



WALKING A TIGHTROPE: BALANCING VICTIM PRIVACY AND OFFENDER ACCOUNTABILITY IN DOMESTIC VIOLENCE AND SEXUAL ASSAULT PROSECUTIONS

Part II. Protecting Privileges and Victims Who Assert Them

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Privileged communications generally include those that are legally protected from being disclosed to anyone, both in and out of a courtroom. Privilege extends to the courtroom by providing the recipient of the privileged information the right not to testify based on a claim of legal privilege. Privilege “overrides a witness’ duty to disclose matters within the witness’ knowledge, whether at trial or by deposition.”²

Part I of this two-part series discusses the distinction between confidentiality and privilege and addresses the importance of confidentiality laws in safeguarding victim privacy, safety, and autonomy. Part II provides prosecutors with a greater understanding of legal privileges that exist in the following relationships: qualified³ community advocate/client,⁴ clergy/penitent, psychiatrist/patient, physician/patient, spousal, and attorney/client. This *Strategies* issue will also include common scenarios in which these privileges may

be challenged and suggest strategies for prosecutors to protect privileged communications where the victim’s privacy interests outweigh the need for the sought information.

STATUTORY PRIVILEGES

An understanding of the policy reasons behind upholding privileges, especially in the prosecution of domestic violence and sexual assault cases, is critical, and should be used in support of an argument to prevent disclosure of privileged communications. Society has made a choice – through our legislatures and courts – to protect communications with professionals who provide the time-honored skills of helping their clients resolve problems so that they can lead healthier, happier, and less conflicted lives. These privileges provide a protective veil, behind which clients can speak truthfully about personal, and often painful,

details to trusted professionals without fear that their most personal thoughts will be revealed. The holder or owner of the privilege is the client, and the professional in the privileged relationship, even under court subpoena, cannot divulge protected privileged communications unless: (a) the client gives express permission for the communications to be disclosed; (b) the client waives the privilege; or (c) there is a recognized public policy exception to the privilege, such as a duty to warn a third party of specified harm that the client is going to commit. In recognition of the benefits of these privileged relationships, communications between individuals in protected relationships are essentially elevated over the public's need to obtain this information, even if the information is otherwise relevant to the truth-seeking process in a court of law. In rare cases, prosecutors may determine that it is necessary to pierce victim privileges, and these circumstances will be discussed below. When prosecutors do decide to pierce a privilege, they should advise the victim to obtain counsel, specifically a victim's rights attorney.⁵

Prosecutors should familiarize themselves with their jurisdiction's statutory privilege provisions prior to commencing work on domestic violence, stalking, sexual assault, and human trafficking cases.⁶ As discussed in Part I, privilege statutes fall into one of the following three categories: (1) *absolute*: meaning that communications arising out of the protected relationship are privileged, unless the privilege holder waives the privilege, and the statutes contain no language providing for in camera review of the relevant records; (2) *semi-absolute*: meaning that the communications are privileged unless voided by public interest exceptions, such as those in child abuse cases; or (3) *qualified*: meaning that there is limited protection for the privileged communication such that a judge can hold an in camera review of privileged records, and then the judge can apply a balancing test to determine whether the information can be released.⁷ Whether and how privileges are categorized is state specific. Prosecutors should note that even when the four corners of a statute indicate that the privilege is absolute, a review of current case law is necessary to determine if courts may have allowed in camera review of records on constitutional due process and confrontation grounds.⁸

Community Advocate/Client Privilege

The community advocate/client privilege is one of the more recent statutorily created privileges, and it protects the dissemination of communications between victims and domestic violence and/or sexual assault counselors. Each state's laws vary with regard to (1) who is a qualified counselor,⁹ (2) what, if any, communications can be revealed and under what circumstances,¹⁰ and (3) whether the privilege applies in civil and/or criminal trials.¹¹ The advocates and counselors covered by this privilege are those based in local domestic violence or sexual assault agencies; the privilege does not include victim witness specialists who are affiliated with government entities like prosecutor's offices or law enforcement agencies.¹² A majority of states now recognize a community advocate/client privilege, which is evidence of a growing awareness of the need to protect domestic violence and sexual assault victims' communications with these professionals.¹³

Defense requests for privileged information can arise at different points throughout a case. Prosecutors should carefully examine the nature and context of the request and try to determine *why* the defense is requesting information from the advocate and the likelihood of its success. While community advocate/client privilege is a strong protection, under certain circumstances, it can be pierced. The burden is high, however, and varies from jurisdiction to jurisdiction. Generally, in order to pierce the privilege, the defense must establish that the information is critical to the defense and that the defendant cannot obtain the information any other way.¹⁴ Prosecutors should ask themselves whether this is a defense fishing expedition or possibly a tactic designed to intimidate a victim into silence due to fear that a trusted counselor will be forced to reveal details of victim disclosures that are sensitive or embarrassing or that might place the victim at risk.

