


Understanding Confidentiality

Protecting the Privacy Rights of Survivors

Denice Labertew, J.D.
Director of Organizational Capacity and
Advocacy Services




The Sexual Assault Counselor-Victim
Privilege

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Why is the privilege so important?

- Promotes victim safety
- Decreases requests for client information
- New information technologies make accessing and sharing information easier
- You are legally obligated to comply with privilege laws



Privilege vs. Confidentiality

- Confidentiality can be established by law or policy to protect information from being disclosed to the general public.
- A privilege is established by law to protect confidential information from being disclosed in certain legal or official proceedings.
- If confidential information is not privileged, you have to disclose in legal/official proceedings.



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The Sexual Assault Counselor-Victim Privilege

A victim of a sexual assault has a **privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault counselor**, as long as the privilege is claimed by either the victim, a guardian or conservator of the victim, the personal representative of the victim if the victim is deceased, or the sexual assault counselor to whom the communication was made. The privilege exists whether or not the victim is party to an action CAL. EVID. CODE § 1035.8

City of Fresno v. Superior Court, 253 Cal. Rptr. 296, 304 (Cal. Ct. App. 1988);

The holder of the privilege **must actively claim** the privilege in order to prevent disclosure. CAL. EVID. CODE § 912

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When does the privilege apply?

- Applies when testimony or records concerning privileged information is requested in a civil, criminal, administrative or other proceeding.
- However, in order to preserve the privilege, confidential communications cannot be disclosed in other situations.



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What does the privilege allow the victim to do?

- Refuse to be a witness (in-court testimony, written declarations, depositions)
- Refuse to produce a writing, object or thing
- Insist that another person not be a witness or not produce a writing, object or thing



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Elements of the privilege

- Who is the holder of the privilege?
- Who qualifies as a sexual assault counselor?
- What is a confidential communication?
- Who can claim the privilege?
- When is the privilege waived?
- What are the exceptions to and limitations of the privilege?

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Who is the holder of the privilege?

- The sexual assault survivor is the holder of the privilege and controls whether confidential information is disclosed.
- If the sexual assault survivor has a guardian or conservator, the guardian/conservator is the holder of the privilege. In General, minor is holder of privilege if they did, or could have, consented to the counseling (12 or older)
- However, a guardian/conservator accused of SA against the survivor cannot act as a holder of privilege.

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Who is a “sexual assault counselor”?

- A person engaged in a **rape crisis center**, office, hospital, or institution,
- whose primary purpose is to **give advice or assistance** to victims of sexual assault.
- Must have received a **certificate** demonstrating completion of a training program issued by a counseling center that meets criteria for grant funding under § 13837 of the Penal Code, which means that it must have crisis intervention, 24 hours per day, seven days a week; follow up counseling services, in-person counseling, including group counseling, accompaniment services, advocacy services, information and referrals to victims and the general public, and community education presentations;
- Must be **supervised by a certified counselor** if not a psychotherapist

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**Certification Required!!!!
(unlike for Domestic Violence Counselors)**

- Must have (at least) 40 hours of training including, the areas of law, medicine, societal attitudes, crisis intervention, counseling techniques, role playing, victimology, client and systems advocacy, referral services, sexuality.,
- OR**
- Must be a psychotherapist as defined under CA law; have a master’s degree in counseling or a related field
- OR**
- Must have one year counseling experience at least six months of which is in rape crisis counseling.
CAL. EVID. CODE § 1035.2

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What is Confidential Communication?

- **Confidential Communication: CAL. EVID. CODE § 1035.4**
- Information transmitted between the victim and the sexual assault counselor **in the course of their relationship**, and in confidence by a means which, **so far as the victim is aware**, discloses the information to **no third persons** other than those who are present to **further the interests of the victim** in the consultation or those to whom disclosures are **reasonably necessary** for the transmission of the information or an accomplishment of the purposes for which the sexual assault counselor is consulted.
- All information regarding the facts and circumstances about the alleged sexual assault, and all information about the victim’s prior or subsequent sexual conduct or sexual reputation.

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What is a “confidential communication”?

- Information transmitted between the victim and the counselor in confidence during the course of their relationship.
- Includes written and oral information regarding the facts and circumstances of sexual assault incidents and any past or present sexual behavior of the victim
- Includes names of clients.



What is a “confidential communication”?

Communication is confidential even if made in the presence of a third party so long as:

- The party's presence furthers the interests of the victim in the consultation (e.g., interpreters, third party assisting a disabled client, non-counseling staff, etc.).
- Disclosure to a third party is reasonably necessary in order to transmit the information (e.g. interpreters), or
- Disclosure to third party is reasonably necessary to accomplish a purpose for which the counselor was consulted (e.g. support groups).



What is a “confidential communication”?

- Communication is confidential even if made by electronic means and persons involved in the delivery, facilitation, or storage of the electronic communication may have access to the content of the communication.



