

Victims' Rights



INTERTRIBAL TECHNICAL-ASSISTANCE
WORKING GROUP ON SPECIAL DOMESTIC
VIOLENCE CRIMINAL JURISDICTION (VAWA
ITWG)

WEBINAR SERIES
FEBRUARY 28, 2014



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Today's Roadmap



- Introduction of Panelists and T/TA Facilitators
- Victims' Rights Webinar II:
- Roles of Victim Advocate
- Confidentiality, Privilege and Disclosure
- Code Examples
- Working with Victims
- Questions

VAWA ITWG Series: Victims' Rights (Part II)



Today's Panelists:

- *Rob (Roberta) Valente*, Consultant, National Domestic Violence Hotline
- *Jax (Jacqueline) Agtuca*, Consultant, National Indigenous Women's Resource Center
- *Kelly Gaines Stoner*, Judge, Seminole Nation of Oklahoma & Victim Advocacy Specialist, TLPI

Facilitators

National Congress of American Indians

Tribal Law & Policy Institute

National Council of Juvenile and Family Court Judges

Roles of Victim Advocate



When is an Advocate an Advocate?



**UNINTENDED SYSTEMS CONFLICTS THAT
MAY IMPEDE VICTIM SAFETY.**

Tribal Victim's Advocacy Programs 2014



- Law Enforcement Based
- Prosecution Based
- Victim Services Based
 - Shelter – White Buffalo Calf, Rosebud Sioux; Native Village of Emmonak Women's Shelter
 - Rape Crisis – Pauma Band of Mission Indians, CA
 - Medical – Indian Health Service Advocacy
 - Tribal Victim's Advocacy Program – refer to shelter, court accompaniment, health, ICWA – La Jolla Band Luiseno Indians

Dedicated Victim Advocates Are Critical to Effective Prosecution Plan & Safety Plan for the Victim



- Fear of retaliation from the defendant or defendant's supporters
- Lack of understanding of the criminal justice system
- Fear of criminal justice system
- Lack of resources to intersect with a criminal court case

Such issues are present at every stage of a criminal case.

VAWA 2005



- “victim advocate”

- someone who works for a victims services program and has confidential communications.

- “victim assistant”

- someone who works for a prosecutor’s office or a law enforcement agency whose communications are public record.

Differing Roles recognized by VAWA 2005



Victim Advocate

- Accompany and service needs of victim before, during and after a case
- Explore / address any reasons creating reluctance for the victim to cooperate with prosecution
- Typically confidential victim-client relationship

Victim Assistant

- Assist with pre-charging investigations – locate victim, advise victim of local procedures
- Court preparation
- Post sentencing serve as a liaison with probation and other justice agencies
- Information often shared with law enforcement / prosecution.

Dedicated victim's advocates are an important human link between the victim and the often intimidating system.



*IF PROVIDED FOR UNDER TRIBAL LAW
VICTIM-ADVOCATE COMMUNICATIONS
CAN
BE HELD CONFIDENTIAL TO ADDRESS
THE
RELUCTANCE OF VICTIMS TO TESTIFY.*

Confidentiality, Privilege and Disclosure



SUBPOENAS



- Command to appear at a certain date/time to give testimony about a certain matter
- Subpoena duces tecum: commands a witness who has possession or control of some document/paper that is relevant to the issues before the court-to produce the paper/document

SUBPOENAS/ Discovery in Criminal Cases



- Based upon the right of the criminal defendant to obtain information from the prosecution and other sources to prepare a defense

SUBPOENAS/In Civil Cases



- Varies from jurisdiction to jurisdiction, but is generally less generous than in criminal cases (defendant's freedom is in jeopardy)

TYPES OF INFORMATION THAT MAY BE DISCOVERABLE



- Names/addresses
- Written/recorded statements
- Photographs
- Documents
- Text messages
- Facebook pages

WHAT IS CONFIDENTIALITY??



- Information that is meant to be held in confidence or kept secret
- Statements that are meant only for the ears of the person addressed

WHY IS CONFIDENTIALITY SO IMPORTANT IN DOMESTIC VIOLENCE CASES?