When preparing to argue against a defense motion to subpoena an advocate's records and/or have the advocate testify, prosecutors should carefully review their jurisdiction's statutes and case law to determine what steps can be taken to protect the privilege.¹⁵ Before turning over subpoenaed records to the court or defense counsel, prosecutors must review them carefully in order to redact any information that might impact the victim's safety, including contact information and the victim's work or home addresses. Victims should also be notified of any requests for information so that they

can engage a civil attorney, if necessary, to independently object to such disclosure. In some jurisdictions, statutes call for judicial *in camera* review to decide whether privileged communications should be revealed.¹⁶ In such cases, prosecutors should carefully prepare to defend the privilege and argue that the victim's privacy is supported by statute and case law.¹⁷

In rare cases, a prosecutor might determine that an advocate's records or testimony are so crucial to obtaining justice that subpoenaing them outweighs the victim's privacy concerns and justifies piercing the privilege.¹⁸ In those situations, the prosecutor should carefully explain the decision, as well as its consequences, to the victim. Victims of domestic and sexual violence often have a very strong expectation of privacy when it comes to the specifics of their victimization, trauma, and recovery. As a result, prosecutors should engage in a careful analysis before subpoenaing advocate records. Victims may expect a prosecutor to vigorously argue against a defense motion to subpoena an advocate's records and/or have the advocate testify. By issuing a subpoena to a victim's counsel or — with whom the victim has shared extremely personal details — prosecutors may not only encroach on a victim's privacy, but also may create a chilling effect for the victim and other victims who may be less likely to seek assistance from a domestic violence or sexual assault agency as well as other community services knowing that their private disclosures may be shared in a public courtroom. This potential negative consequence is yet another example of the importance of explaining the scope of the privileged relationship to victims.

A prosecutor also should consider whether to recommend that the victim hire a victim's rights attorney or that the court appoint one to represent the victim's privacy interests.¹⁹ Taking this step could at least signal to a victim that her privacy interests are being considered, are viewed as significant, and are respected by the prosecutor even in cases where a prosecutor is seeking information that the victim wants to keep private.

Prosecutors should always consider whether there are alternative sources for obtaining the information without piercing the privilege, including communicating with unprivileged sources. For example, the victim and/or the offender's family, friends, or coworkers may have information relevant to the case, as could law enforcement or other professionals in the community involved in the victim and offender's lives.

Clergy/Penitent Privilege

Clergy members are often part of coordinated community responses to trauma and may be present at Family Justice Centers, hospitals, and other community-based facilities to provide victims as well as abusers with support and spiritual guidance during times of crisis. In addition, victims of domestic and sexual violence frequently confide in their faith leaders about abuse at their local houses of worship. The clergy/penitent privilege protects the communications shared between a clergy member and a penitent during a private conversation.

Every state has laws that define which clergy and other religious leaders and advisors qualify for this privilege.²⁰ A lay leader associated with a church may provide support services on behalf of the church, but communications with this person may not qualify as privileged under a state statute. When determining whether communications between a faith leader and a victim as well as the accused are privileged, prosecutors should identify the role and scope of the religious leader.

Prosecutors should be aware that some clergy members provide "couple's counseling" for couples that include one abusive spouse or partner. This type of counseling — whether facilitated by clergy or lay counselors — is criticized for several reasons.²¹

Prosecutors should examine their state laws to see whether communications made in the presence of a third party constitutes a waiver of the clergy/penitent privilege, even if that third party is the victim's spouse. Generally, the purpose of spousal privilege is to protect private or intimate communications between spouses and to promote marital harmony. When communications are disclosed to a third party it is outside of the private marital relationship and therefore not covered by the statute. This could become relevant in a case where a victim or defendant may reveal additional or contradictory information or motives during counseling sessions. Spousal privilege is discussed in further depth later in this article.

Psychiatrist/Patient Privilege

The psychiatrist/patient privilege protects communications made between the patient and the psychiatrist during

the course of a professional relationship involving diagnosis and treatment. Depending on the language of the particular state statute, the privilege can encompass psychologists, therapists, and counselors.²² The psychiatrist/patient privilege covers communications including disclosures, notes, records, psychological tests, diagnoses, medications, and recommendations made pursuant to treatment.

The privilege does not apply when the patient receives a court-ordered evaluation. In those circumstances, it is understood that the psychiatrist will report any and all findings to the court. The privilege is also waived when a patient threatens another individual with bodily harm. In those instances, psychiatrists have a legal duty to warn the intended victim.²³ Depending on applicable law, the psychiatrist can satisfy the duty to warn in several acceptable forms, including police notification, warning the intended victim herself, and/or taking other reasonable steps to protect the threatened individual.²⁴

The psychiatrist/patient privilege may become relevant to both the victim and the attacker in domestic violence and sexual assault prosecutions. The issue arises most frequently when defense attorneys request that a victim's mental health records be subpoenaed on the basis that they contain potentially exculpatory evidence.²⁵ Prosecutors should be cautious and aware that these requests may be a defense strategy to introduce irrelevant information to embarrass, harass, or intimidate the victim. The prosecutor should talk with the victim about the option of retaining a victim's rights attorney or civil attorney or having one appointed in order to protect the victim's privacy interests.

