



State of New York
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M E M O R A N D U M

To: Gwen Wright
From: Johanna Sullivan
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INTRODUCTION

In New York State Domestic Violence victims have a variety of residential and non residential programs where they can obtain services. These programs provide a variety of services including but not limited to: advocacy, legal, social work, or rape crisis counseling. The question has been raised pertaining to what kinds of protections are in place to prevent disclosure of the information received during the course of providing these services. The information may be protected by the rules guiding confidentiality and the laws which set out the parameters of privilege.

The various standards for establishing what is *confidential* or *privileged* have led to confusion, particularly when it comes to the issue of domestic violence services. This memo serves as a broad overview of New York's regulations and laws pertaining to confidentiality and privilege and how these laws intersect with federal requirements set out under the Violence Against Women Act and statutes establishing the Human Resource Management Information System. Like most areas of the law, interpretations may differ depending upon each individual situation and fact pattern. It is important that an attorney be advised if a particular issue pertaining to confidentiality or privilege emerges.

CONFIDENTIALITY

RESIDENTIAL SHELTER LOCATION

The location of a residential shelter must be kept confidential by the program and its staff, OCFS staff, local district staff, or any state or local agency that may have access to the address of a residential facility¹. The address of a residential program can not be turned over pursuant to a request

¹ 18 NYCRR 452.10(c) and Social Services Law § 459-g.

under the Freedom of Information Law.² All residential programs must maintain a business address which is separate and distinct from the actual address where residents reside, the business address is the address that should be utilized when a victim is filing for public assistance.

The actual residential address can only be shared if it is required pursuant to a court order, a law or a regulation³. Courts have required the disclosure of the residential program's address and telephone number where a complainant/victim was housed in a residential domestic violence program and the address was necessary to pursue a criminal action against the victim's abuser.⁴

LOCAL DISTRICT STAFF ACCESS TO RESIDENTS OF A DOMESTIC VIOLENCE PROGRAM

Access to Residents at the Residential Facility

A local social service district can have access to the residents of a domestic violence shelter at the facility or safe home under the following circumstances:

- When required by a court order;
- When investigating a report of suspected child abuse and the resident of the program is the subject of the report; and
- Where authorized by the residential program's policies and with the consent of the resident/victim.

While a residential program must, under the circumstances described above, provide access to the victim at the actual residential facility, the local district staff can not access the residential facility when there are no residents unless the program's policies allow such access⁵.

Access to residents at an off-site location

Residential domestic violence programs must allow local district staff to have access to residents of the program at a location other than the confidential location under the following circumstances:

- To determine a resident's length of stay;
- To assess the services' and/or safety needs of the resident; and/or to
- To assist a resident in finding appropriate alternative residential housing⁶.

² 18 NYCRR 452.10©(2) forbidding redisclosure pursuant to Article 6 of the Public Officer's Law Section 87(2)(f).(Freedom of Information Law).

³ 18 NYCRR 452.10©.

⁴ See People v. Ramsey, 174 Misc. 2d 304, 305, 665 N.Y.S.2d 501, 501 (New York County Sup. Ct., 1997).

⁵ 94 ADM-11

⁶ 18 NYCRR 452.10 (d)(2) and 94 ADM-11.

CASE FILES AND RECORDS OF A RESIDENTIAL AND NON-RESIDENTIAL PROGRAM

New York regulations pertaining to confidentiality of case files and records of domestic violence programs

The primary rules and parameters surrounding confidentiality for domestic violence programs are set out in what is commonly called “the shelter regulations” contained in 18 NYCRR § 452.10 (residential services) and 18 NYCRR § 462.9 (non-residential services). All residential programs with an operating certificate issued by OCFS must comply with Section 452.10. For non-residential programs, only programs that are operated directly by a social services district or operating through a contract with a social services district must comply with Section 462.9.⁷

The regulations require residential and non-residential programs to keep confidential all records, books, reports and papers pertaining to the operation of the programs and the victims who receive services from the program.⁸ This imposes an affirmative obligation on the program and its employees to keep the information they obtain confidential and to establish systems to ensure confidentiality.

The regulations, however, have created a number of exceptions to the rule of confidentiality. Some of the exceptions to confidentiality apply to both types of programs and others only apply to residential or to non-residential.

Exceptions to the rule of confidentiality for case files and records of residential and non-residential programs

Access to confidential information obtained by both residential and non-residential services may be granted under the following circumstances:

- OCFS will have full access to all information pertaining to the operation of the program including individual identifying information⁹;
- Any person can gain access to information if such access is granted by a court order¹⁰;
- A resident or person receiving services at a non-residential program will have access to his/her own case file¹¹;
- A federal, state or local agency may access program information, but not identifying information about a client, when performing an audit¹²; and
- Residential and non-residential programs, must report suspected cases of child abuse, neglect and maltreatment, whenever a staff person has reasonable cause to suspect child abuse, neglect or maltreatment based upon a child coming before a staff member or the statements from the child’s parent from personal knowledge, facts, conditions or circumstances.¹³

⁷ 18 NYCRR 462.9 (Non-residential services) and 18 NYCRR 452.10 (residential)

⁸ Id.

⁹ 18 NYCRR §§ 452.10(a)(1) and 462.9(a)(1).

