a risk that a court will rule the communications about the abuse were not kept confidential, even if no other details were shared. There is very little case law on this particular question so it is difficult to determine how a judge would rule if privilege were challenged because of an advocate certification.

### **E. Will a court think it is “confidential” if the survivor has others present during the communication?**

Maybe; maybe not. The answer to this depends on the law in your state and the purpose of having the other person present. Know exactly what your state law says; you can start your research by going to Confidentiality Institute's [Summary of U.S. State Laws Regarding Advocate Confidentiality](#).

Always remember that a court's opinion on whether it is “confidential” is different from an advocate's ethical and legal duty to protect information from disclosure. If an advocate thinks that legal privilege might not apply, the advocate will still zealously protect the survivor's privacy and take all possible steps to prevent the disclosure of information against the survivor's wishes.

Let's consider the situations where third parties might be present during a communication between advocate and survivor. If there are others from the same advocacy program present, then it is still a private communication with that organization and thus should be considered confidential for privilege purposes. If a third person is necessary for the communication (for instance, an interpreter), then the communication is still confidential. If the survivor has other family members present, there is a real risk that an opponent might claim the information is not private between the advocacy program and the survivor. Some states recognize that communication is still confidential in the presence of third parties assisting the client to meet her interests. Other states do not address the question at all. If the third party is a different kind of professional, even the survivor's lawyer, then the communication between the client, the advocate, and the lawyer *might not* be

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confidential under state law. It is very important to understand the law in your state. Whether or not the presence of a select third person (a victim's best friend, lawyer, or SANE nurse) makes the conversation not confidential for privilege purposes varies from state to state depending on the wording of the privilege statute, the type of third person present, and the decisions of that state's courts.

Check the Confidentiality Institute's [Summary of U.S. State Laws Related to Advocate Confidentiality](#) to begin your research on whether and how your state has addressed the presence of third parties.

### **F. What does "communication" mean for privilege purposes?**

Privileged communication can vary depending on the law and the court decisions of each state. In some states, any information in a survivor's file at an advocacy program is protected by privilege, regardless of where it came from or how it got there. *See, e.g., Conn. Gen. Stat. § 52-146k (2013)*. In cases analyzing privilege for other professions, courts look at whether the communication was made between the client and the professional with whom that client has privilege. *Upjohn v. United States*, 449 U.S. 383 (1981). That means information sent to the privileged professional by a third party *might* not be considered a communication that is protected by privilege.

In the advocacy context, the starting assumption should be that the advocate will protect all information about a survivor. Typically, the first confidential communication comes when the survivor contacts the program for help. Therefore, programs should take a hard line in protecting the anonymity of the survivors they serve. The mantra is "I can neither confirm nor deny whether we have worked with that person." If programs are successful in protecting the anonymity of people who make contact, then advocates are less likely to ever get into a debate about whether or not they hold information that was sent by a third party.

### **G. What does "shared within a special relationship" mean for privilege purposes?**

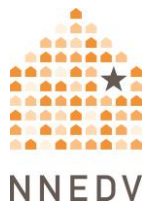
Confidential communications are only "privileged" if the law also recognizes that there is a special relationship between the participants in the communication. Typically, a "special relationship" is one where a court or a legislature agrees that there is a strong public interest in protecting and strengthening the relationship, and that the ability to share confidential information and shield it from public view is important to the success of the relationship. Most recognized privileged relationships are professional ones: attorney-client, doctor-patient, and therapist-client. The public has a strong interest in people receiving these professional services, and lawmakers agree that the free flow of information between a person and his/her doctor, lawyer or therapist is necessary to get the full benefit of the professional services.

Most states have also recognized the special relationship between advocacy or victim-counselor programs and the people they serve. In fact, many states protect the communications of volunteers, as well as paid staff in advocacy programs. Under Federal Rules of Evidence 501, a federal court can consider whether "reason and experience" justifies protecting any relationship, so advocates should definitely be arguing for recognition whenever a federal judge attempts to force disclosure of confidential communications.

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Remember the basics: “privileged” information typically meets all three elements: (1) confidential (2) communication (3) shared within a special relationship.

## H. Can privilege be lost or unintentionally waived?

If the survivor wants the information to remain privileged, then the survivor should make efforts to keep it confidential. If the survivor takes any action to make the information public, or even just not completely private, a court may rule s/he has “waived” or given up the right to protect the information. This is sometimes referred to as “opening the door”; even cracking the door a little bit can be enough to destroy privilege in the eyes of a trial judge. Remember the Martha Stewart example above. The holder of the privilege must exercise caution to avoid the loss of privilege.

Courts can be hostile to privilege claims, and therefore eager to find evidence that the information is not really confidential. Anytime a survivor asks an advocate to disclose information about their communications, there is a substantial risk that a court could use that as an excuse to break privilege. For this reason, survivors need to fully consider the risks when giving advocates permission to disclose information and advocates should be guiding that conversation so the survivor can make an informed decision. For instance, if an advocate signs a form certifying that abuse did happen to help a survivor get housing, the survivor may mistakenly believe that the certification can only be used in relation to the housing request. However, a court might use the certification to force testimony by the advocate in a criminal prosecution or in a case related to the housing. Because of that risk, it is always advisable to consider procedures for referrals and connection to resources that do not rely on certification from advocates.

## I. Can you lose some privilege and keep some privilege?

Privilege is intended to generally protect communication within a special relationship. It is possible to lose privilege for one part of the communication that was not kept confidential, and still retain privilege for other communications. If a judge rules that some communication was not kept confidential, the judge will also decide how *much* information is now subject to testimony, and how much remains privileged. A survivor can then assess how s/he feels about that amount of disclosure and whether s/he wants to pursue an appeal of the judge’s ruling.

If a survivor “opens the door” to communications with the advocate by disclosing it, the court ruling on how wide the door is opened could vary drastically from judge to judge. Advocates and survivors should continue to argue for disclosing as little as possible even when some information must be disclosed, and should always be consulting with attorneys about the possibility of challenging the trial judge’s ruling.

## 5. Summary on privacy, confidentiality & privilege

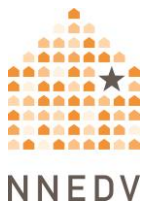
Confidentiality is a set of practices employed by advocates to ensure privacy for survivors and protect survivors’ control over their own information. Privilege is law requiring courts and other entities to respect that confidentiality and prohibiting the disclosure of confidential information in court.

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The precise contours of the law on privilege will depend on local law and practice. But the responsibility to enforce confidentiality as vigorously as possible should be a constant across the professional community responding to the needs of survivors of domestic, sexual, dating, family, stalking and trafficking violence.

### **Final Tips on Privacy, Confidentiality & Privilege:**

- 1. Privacy is an individual right to make decisions about how much information to share with anyone.**
- 2. Confidentiality is a legal or ethical duty to protect someone else's information from disclosure against their will.**
- 3. Providing as much confidentiality as possible for survivors is integral to advocacy practice.**
- 4. Privilege is a special protection that courts and legislatures can grant to confidential communications between survivors and advocates.**
- 5. Privilege belongs to the survivor who has the right to assert it or waive it.**
- 6. Advocates have a duty to vigorously protect a survivor's privilege until a survivor gives specific instructions that s/he is waiving privilege.**
- 7. Whenever a survivor discloses confidential communications with an advocate, s/he runs a risk that the court will say s/he has waived the privilege.**
- 8. If an advocate discloses privileged communications without survivor permission, the survivor still has the right to assert the privilege *and* the advocate may be liable for any damages resulting from the disclosure.**

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