In rare cases, a victim's mental health records might contain crucial evidence necessary for the prosecution of the offender. In those cases, prosecutors should consult with the victim and determine whether the victim is comfortable waiving the privilege. Depending on applicable law, prosecutors might be able to argue for a limited waiver. Regardless, prosecutors should be mindful that piercing the privilege might end up ultimately hurting the victim as well as the entire case. Piercing the sanctity of the very professional relationship that has helped the patient heal may invade her privacy to such an extent that it has a chilling effect, thus preventing the victim and others from seeking the therapeutic services of these professionals or from dis-

closing violence out of fear that their mental health records will be accessible to others.

Because the privilege is so significant and because prosecutors want to prevent defense access to a victim's mental health records, prosecutors should think proactively about how to protect this information. For example, if the defense files a motion to obtain a victim's psychiatric records on the basis that she was diagnosed with and received treatment for depression after her victimization, prosecutors should consult with experts to craft and argue pretrial motions that support upholding the privilege. By consulting with mental health experts and obtaining accurate information about a mental health diagnosis and treatment, prosecutors can successfully argue that the evidence sought by the defense neither establishes the context of the assault nor does it affect the victim's truthfulness or ability to perceive what the offender did to her; the victim's depression is irrelevant and, therefore, should be inadmissible. Additionally, experts can assist prosecutors in understanding the relevance and impact of medications that the victim may be taking and whether they could interfere with a victim's mental, physical, or cognitive processes and thus protect the psychiatrist/client privilege.

Physician/Patient Privilege

The physician/patient privilege "excludes from evidence in a legal proceeding any confidential communication that a patient makes to a physician for the purpose of diagnosis and treatment, unless the patient consents to the disclosure."²⁶ Almost every jurisdiction recognizes this privilege either by statute or through case law, but jurisdictions differ as to whether the privilege applies in both civil and criminal cases.²⁷

Victims of domestic violence may seek medical care in an emergency room or with a private doctor in an office or clinic. In some jurisdictions, mandatory reporting statutes require that medical professionals notify the police when they treat a patient for injuries that result from the commission of a crime, particularly those involving a weapon.²⁸ Depending on the scope of the privilege adopted in a jurisdiction, the physician/patient privilege may or may not include hospital records. Hospital records are extremely important in the investigation and prosecution of domestic violence, as they may corrobore-

rate that the abuse has occurred, establish a timeline of the assault(s), disclose who committed the abuse, note whether a weapon was used, indicate if others were present during the events or during the visit to the medical professional, reveal the extent of old and recent injuries, and include discharge instructions relevant to the victim's safety. If the victim signs a written consent, hospital or other medical records can be released to certain persons or agencies. In some states, the prosecutor's office can obtain a person's hospital or medical records by issuing a subpoena *duces tecum* to the custodian of records of the hospital or clinic.²⁹

Due to the fact that information contained in the medical records is relevant, material, and potentially exculpatory, prosecutors should redact certain information, such as the victim's contact information, that could adversely affect the victim's safety before turning over the records to defense counsel. When reviewing the victim's medical records, prosecutors should pay close attention to the patient's medical history.

PRACTICE TIP

Prosecutors should be prepared for the defense to argue that the victim's statements contained in police reports are inconsistent with the victim's statements in medical records. To refute these arguments, the prosecutor should talk to the victim about what occurred during her interactions with police as well as her interactions with medical professionals – specifically, the information she was asked to reveal, the type of information she believed was necessary or important to reveal, and whether she felt safe and comfortable revealing it. After having this kind of conversation with the victim, the prosecutor will often find that the statements the victim gave to different personnel are consistent and corroborate one another, with differences attributable to explanations including her frame of mind, the kind of questions posed, and the individual who sought the answers at the specific time. Perhaps the victim spoke to police officers immediately after the incident while still under the immediate affect and shock of the trauma. Perhaps the defendant was still on the scene at the time. Perhaps later, after the victim felt that the immediate threat of danger had diminished, she revealed different information to medical professionals in response to their questioning. It is important to note that doctors and nurses ask different questions in order to medically diagnose and treat a patient than law enforcement officers do in order to investigate a crime.

It is important to note that a victim who has experienced trauma and is subsequently asked to disclose and summarize abuse to a variety of personnel, including law enforcement and medical professionals, may disclose certain facts at certain times to different individuals. This behavior is consistent with the way that most people disclose information in general, and is particularly relevant to those who disclose information after suffering abuse and trauma. In addition, differences in the content and style of questioning can result in victims giving varied answers.³⁰

In cases of sexual assault, the physician/patient privilege and the obtaining of defendant's medical records are also crucial issues. If the defendant received medical treatment as a result of the assault, prosecutors should subpoena the relevant medical records. They might contain evidence that corroborates the victim's statements regarding the assault, including admissions from the defendant, as well as injuries that occurred when the victim was trying to defend against the perpetrator.

PRACTICE TIP

Evidence gathered and preserved in medical records may also be relevant to the prosecution of the assailant. For example, medical records also might note the presence of tattoos, jewelry, or other signs that help corroborate the perpetrator's identity. These may also indicate possible gang affiliation or beliefs that promote domination of and violence against women.

Physician/patient privilege is also implicated if the prosecutor's office wants a defendant who is charged with rape to submit a blood sample to test for the human immunodeficiency virus and other sexually transmitted infections, in accordance with state laws, in order to fully protect the victim's health as well as determine all potentially appropriate charges and penalties for the case.³¹ A blood sample can be obtained through statute or court order depending on the jurisdiction. While the defense may argue that this medical information should remain privileged, the prosecutor can make a compelling case for prioritization of the victim's health and safety needs.