- Preserve safety strategies that rely on certain information remaining private
- Provide privacy necessary for women to speak freely and share details essential to safety planning
- Place control of the information in the woman's hands and demonstrate the advocate's commitment to client autonomy and self-determination

THE BASIC RULE



- Most domestic violence programs adhere to this basic rule:

A client's information is not shared outside the program unless the client gives the program permission to do so in writing.

Some Statutes/Caselaw Protect Confidential Information



- Privileged Communications
- Usually protected by statute or case law in the applicable jurisdiction

Privilege: A Legal Concept



- Privileged communications: statements and conversations made under circumstances of assured confidentiality which must not be disclosed

PRIVILEGE: A Legal Concept (cont)



- Based upon public policy: one should be able to speak freely to certain persons without fear of repercussions

What Statements Are Protected?



- “Holder” of the privilege is the person speaking that has statutory protection regarding the statement made (Patient in a Doctor/Patient relationship)
- Only the holder of the privilege may allow the disclosure to a third party

Privilege: The Legal Effect



- One cannot be forced to testify or reveal such privileged conversations to law enforcement, courts, or others even under threat of contempt
- May be waived by the holder of the privilege (the person who communicated the confidential information not the person who heard it)

Recognized Privileged Communications



- Most common:
 - Priest-Penitent
 - Lawyer-Client
 - Psychologist-Patient
 - Doctor-Patient
 - Husband-Wife
- Licensed Social Worker-Client
- Domestic Violence Advocate-Victim (but not a victim witness advocate working for the prosecutor or law enforcement)

WAIVING THE PRIVILEGE



- Expressly: Victim tells advocate “Please tell the prosecutor x,y,z that we discussed.”
- Because of actions of the holder:
 - having a third party present during the communication (in the interview room)
 - putting the statement at issue such as bringing the statement up at trial

PERMISSION TO DISCLOSE



- Concerns about confidentiality do not arise when the client grants you permission to disclose the information
- Be certain that you understand what the client is granting you permission to disclose

PERMISSION TO DISCLOSE (cont)



- It is best to get the client's permission to disclose in a writing that
 - lists what specific information you can disclose
 - says to whom it can be disclosed
 - is signed by the client
 - includes an expiration date
 - provides a notice that the client can rescind her permission at any time if she chooses

Code Examples



Pascua Yaqui Tribe of Arizona



Section 250 Consultation between Victim Advocate and Victim; Privileged Information

Exception (4 PYTC § 5-250)

(A) A victim advocate shall not be disclosed as a witness or otherwise disclose any communication, except compensation or restitution information, between himself and the victim, unless the victim consents in writing to the disclosure.

(B) Unless the victim consents in writing to the disclosure, a victim advocate shall not disclose records, notes, documents, correspondence, reports or memoranda, except compensation or restitution information, that contain opinions, theories or other information made while advising, counseling or assisting the victim or that are based on the communication between the victim and the advocate.

Pascua Yaqui Tribe of Arizona cont...



(C) The communication is not privileged if the victim advocate knows that the victim will give or has given perjured testimony or if the communication contains exculpatory material. The victim advocate must disclose such information to the prosecutor.

(D) Upon motion of either party, or where the court finds there is reasonable cause to believe the material is exculpatory, the court shall hold a hearing in chambers. Material that the court finds is exculpatory shall be disclosed to the defendant.

(E) The victim advocate shall disclose to the prosecutor or a law enforcement agency any communication between the victim and the advocate or any records, notes, documents, correspondence, reports or memoranda; the prosecutor shall disclose such material to the defendant's attorney only if such information is otherwise discoverable.

Coushatta Tribe of Louisiana



Title 3A PROTECTION FROM VIOLENCE AND DOMESTIC VIOLENCE CODE

CHAPTER 3A.05. SPECIAL RULES OF COURT AND LAW APPLICABLE IN DOMESTIC VIOLENCE CASES

3A.05.040 Advocate-victim privilege applicable in cases involving domestic violence--circumstances where privilege not available.

(a) A victim of domestic violence may refuse to disclose, and may prevent an advocate from disclosing, confidential oral communications between the victim and the advocate, and written records and reports concerning the victim when:

Coushatta Tribe of Louisiana cont...



- (1) The victim claims the advocate-victim privilege.
- (2) The person who was the advocate at the time of the confidential communication claims the advocate-victim privilege.

