



## COMMUNICATION BETWEEN AN ADVOCATE AND A VICTIM/SURVIVOR IS NOT ALWAYS CONFIDENTIAL

In Minnesota, Sexual Assault Counselors may **generally** not be compelled to testify about any opinion or information received from or about the victim with whom they are working. *See*, Minnesota Statute §595.02 subd. (k). There are however, some exceptions to this general rule.

**Do you meet the definition of a sexual assault counselor?**

**A sexual assault counselor must meet all of the following:**

- have undergone at least forty hours of crisis counseling training
- work under the direction of a supervisor in a crisis center,
- the crisis center's primary purpose must be to render advice, counseling or assistance to victims of sexual assault.

If you meet the definition, then communication is deemed privileged unless that privilege is waived. Waiver of the privilege may occur in more than one way:

**HOW PRIVILEGE IS WAIVED:**

**Victim/Survivor Consent**

- If the victim/survivor consents to having the advocate testify, the communication that has occurred will no longer be deemed privileged.
- The privilege belongs to the victim/survivors and it is their right to waive that privilege if they choose.
- If the survivor/victim does in fact wish to have the advocate testify, the waiver will need to be stated on the court record so the advocate is clear that (s)he is granted permission to testify.
- It would be wise for the advocate to communicate with the prosecutor on the case to verify that the waiver has in fact been made before they testify.

**Court Deems Good Cause is Shown**

- This waiver applies when the advocate's information relates to neglect or termination of parental rights. (Note: These fact patterns may lead to a situation requiring mandatory reporting.)
- Victim/Survivor does not consent to having the advocate testify.
- Court is ordering this testimony or disclosure of information.
- The court must perform a balancing test in order to determine if good cause exists for disclosure.
- The balancing test requires the court to weigh the public interest and need for the disclosure against the effect on the victim, the relationship between the advocate and the victim, and the services provided if disclosure occurs.
- In this instance, the advocate if called to testify would assert on the witness stand that the information they possess is confidential. The court will then rule on the issue and the advocate will be informed as to whether they will be required to testify and what the boundaries of their testimony if any, will be.

It is also important to note that Minnesota Statutes §626.556 and 626.557 address issues of maltreatment of minors and these statutes should be consulted if your situation involves these issues.

**Third Party**

- Victim/Survivor does not knowingly consent to the advocate's testimony.

## Conversations

- Conversations between victim/survivor and advocate occur in the presence of a third party. For example, a meeting between the advocate, victim/survivor and law enforcement.
- Conversations between victim/survivor and advocate are subsequently purposefully disseminated to a third party. For example, after victim/survivor meets with an advocate, the victim/survivor then tells someone else about the content of the meeting.
- The communication is not longer confidential because it has been shared with someone outside the confidential relationship.
- Once the information is disclosed to someone else even though it was by choice, the victim/survivor may not later assert privilege when disclosure is sought by someone else.
- This concept is not unique to the relationship between sexual assault counselors and clients. It also applies to other disciplines including lawyers and their clients.

## WHAT CAN I DO:

**The above information is not meant to discourage advocates from providing support to the victims/survivors in their meetings with third parties. Instead, the information is intended to help you understand the limits of confidentiality as you assist victims/survivors.**

- If you meet with a victim/survivor and they are being interviewed by law enforcement, remember the role of the advocate is to provide support for the survivor. Do not take notes; the officer will likely be recording the conversation. This reinforces the notion that the advocate is a support person and not an investigator. It also prevents the advocate from having to disclose those notes.
- Discuss with the victim/survivor the ways in which the cloak of confidentiality may be waived so that they have knowledge of this issue from the beginning of the working relationship.
- Talk to the local prosecutors in the jurisdiction in which you work. Discuss the potential ramifications within your community if victim/survivors do not have a confidential resource to talk to concerning sexual assault.
- Let your local prosecutor know that you would be willing to testify as an expert witness on the issue of sexual assault. This may alleviate some of the issue of having advocates testify concerning case specific information.
- If you are going to meet with the victim/survivor and someone else, ask that an additional person be present as well. That additional person may then be called as a witness. This will not be an absolute bar to you being called to testify, but it provides a strong argument that your testimony would be duplicative and thus unnecessary.

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