Spousal Privilege

The spousal privileges include the spousal testimonial privilege and the spousal communications privilege.³² These privileges permit a spouse not to testify and prevent another “spouse from testifying about confidential communications with the other spouse during the marriage.”³³

These spousal privileges were created at common law to foster harmony and sanctity within the marriage³⁴ and to promote marital discourse. These privileges, however, originally did not contemplate domestic and sexual violence involving intimate partners. Today, in most jurisdictions, the privileges do not apply in prosecutions for crimes against a spouse or the couple’s children. Statutory exceptions to these privileges have been created in the majority of jurisdictions to permit the victim spouse to testify against the abusive spouse so that offenders cannot escape prosecution because of marital status.³⁵ A victim is now permitted to testify against a spouse in every jurisdiction except for Maryland and the District of Columbia, which have statutes that permit victims to invoke a one-time marital privilege in domestic violence cases and not testify against the offender spouse.³⁶

The spousal testimonial privilege (also known as the anti-marital fact privilege) means that a spouse may not be compelled to testify against a defendant-spouse in a criminal prosecution. The testimonial privilege is determined at the time of trial. If there is a valid marriage at the time of trial, the privilege applies; if the parties are divorced at the time of trial, the privilege does not apply. The privilege does not apply if the charged offense involves a crime against the other spouse or their children. The spousal testimonial privilege can be waived if there is a failure to object to the spouse’s testimony at the time of trial or if there is a voluntary disclosure to a third party.

The spousal communications privilege is applicable in both civil and criminal cases, and governs only if the communications in question were made during the time of marriage. In many jurisdictions, even if the couple is divorced at the time of trial, the privilege will survive if the communications in question were made during the marriage.³⁷ The spousal communications privilege can be waived if there is a failure to object to the spouse’s testimony at the

time of trial, if there is a voluntary disclosure to a third party, or if there is evidence that there was a witness to the communications.

Attorney/Client Privilege

The attorney/client privilege protects communications between a client and attorney made within the privileged relationship. The client holds the privilege, which permits him to refuse to disclose confidential communications between himself and the attorney. It also prevents any other person, including the attorney, from disclosing the confidential communications.

Although each state has its own rules of professional conduct governing attorney conduct, the majority of jurisdictions have adopted the American Bar Association’s Model Rules of Professional Conduct. Rule 1.6, “Confidentiality of Information,” generally prohibits a lawyer from disclosing “information relating to representation of a client.”³⁸ The rule permits, but does not require, the lawyer to disclose such information if the client consents (explicitly or implicitly) or to the extent necessary to either: (1) prevent reasonably certain death or substantial bodily harm, or (2) establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.³⁹ The first exception can be called “harm prevention,” and the second “lawyer protection.”⁴⁰

The attorney/client privilege may become an issue when prosecutors evaluate and determine whether charges have been appropriately filed against a possible victim of intimate partner violence who has used violence against her batterer. In these situations, important information disclosed in the attorney/client relationship could provide the context within which the violence was used. Significantly, information establishing self-defense or indicating primary versus predominant aggressor factors may be privileged but critical to a prosecutor determining the just disposition of a case.

An attorney for an intimate partner violence victim charged with assault against a batterer may advise the client to waive attorney/client privilege for purposes of

open pretrial communication between the defense attorney (or civil attorney) and prosecutor concerning the reasons the client used violence against her batterer. The decision of whether to meet with a defense attorney in order to ask the attorney to discuss the potential disclosure of confidential communications with the client may be complicated. Such a meeting may depend on whether the prosecutor believes that defense counsel has relevant and credible information that could affect the ultimate decision to proceed with the prosecution. For example, if the prosecutor reviews prior police and court records and sees that the defendant was previously a victim in other domestic violence incidents, the prosecutor may want to re-evaluate the case.⁴¹ The prosecutor's willingness to meet with the defense attorney may also be affected by the professional relationship that the defense attorney has with the prosecutor's office and whether that attorney is considered a credible source of information. The prosecutor may want to meet with the defense attorney to discuss any and all options in such a case, especially if the person charged is incarcerated pending trial and the case is likely going to be dismissed or otherwise alternatively disposed.

CONCLUSION

Victim privacy laws are the pillars upon which the safe disclosure of abuse and the receipt of services have been built. If domestic violence and sexual assault victims do not feel that their private information will remain so under confidentiality and privilege laws, victims may be hesitant to reveal their trauma and get the services that they need to begin their physical and psychological healing processes. Prosecutors can succeed in balancing victims' privacy rights and interests with offender accountability by fully understanding the laws of confidentiality and privilege and then employing the strategies discussed in this article that ensure that victims' privacy needs are preserved at every possible opportunity while holding abusers accountable. Prosecutors may need to make accommodations to access confidential information from non-confidential sources to realize the dual goals of victim protection and offender accountability, but taking these extra steps will ensure that victims now and in the future know that they can trust and rely on prosecutors to help protect them to the greatest extent possible under the law.