The privilege extends to all oral and written communications between and by either the advocate or the victim, and encompasses all communications made in the course of the advocacy relationship, including those made in the presence of third parties also participating in the advocacy or other victim services.

Coushatta Tribe of Louisiana cont...



(b) An advocate may not claim the privilege if the privilege has been waived by the victim, or if the victim is deceased.

(c) The advocate-victim privilege does not relieve a person from any mandatory duty to report child abuse imposed by federal or tribal law. A person may not claim the privilege when providing evidence in proceedings concerning child abuse.

Louisiana Domestic Violence Laws



CONFIDENTIALITY AND DOMESTIC VIOLENCE

La. R.S. 46:2124.1. Privileged communications and records

A. As used in this Section, the following terms shall have the following meanings: (1) "Community shelter" means a community shelter or other program established in accordance with R.S. 46:2124.

(2) "Privileged communication" means a communication made to a representative or employee of a community shelter by a victim. It also means a communication not otherwise privileged made by a representative or employee of a community shelter to a victim in the course of rendering services authorized by R.S. 46:2124.

Louisiana Domestic Violence Laws cont...



3) "Victim" means a victim or potential victim of an act of family or domestic violence and his or her children.

B. Except as provided in Subsection D, no person shall be required to disclose, by way of testimony or otherwise, a privileged communication or to produce, under **subpoena**, any records, documentary evidence, opinions, or decisions relating to such privileged communication:

- (1) In connection with any civil or criminal case or proceeding.
- (2) By way of any discovery procedure.

Louisiana Domestic Violence Laws cont...



C. The records relating to a privileged communication kept by a community shelter or other agency or department shall not be public records. Such records may be used for the compilation of statistical data if the identity of the victim or the contents of any privileged communication are not disclosed.

D. The prosecuting attorney or any person who is a party in a civil proceeding or who has been arrested or charged with a criminal offense may petition the court for an in-camera inspection of the records of a privileged communication concerning such person. The petition shall allege facts showing that such records would provide admissible evidence favorable to the person and, in criminal proceedings, are relevant to the issue of guilt or punishment and shall be verified. If the court determines that the person is entitled to all or any part of such records, it may order production and disclosure as it deems appropriate.

Working with Victims



Confidentiality Under the Violence Against Women Act



- If your program receives Violence Against Women Act funding or funding under the Family Violence Prevention and Services Act, your program/agency is required, as a condition of receiving the funding, not to disclose personally identifiable information about victims/clients using services.
- Whether you receive this funding or not, it is best to protect personally identifying information in the interests of victim/client safety
- The survivor gets to choose when, how and what personal information will be shared, or not shared, and with whom.

VAWA/FVPSA Confidentiality Requirements: 42 U.S.C. 13925(b)(2) and 42 U.S.C. 10406(c)(5)



- **(2) Nondisclosure of confidential or private information**
- **(A) In general**
- In order to ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families, grantees and subgrantees under this subchapter shall protect the confidentiality and privacy of persons receiving services.
- **(B) Nondisclosure**
- Subject to subparagraphs (C) and (D), grantees and subgrantees shall not—
- (i) disclose any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees' and subgrantees' programs; or
- (ii) reveal individual client information without the informed, written, reasonably time-limited consent of the person (or in the case of an unemancipated minor, the minor and the parent or guardian or in the case of persons with disabilities, the guardian) about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program, except that consent for release may not be given by the abuser of the minor, person with disabilities, or the abuser of the other parent of the minor.

VAWA/FVPSA Confidentiality Requirements: 42 U.S.C. 13925(b) and 42 U.S.C. 10406(c)(5)



- **(C) Release**
- If release of information described in subparagraph (B) is compelled by statutory or court mandate—
- (i) grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the disclosure of information; and
- (ii) grantees and subgrantees shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information.
- **(D) Information sharing**
- Grantees and subgrantees may share—
- (i) nonpersonally identifying data in the aggregate regarding services to their clients and nonpersonally identifying demographic information in order to comply with Federal, State, tribal, or territorial reporting, evaluation, or data collection requirements;
- (ii) court-generated information and law-enforcement generated information contained in secure, governmental registries for protection order enforcement purposes; and
- (iii) law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.