Who can claim the privilege?

- Holder of the privilege (i.e., the sexual assault survivor or the survivor's guardian/conservator)
- Sexual assault counselor
 - Sexual assault counselor who received/made the communication must claim the privilege whenever s/he is present when a request for disclosure is made (exception: holder instructs otherwise or holder is no longer alive)
- Person authorized by the holder to claim the privilege

Waiver of privilege

- Although it is important to know how the privilege can be waived, you should treat all client information as privileged until proven otherwise.
- Informed Consent is CRITICAL!
- The holder is the only one who can waive privilege.



Waiver Statutes

- Privilege waived **if any holder of the privilege**, without coercion, has disclosed a **significant part** of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by **any statement or conduct** indicating consent, including **failure to claim the privilege in any proceeding.**

CAL. EVID. CODE § 912

When is the privilege waived?

- Consent to disclosure (INFORMED CONSENT)
- Voluntary disclosure to a third party of a significant part of the communication
- Making statements in the known presence of unnecessary third parties
- Failure to claim privilege



Consent to disclosure

Consent should be:

- Written
- Informed
- Specifically tailored and time-limited
- No duress



*No blanket waivers

Voluntary disclosure to 3rd party

- Constitutes waiver only as to matters relating to the information disclosed.
- Disclosure that is itself privileged does not constitute a waiver.
- Inadvertent disclosure does not constitute waiver because not voluntary.



Making statements in the known presence of 3rd parties

- Holder is not treating the information as confidential and privileged.
- However, remember exceptions for 3rd party participation in confidential communications.



Failure to claim the privilege

- If victim/holder had opportunity to claim the privilege, but failed to do so, then there has been a waiver.



What are the exceptions to and limitations of the privilege?

- SA counselors are required to inform victims of any limitations on the confidentiality of their communications
- Exceptions: Mandated child abuse reporting, Duty to warn about dangerous clients (Tarasoff), harm to self or others
- Limitations: Qualified Privilege



Qualified Privilege

- Once you claim privilege, there is a presumption of privilege and burden shifts to requesting party
- **Balancing test: probative value** of the evidence involving alleged SA that is the subject of a criminal proceeding **outweighs the effect of the disclosure on the victim**, the counseling relationship, and the counseling services
- **Court may compel disclosure if**
 - (1) The information is sought in a criminal proceeding and constitutes relevant evidence of the facts/circumstances of a crime committed against the victim or another household member and the above balancing test is met; (People v. Gilbert, 7 Cal. Rptr. 2d 660, 671 Cal. Ct. App. 1992)
 - (2) The victim is dead or is not the complaining witness in a criminal action against the perpetrator.

In Camera Review

- **EVID. CODE § 1035.4**
- The court may compel disclosure of privileged information if the court determines that the **probative value outweighs the effect on the victim**, the treatment relationship, and the treatment services if disclosure is compelled.
- The court may conduct an **in camera review** of the privileged records in order to determine whether or not they should be disclosed.

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In Camera Review (continued)

- If the court determines that certain information is relevant to the case and must be disclosed, the following procedure must be followed:
- The court must inform defendant of the nature of the information that is subject to disclosure;
- The court will hold a hearing to allow the defense counsel to question the sexual assault counselor regarding the information the court has determined is subject to disclosure;
- At the end of the hearing, the court will rule which items of information can be disclosed.

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Apply It!

You have been assisting a client for the past six weeks. You are served with a criminal subpoena for your records concerning this client.

- Name the steps you should take as soon as you get the subpoena.
- What if the client does not want to release the information?

Apply It!

A survivor asks you to provide information regarding her counseling with your program to her drug abuse treatment program.

- Does this information disclosure constitute a waiver?
- What steps can you take to protect the privileged nature of the information provided?

Federal Confidentiality Laws

Violence Against Women Act (VAWA) 2005

- Prohibits programs that receive VAWA funding from disclosing personally identifying information about clients who are victims of DV, dating violence, sexual assault or stalking (42 USC §13925).
- Prohibits programs that receive funding under the McKinney-Vento Act ("HUD Funding") from disclosing, for the purposes of HMIS, personally identifying information about clients who are victims of DV, dating violence, sexual assault or stalking (42 USC §11363).



VAWA 2005: Programs that Receive VAWA Funding

- Prohibits programs from:

Disclosing personally identifying information about victims collected in connection with program services requested, utilized or denied without informed, written and reasonably time-limited consent.



VAWA 2005: Programs that Receive VAWA Funding

- "Personally identifying information" - includes that which is likely to disclose the identity or location of a victim of DV, dating violence, sexual assault, or stalking.

(e.g, first/last name, physical address or other contact information, SS#, DOB, ethnic background, religious affiliation)



VAWA 2005: Programs that Receive VAWA Funding

- Programs may share non-personally identifying, aggregate data in order to comply with federal, state, tribal or territorial data collection requirements.
- If disclosure is compelled by statute or court order, programs must (1) make a reasonable attempt to notify the victim and (2) take steps necessary protect the victim's privacy and safety.