ENDNOTES

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- 2 BLACK'S LAW DICTIONARY 1235 (8th ed. 2004) ("testimonial privilege").
- 3 The specific qualifications for community advocates vary depending on field and jurisdiction and are discussed, in more depth, below.
- 4 Prosecutors and advocates should check state law requirements for qualifying an advocate to be able to claim the privilege.
- 5 For more information on victim's rights attorneys and referrals for pro bono representation, contact the NATIONAL CRIME VICTIMS LAW INSTITUTE (NCVLI), http://law.lclark.edu/centers/national_crime_victim_law_institute/.
- 6 Prosecutors should also familiarize themselves with victim's right provisions that relate to privacy, protection, and the right to refuse discovery.
- 7 See Loretta Frederick, *Confidentiality and Information Sharing Concerns for Advocates*, available at <http://www.mcbw.org/files/u1/confidentiality.pdf>; *The Laws in your State*, RAPE, ABUSE & INCEST NATIONAL NETWORK (RAINN), <http://rainn.org/public-policy/laws-in-your-state> (last visited March 22, 2013).
- 8 See, e.g., *P.M. v. Gould*, 212 Ariz. 541, 136 P.3d 223 (2006) (specifically addressing that when a victim's state rights conflict with a defendant's federal constitutional due process rights, such as confrontation, that the defendant's rights will prevail).
- 9 See, e.g., ARIZ. REV. STAT. ANN. § 12-2239 (2012) ((F) "To qualify for the privilege prescribed in this section, a domestic violence victim advocate must have at least thirty hours of training in assisting victims of domestic violence victims."); see also, e.g., CAL. EVID. CODE § 1035.2 (2012) (defining "sexual assault counselor" with privilege as one who is a psychotherapist with a counseling degree or has one year of counseling experience, at least six months of which is in rape crisis counseling or has 40 hours of training as described by statute and is under supervision).
- 10 See, e.g., CAL. EVID. CODE § 1035.8 ("Sexual assault counselor privilege." Victim has privilege to refuse to disclose and to prevent another from disclosing a confidential communication between victim and sexual assault counselor. Confidential communication is defined to include "all information regarding the facts and circumstances involving the alleged sexual assault and also includes all information regarding the victim's prior or subsequent sexual conduct, and opinions regarding the victim's sexual conduct or reputation in sexual matters."); see also, e.g., CONN. GEN. STAT. ANN. § 52-146k (West 2012) ("Confidential communication" means information transmitted between a victim of a battering or a sexual assault and a battered women's counselor or sexual assault counselor in the course of that relationship and in confidence ... and includes all information received by, and any advice, report or working paper given or made by, such counselor in the course of the relationship with the victim.").
- 11 See, e.g., 750 ILL. COMP. STAT. ANN. 60/227 (West 2012) ("No domestic violence advocate or counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal case or proceeding or in any legislative or administrative proceeding without the written consent of the domestic violence victim").

12 See *Commonwealth v. Bing Sial Lian*, 434 Mass. 131, 747 N.E.2d 12 (2001) (holding that advocates are a part of the “prosecution team”, employed by the prosecution and therefore no statutory privilege for victim and counselor applies. However, the court allowed protection of the victim advocate’s notes as work product, under the same reasoning as attorney work product).