Personally Identifying Information



- Name (even simply first name in some cases)
- Birth date
- Address or other specific location information
- Phone number or other numeric identification (Soc. Sec. #, etc.)
- Place of work
- Family characteristics
 - How many children, genders of children
 - Tribal affiliation or racial/ethnic information
 - Names of near relations
 - Religious affiliation

Personally Identifying Information



- Sometimes, pieces of data relating to a victim/client may seem like they would not necessarily identify them
- BUT
- If they are combined with other data, they may identify a victim/client
- For example:
 - Tribal affiliation if victim/client is only member of that tribe in area
 - An unusual number of children plus a zip code may be personally identifying

Consent



- Your program should not release any information about the victim/client unless you have the victim's/client's consent
- Informed consent: you have explained to the victim/client:
 - Who will get the information?
 - What information will be released?
 - How will the recipient use the information?
 - Is the recipient a public record agency?
- Consent must be written and signed by victim/client
- Must be reasonably time-limited

What if the information *must* be released?



- Sometimes Tribal or state law requires you to disclose victim/client information:
 - Mandatory reporting of child or elder abuse
 - Duty to warn (threatened imminent harm)
- Sometimes court order requires the program/agency to disclose or release information about the client
- Share only the information necessary to meet the statutory or court mandate

Notifying the Victim/Client



- VAWA confidentiality standards requires programs/agencies to notify the victim of any disclosure
 - Notification in person
 - Notification by mail, fax, or email
 - Preferably before information is actually released
- Let victim/client know the scope of information to be released
- Released to a public record agency? Notify victim/client who will have access to information

Victim Safety and the Release of Information



- Always have a victim advocate capable of having a privileged communication with victim/client work with victim/client around release of information
- Identify when the information will be released and what will be released—and what the consequences may be
- Work with victim/client to develop a safety plan if personally identifying or locational information is released
- Determine whether there is another, safer way for recipient to obtain needed information if victim safety is at risk with disclosure

Reporting Requirements



- **Mandatory reporting of child or elder abuse:**
 - Work with non-offending parent/adult to determine safest way to release information
 - Develop inter-agency relationships and protocols so that disclosure of information can be made with as little potential harm to victim, child or elder
 - Find safe ways for non-offending victim/client to make the report herself, rather than having the program report in order to build trust and support between victim/client and agency
 - Always consult with legal expert about best ways to make such reports
 - Never provide more information than is needed

Reporting Requirements



- Some grantors require grantees to collect data about victims/clients using funded services
- If program receives VAWA or FVPSA funding, personally identifying information cannot be released without consulting first with OVW or FVPS Office to ensure grant funding is not jeopardized
- Usually data can be collected in the aggregate:
 - Numbers of clients seen
 - Numbers/types of services provided
 - Very general ethnic/racial/locational information gathered

Letting the Victim/Client Control Disclosure



- To the extent possible, you should work with the victim/client to determine the best ways to release information—perpetrator’s violence often escalates in domestic violence cases when sensitive information is disclosed
- To the extent possible, make sure victim/client can get legal advice before disclosing information, particularly when disclosure may impact victim/client safety
- If victim/client safety is at risk, work with legal counsel to find ways to minimize amount of information to be disclosed (have records sealed, for example)

Clearing Information After Disclosure



- If victim/client is required to disclose personally identifying information or information that puts victim/client at risk, consider ways to clear information after disclosure or clearing information from record-keeping system:
 - Court can purge information from court record or seal the record
 - Public record agencies can purge information no longer needed (if case is closed, shredding records no longer needed)
 - Return records to victim/client when services are no longer needed
 - Keep only records needed to carry out specific work
 - Develop policies for disposing of any records not legally required to be kept after a specific time period

Protecting Victim/Client Information



- Victim services programs must develop written policies around confidentiality of victim/client records or information that provide standards for:
 - Keeping or disposing of client records
 - Maintaining client records securely, with only specific persons allowed to have access to records
 - Providing clear guidelines as to what information is to be collected—and guidelines as to information that should not be collected
 - Informing client of record-keeping policies; letting client know who has access to records at which times (For example, Board members should not regularly have access to confidential client records; only when serious threat or actual danger to any client arises and access to records is needed to protect the safety of clients or staff)

Questions?



Restoration of Native Sovereignty and Safety for
Native Women Magazine:

- <http://goo.gl/CmFIoi>