VAWA 2005: Programs that Receive HUD Funding

- For purposes of HMIS (Homeless Management Information System), victim service providers are prohibited from disclosing any personally identifying information about a client who is a victim of DV, dating violence, sexual assault or stalking.



VAWA 2005: Programs that Receive HUD Funding

- "Victim service provider" - a nonprofit, nongovernmental organization including rape crisis centers, battered women's shelters, domestic violence transitional housing programs, and other programs whose primary mission is to provide services to victims of domestic violence, dating violence, sexual assault, or stalking.
- HUD can request non-personally identifying, aggregate data in an encoded or encrypted form from programs only after providing public notice and opportunity to comment.

HIPAA (Health Information Portability and Accountability Act)

- Applies to “health care providers” who utilize any form of electronic communication regarding clients. (billing, email, etc.)
- Requires disclosure of Privacy Practices to “patient” and protection of such personally identifying information AND health information
- Provider must protect the information from disclosure and notify “patient” of their Privacy Practices in writing.

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HIPAA Definitions

- *Health care* means care, services, or supplies related to the health of an individual. Health care includes, but is not limited to, the following:
 - (1) Preventive, diagnostic, **therapeutic**, rehabilitative, maintenance, or palliative care, **and counseling**, service, assessment, or procedure with respect to the **physical or mental condition**, or functional status, of an individual or that affects the structure or function of the body
- *Health care provider* means a...provider of medical or health services and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.
- *Disclosure* means the release, transfer, provision of, access to, or divulging in any other manner of information outside the entity holding the information.

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HIPAA Definitions (continued)

- *Health information* means any information, whether oral or recorded in any form or medium, that:
 - (1) Is created or received by a health care provider...; and
 - (2) Relates to the past, present, or future physical or **mental health** or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.
- *Electronic media* means:
 - (1) Electronic storage media including memory devices in computers (hard drives) and any removable/transportable digital memory medium, such as magnetic tape or disk, optical disk, or digital memory card; or the internet (wide-open), extranet (using internet technology to link a business with information accessible only to collaborating parties)...

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Better to protect...

- While it is uncertain whether or not all Rape Crisis Centers fall under the compliance responsibilities of HIPAA, it is better to protect survivor information and fully inform of how any protected information will be or must be disclosed.
- CMIA (California Medical Information Act) restatement of HIPAA and more restricted.

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Apply It!

- You have been trying to get a hold of the SART nurse at your local SART Center for over a week. You have left several messages and are wanting to try to send an email.
 - Would HIPAA apply? If so, what practices would you implement to protect survivor's confidential information?
 - Take a moment to discuss whether or not you believe your agency may be subject to HIPAA compliance regulations.
 - What other Federal Privacy Protections is your agency subject to?

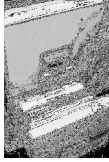
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State Confidentiality Laws

Cal. Civil Code §1798.79.8, et seq.

Prohibits public and private funders from:

- Requesting/requiring that a victim service provider disclose personally identifying information about clients who are victims of DV, dating violence, sexual violence or stalking, or their children.
- Requesting/requiring that a victim service provider use computer software, programs, protocols or systems that require the disclosure of such client information.



Cal. Civil Code §1798.79.8, et seq.

“Victim service provider”

- A nongovernmental organization or entity that provides shelter, programs, or services at low cost, no cost, or on a sliding scale to victims of DV, dating violence, sexual assault, or stalking, or their children, either directly or through other contractual arrangements, including rape crisis centers, domestic violence shelters, domestic violence transitional housing programs, and other programs with the primary mission to provide services to victims of DV, dating violence, sexual assault, or stalking, or their children, whether or not that program exists in an agency that provides additional services.

Cal. Civil Code §1798.79.8, et seq.

“Personally identifying information” defined as:

- First and last name or last name only;
- Home or other physical address (except Safe At Home address or business address of service provider);
- Telephone number (except business phone of service provider);
- Email address, internet protocol address or other online contact information;
- SS#;
- DOB (except just the year of birth);
- Any other info that when combined w/ non-personally identifying information would identify the individual (e.g., first and last names of children or relatives; race/ethnicity, religious affiliation)

Cal. Civil Code §1798.79.8, et seq.
Legal Remedy

- If funder violates this law, the service provider can sue the funder for injunctive relief, damages, and attorney's fees if the service provider has notified the funder of the violation and the funder has not cured the violation within 5 business days of receiving notice



Other State Laws that Protect Client Information

- **Domestic Violence Counselor-Victim Privilege** (Cal. Evidence Code §§1037, et seq.)
- **Human Trafficking Counselor-Victim Privilege** (Cal. Evidence Code §§1038, et seq.)