13 See, e.g., Alabama: ALA. CODE § 30-6-8 (2009), ALA. CODE §§ 15-23-41 TO 45 (2009), § 15-23-41, ALA. CODE § 15-23-42 (2009)], ALA. CODE § 15-23-43 (2009), ALA. CODE § 15-23-44 (2009), ALA. CODE § 15-23-45 (2009), ALA. R. EVID. § 5:10; Alaska: ALASKA STAT. § 18.66.200, ALASKA STAT. § 18.66.210, ALASKA STAT. § 18.66.250, ALASKA STAT. § 12.45.049, ALASKA STAT. § 09.25.400; Arizona: ARIZ. REV. STAT. ANN. § 12-2239 (2009), ARIZ. REV. STAT. ANN. § 13-4430. (2009); California: CAL. EVID. CODE § 1035 (West 2009), CAL. EVID. CODE § 1036, CAL. EVID. CODE § 1037 (West 2009); Colorado: COLO. REV. STAT. ANN. § 13-90-107 (West 2009), COLO. REV. STAT. ANN. § 19-1-211 (West 2009); Connecticut: CONN. GEN. STAT. ANN. § 52-146k (West 2009); District of Columbia: D.C. CODE § 14-310 (2010); Florida: FLA. STAT. ANN § 90.5035 (West 2010); Hawaii: HAW. REV. STAT. RULES OF EVID. § 505.5; Illinois: ILLINOIS DOMESTIC VIOLENCE ACT OF 1986/750 ILL. COMP. STAT. ANN. 60/227 (West 2009); Indiana: IND. CODE ANN. § 35-37-6-1 (2009), IND. CODE ANN. § 35-37-6-9 (2009); Iowa: IOWA CODE ANN. §915.20A. (West 2009); Kentucky: KY. R. EVID. 506; Louisiana: LA. REV. STAT. ANN. § 2124.1 (2009); Maine: ME. REV. STAT. ANN. TIT. 16 § 53-A (2009), ME. REV. STAT. ANN. TIT. 16 § 53-B (2009), ME. REV. STAT. ANN. TIT. 16 § 53-C(2009); Massachusetts: MASS. GEN. LAWS ANN. CH. 233, § 20J (West 2009), MASS. GEN. LAWS ANN. CH. 233, § 20K (West 2009); Michigan: MICH. COMP. LAWS ANN. § 600.2157A (West 2009); Minnesota: MINN. STAT. ANN. § 595.02 (L) (West 2009); Montana: MONT. CODE ANN. § 26-1-812 (2009); Nevada: NEV. REV. STAT. ANN. §§ 49.2541 TO 49.2549 (West 2009); New Hampshire: N.H. REV. STAT. ANN. §§ 173-C:1 TO -C:10 (2009); New Jersey: N.J. STAT. ANN. § 2A:84A-22.15 (West 2009); New Mexico: N.M. STAT. ANN. § 31-25-1 TO -6 (West 2009); New York: N.Y. [C.P.L.R.] LAW § 4510 (McKINNEY 2009), N.Y. [CRIM. PROC.] § 60.76 (McKINNEY 2009); North Carolina: N.C. GEN. STAT. ANN. § 8-53.12 (West 2009). North Dakota: N.D. CENT. CODE § 14-07.1-18 (2009); Pennsylvania: 42 PA. CONS. STAT. ANN. § 5945.1 (West 2009), 23 PA. CONS. STAT. ANN. § 6102 (West 2009), 23 PA. CONS. STAT. ANN. § 6116 (West 2009); Rhode Island: SUPREME COURT OF RHODE ISLAND. 83 OP. ATTY GEN. 265 (1983). Texas: TEX. [GOV’T] CODE ANN. § 420.071 TO 420.075 (VERNON 2009); Utah: UTAH CODE ANN. § 77-38-201 TO -204 (West 2009); Vermont: VT. STAT. ANN. TIT. 12 § 1614 (2009); Virginia: VA. CODE ANN. § 63.2-104.1 (West 2009); Washington: WASH. REV. CODE ANN. § 5.60.060 (West 2009); Wisconsin: WIS. STAT. ANN. § 905.045 (West 2009); Wyoming: WYO. STAT. ANN. § 1-12-116 (2009). See also, Summary Of Domestic Violence/Sexual Assault Advocate Confidentiality Laws (2007), available at <http://www.njep-ipsacourse.org/MaritalPrivilege/FedStateConfidentialityLegislation.php>.

14 See, e.g., Ky. R. EVID. 506 (“Counselor-Client Privilege,” overcoming privilege only where judge finds substance of communication is relevant to an essential issue; there are no alternative means to obtain a substantial equivalent of the communication, and the need for the information outweighs the interest protected by the privilege).

15 Victims should be notified of requests for their private information so that they may independently make objections. It is important for prosecutors to present these arguments, but the privilege ultimately belongs to the victim, who primarily has standing to defend against disclosure.

16 See, e.g., ARIZ. REV. STAT. ANN. § 13-4430(D) (2012) (“A defendant may make a motion for disclosure of privileged information. If the court finds there is reasonable cause to believe the material is exculpatory, the court shall hold a hearing in camera. Material that the court finds is exculpatory shall be disclosed to the defendant.”).

17 The disclosure of privileged information may come about in one of two ways – the first where defense subpoenas information. In this case, the prosecutor has notice and should be prepared to argue against disclosure. Second, the defense may subpoena a third party and the

prosecutor will not know or have an opportunity to make an argument. It should also be noted that once disclosure of privileged information is made to the prosecution or defense by a victim or third party, the privilege is destroyed.

18 The community advocate privilege is relatively new, compared to the well-established privileges such as attorney/client, physician/patient, and clergy/penitent. Despite that fact, this privilege, where it exists, is just as strong legislatively and the only difference may remain in application and practice.

19 Contact NCVLI for referrals to pro bono victim’s rights attorneys. For more information, please visit, *Contact Us*, NATIONAL CRIME VICTIM LAW INSTITUTE, http://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/contact_us/ (last visited March 23, 2013).

20 See, e.g., COLO. REV. STAT. ANN. § 13-90-107(1)(c) (West 2012); see also, e.g., MINN. STAT. ANN. § 595.02 (West 2012).

21 Spiritual leaders and lay counselors may lack the training necessary to understand abusers and their manipulative and violent behaviors, as well as other domestic violence dynamics. The spiritual leader and lay counselors may facilitate a popular misconception – that the couple needs therapy or the batterer needs anger management – rather than understand that the batterer is the one in need of unique treatment and counseling, e.g., batterer intervention, to begin to address his criminal behavior. In addition, the counseling and other needs of the victim are unique, and likely cannot be addressed in couple’s therapy led by an untrained facilitator. Another negative consequence of couple’s counseling is that the abusive partner might use it to further control and abuse the victim, inculcate the victim, avoid facing the truth about the abuse, or even pretend to be the victim himself. An untrained clergy member or lay counselor will likely be unable to recognize this manipulation and thus will further the trauma experienced by the victim.

22 See, e.g., Alabama: ALA. CODE § 34-26-2 (2009); Alaska: ALASKA STAT. § 08.86.200; Arkansas: ARK. R. EVID. 503, ARK. CODE ANN. § 17-97-105 (West 2009); California: CAL. EVID. CODE § 1012 (West 2009), CAL. EVID. CODE § 1014 (West 2009); Colorado: COLO. REV. STAT. ANN. § 13-90-107 (West 2009); Connecticut: CONN. GEN. STAT. ANN. § 52-146c. (West 2009); Delaware: DEL. CODE ANN. TIT. 24, § 3017 (2009); DEL. R. EVID. 503; District of Columbia: D.C. CODE § 14-307 (2010); Florida: FLA. STAT. ANN § 90.503 (West 2010); Idaho: IDAHO CODE ANN. § 54-2314 (2009); INDIANA: IND. CODE ANN. § 25-33-1-17 (2009); Iowa: IOWA CODE ANN. § 622.10 (West 2009); Kansas: KAN. STAT. ANN. § 74-5323 (2009); Kentucky: KY. R. EVID. 507; Louisiana: LA. CODE EVID. ANN. ART. 510 (2009), LA. REV. STAT. ANN. § 13:3734 (2009); Maryland: MD. CODE ANN., [Cts. & Jud. Proc.] § 9-109 (West 2009); Massachusetts: MASS. GEN. LAWS ANN. CH. 233, § 20B (West 2009), MASS. GEN. LAWS ANN. CH. 112, § 129A (West 2009); Michigan: MICH. COMP. LAWS ANN. § 333.18237 (West 2009); Minnesota: MINN. STAT. ANN. § 148B.593 (West 2009); MINN. STAT. ANN. § 595.02 (West 2009); Missouri: MO. ANN STAT. § 337.055 (West 2009); Nebraska: NEB. REV. STAT. § 38-2136 (2009), NEB. REV. STAT. § 38-3131 (2009); New Jersey: N.J. STAT. ANN. § 45:14B-28 (West 2009); New Mexico: N.M. STAT. ANN. § 61-9-18 (West 2009); North Carolina: N.C. GEN. STAT. ANN. § 8-53.3 (West 2009); Oregon: OR. REV. STAT. ANN. § 40.230 (West 2009); Pennsylvania: 42 PA. CONS. STAT. ANN. § 5944 (West 2009); Tennessee: TENN. CODE ANN. § 63-11-213 (West 2009); Vermont: VT. STAT. ANN. TIT. 12 § 1612 (2009); Washington: WASH. REV. CODE ANN. § 18.83.110 (West 2009); Wisconsin: WIS. STAT. ANN. § 905.04 (West 2009); Wyoming: WYO. STAT. ANN. § 33-27-123 (2009).

23 See *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976). While this duty requires warning the patient and/or police, such a warning does not negate the confidential nature of the psychiatrist/patient relationship in court. “Neither a psychiatrist issuing a *Tarasoff* warning nor a patient telling his friends he’s in treatment constitutes a waiver of a patient’s psychiatrist-patient privilege.” *New York v. Robert Bierenbaum*, 301 A.2d 119, 122, lv denied 99 NY2d 626 [2003], cert denied 540 U.S. 821 [2003]. See also <http://jaffee-redmond.org/cases/bierenbaum.htm>. In *Tarasoff*,

"a California court ruled in a landmark decision that a psychiatrist was liable for damages when he failed to warn a patient's intended victim, Tatiana Tarasoff, of an imminent threat to her life. The privilege between a therapist and patient ends where the "public peril begins," the court said. Psychiatrists protested the *Tarasoff* decision ... arguing that it would erode confidentiality and make patients less trusting. But it was adopted as law by many states and became a national standard taught to every psychiatrist in training." Katherine E. Finkelstein, *85 Murder Case Tests Limits Of Patient Confidentiality*, NY TIMES (Aug. 6, 2000), <http://www.nytimes.com/2000/08/06/nyregion/85-murder-case-tests-limits-of-patient-confidentiality.html?pagewanted=all&src=pm>.

24 See, e.g., MASS. GEN. LAWS ANN. CH. 112, § 129A (West 2012) (reasonable steps would include contacting appropriate law enforcement, recommending inpatient treatment or hospitalization).

25 It is worth nothing here that defendants do not have a constitutional right to pretrial discovery of information, such as the mental health records of the victim. There is, however, a constitutional right to adequate assistance of counsel during the pretrial and plea process that may impact a defendant's decision to enter into a plea. *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *United States v. Ruiz*, 536 U.S. 622 (2002). When entering into a plea agreement with a defendant where the victim's mental health record could have been an issue in the case, prosecutors should note, on the record, the plea is being entered into without the mental health history.

26 BLACK'S LAW DICTIONARY 1236 (8th ed. 2004) ("doctor-patient privilege").

27 See, e.g., Arizona: ARIZ. REV. STAT. ANN. § 12-2235 (2009); Arkansas: ARK. R. EVID. 503; California: CAL. EVID. CODE § 992 (West 2009); Colorado: COLO. REV. STAT. ANN. § 13-90-107 (West 2009); District of Columbia: D.C. CODE § 14-307 (2010); Georgia: GA. CODE ANN. § 24-9-40 (West 2009); Idaho: IDAHO CODE ANN. § 9-203 (2009); Iowa: IOWA CODE ANN. § 622.10 (West 2009); Louisiana: LA. CODE EVID. ANN. art. 510 (2009), LA. REV. STAT. ANN. § 13:3734 (2009); Minnesota: MINN. STAT. ANN. § 595.02 (West 2009); Ohio: OHIO REV. CODE ANN. § 2317.02 (West 2009); Rhode Island: R.I. GEN. LAWS § 9-17-24 (2009); Vermont: VT. STAT. ANN. TIT. 12 § 1612 (2009); Wisconsin: WIS. STAT. ANN. § 905.04 (West 2009); Wyoming: WYO. STAT. ANN. § 6-2-309 (2009).

28 Please contact AEQUITAS for a compilation on reporting requirement for medical practitioners.

29 See, e.g., Alaska: ALASKA STAT. §24.65.110; Arkansas: ARK. CODE ANN. §9-4-111 (West 2009); Colorado: COLO. REV. STAT. ANN. §12-43-218 (West 2009); Connecticut: CONN. GEN. STAT. ANN. §54-86(e) (West 2009); Delaware: DEL. CODE ANN. TITLE 11, §9403 (2009); District of Columbia: D.C. CODE §15-925 (2010); Florida: FLA. STAT. ANN. §456.057 (West 2010); Georgia: GA. CODE ANN. §19-13-55 (West 2009); Hawaii: HAWAII REV. STAT. §321-473 (2009), HAW. REV. STAT. §346-10 (2009); Idaho: IDAHO CODE ANN. § 9-203 (2009); Illinois: 750 ILL. COMP. STAT. ANN. 60/227.1 (West 2009); Iowa: IOWA CODE ANN. §22.7 (West 2009); West Virginia: W.VA. CODE ANN. §48-27-312 (West 2009).

30 It may be appropriate to introduce expert testimony on victim behavior and response to trauma. Contact AEQUITAS for more information.

31 The majority of states have statutes to criminally charge individuals who knowingly expose another to HIV infection. See THE NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES (July 2010), <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>; see also *Criminal Statutes on HIV Transmission*, STATE HEALTH FACTS.ORG (2008), <http://www.statehealthfacts.org/comparetable.jsp?ind=569&cat=11> (last visited March 23, 2013) (full list of thirty-two states that criminalize transmission of HIV).

32 These privileges are applicable in every state for parties who are legally married. These privileges extend to domestic partnerships in the District of Columbia, Washington, and Wisconsin and to civil unions in New Jersey.

33 BLACK'S LAW DICTIONARY 1236 (8th ed. 2004) ("marital privilege").

34 *Trammel v. United States*, 445 U.S. 40 (1980).

35 See, e.g., CONN. GEN. STAT. ANN. §54-84A; D.C. CODE §14-306(B-1); GA. CODE ANN. §24-9-23; MISS. CODE ANN. §13-1-5; N.C. GEN. STAT. ANN. §8-56, 57; VA. CODE ANN. §19.2-271.2; W. VA. CODE ANN. §57-3-3. These privileges are applicable in every state for parties who are legally married. These privileges extend to *domestic partnerships* in the District of Columbia, Washington, and Wisconsin and to civil unions in New Jersey.

36 D.C. CODE ANN. §14-1306 (b-1)(1)(A); MD. CODE ANN. [CTS. AND JUD. PROC.] §9-106 (a)(2)(iii).

37 Application of the spousal communications privilege may require that the communication be "intimate" and/or intended to be kept confidential between spouses. See your state's specific law for satisfaction of spousal privilege. Please contact AEQUITAS for its compilation on "Spousal Immunity and Marital Privilege."

38 Model Rule 1.6(a) (ABA 2002).

39 Model Rule 1.6(b)(1), (3) (ABA 2002). ABA Model Rule 1.6(b) contains two other exceptions: "to secure legal advice about the lawyer's compliance with these Rules ... and to comply with other law or a court order." Model Rule 1.6 (b)(2),(4). The current language of the harm prevention exception represents an amendment to Rule 1.6 approved by the ABA in 2002 and has not yet been adopted by any state. The pre-2002 version of the harm prevention is more restrictive, permitting disclosure only "to prevent the *client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm*" (emphasis added). Model Rule 1.6 (b)(1) (ABA 2001). A majority of states have versions of Rule 1.6 that differ from both the current and the pre-2002 ABA Model Rules by creating broader exceptions to the duty of confidentiality. Geoffrey C. Hazard, Jr. & W. William Hodes, *THE LAW OF LAWYERING* § 9.21, at 9-78 (3d ed. 2003).

40 Clark D. Cunningham, *How to Explain Confidentiality?* 9 CLINICAL L. REV. 579-621 (2003), available at <http://law.gsu.edu/Communication/HTE/HTE-Final.htm>.

41 See AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, INTIMATE PARTNER VIOLENCE VICTIMS CHARGED WITH CRIMES: JUSTICE AND ACCOUNTABILITY FOR VICTIMS OF BATTERING WHO USE VIOLENCE AGAINST THEIR BATTERERS (Dec. 2010), http://www.aequitas-resource.org/Intimate_Partner_Violence.pdf.

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