¹⁰ 18 NYCRR §§ 452.10(a)(2) and 462.9(a)(2).

While a court order may require the information to be turned over one can move to quash or block the order if the information requested is privileged—further discussion of this will follow.

¹¹ 18 NYCRR §§ 452.10(a)(5) and 462.9(a)(3).

¹² 18 NYCRR §§ 452.10(a)(6) and 462.9(a)(4).

¹³ 18 NYCRR §§ 462.8 (non-residential programs) and 452.9(e)(2)(residential program)

Exceptions to the rule of confidentiality for case files and records of residential programs

In addition to the confidentiality exceptions discussed above, the regulations also permit residential programs to disclose information about the services they provide under the following circumstances:

- A residential program will have access to the case files of a resident of another residential program, excluding actual residential address, for purposes of referral if the resident continues to be in need of services beyond the current program's length of stay¹⁴; and
- A local social services district will have access to resident case records:
 - for the purposes of investigating reports of child abuse and maltreatment;
 - when the resident has voluntarily given permission for such access; and/or
 - when the following components of the resident's case file are needed for the purpose of reimbursing the shelter:
 - Name of the resident and any minor child(ren) for whom the shelter will be reimbursed;
 - Business address of the shelter;
 - Date the resident entered;
 - Date of the resident's departure; and
 - Any "other relevant information",¹⁵ which identifies the resident's needs and are necessary to ensure that appropriate services are provided¹⁶. While local district staff may obtain information pertaining to the types of services, they are not permitted access to the victim's actual case file, for the purpose of reimbursement of the shelter.¹⁷

Exceptions to the rule of confidentiality for case files or records of non-residential programs

In addition to the permitted disclosure discussed above, the regulations for non-residential programs provide access under the following circumstances:

- Local department of social services will have access to:
 - all books, records, reports and papers relating to the operation of the program; and
 - information regarding the persons receiving services from the program including:
 - name of the person
 - date of service
 - reason for service
 - name of children or family members receiving services
 - types of core services and optional services provided to the victim.

¹⁴ 18 NYCRR § 452.10(a)(3).

¹⁵ 94 ADM-11

¹⁶ 18 NYCRR § 452.10(a)(4).

¹⁷ 94 ADM-11

- A perpetrator or alleged perpetrator of domestic violence may have access to the information contained in the case record that pertains to the services provided to the perpetrator or alleged perpetrator¹⁸; and
- A person engaged in a research project will have access to information consistent with applicable laws and regulations. The researcher, however, will not have access to client identifying information unless such information is essential to the research and the department (OCFS) has given approval for such access.¹⁹

Breach of confidentiality of case files or records of a residential or non-residential program

Anyone to whom confidential information relating to the operation of a residential or non-residential program, including case files, is shared must maintain the confidentiality of this information. If an employee of OCFS or a local district staff that receives information pursuant to the exceptions of confidentiality discloses the information in a manner inconsistent with the limited exceptions, discussed above, the employee will be subject to disciplinary action in accordance with applicable collective bargaining agreements, laws and regulations.²⁰

PRIVILEGE

As discussed above, the communications and case files of a domestic violence victim receiving services at a residential or non-residential program must be turned over if requested by a court order. This blanket rule, however, may not be applicable if some of the services rendered were performed by certain professionals to whom the rules of evidence impose a privilege that forbids disclosure.

As was discussed above many domestic violence programs are multidisciplinary in nature. Some programs employ attorneys, social workers, and rape crisis counselors, to name a few.

“Certain communications are vested by law with a privilege against disclosure. New York, by statute, recognizes a privilege for confidential communications between attorney and client (CPLR 4503); physician and patient (CPLR 4504); spouses (CPLR 4502); registered psychologist and client (CPLR placed “on the same basis” as attorney client privilege, CPLR4507); a certified social worker and client (CPLR 4508) and rape crisis counselor and client (CPLR 4510).”²¹

The types of communications that are privileged in New York State that are most commonly engaged in under a domestic violence program include the privilege between attorneys and clients, sexual assault counselors and clients, and social workers and clients. These three types of privilege have been codified via CPLR §§ 4503, 4510, and 4508, respectively. Additionally, there are exceptions to each type of privilege which will be discussed below.

- **Attorneys and Clients**

In New York State, any confidential communication made between a client and his/her attorney shall remain confidential.²² Rule 1.6 of the ABA’s model Rules of Professional Conduct states that a

¹⁸ 18 NYCRR § 462.9(a)(3).

¹⁹ 18 NYCRR § 462.9(a)(5).

²⁰ 18 NYCRR 462.9(b)(2) (non-residential) and 18 NYCRR 452.10(b)(2)(residential).

²¹ Prince, Richardson on Evidence Article V. A General Considerations § 5-101, p. 225.

²² “Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee

lawyer shall not reveal information relating to the representation of a client, although several exceptions are provided.²³ These exceptions include: (1) if the client consents to the disclosure; (2) the lawyer believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm; (3) the lawyer believes disclosure is necessary to prevent the client from committing a crime or fraud; (4) disclosure is necessary to prevent, mitigate or rectify substantial injury to the financial interests or property of another; (5) disclosure is necessary to obtain legal advice regarding compliance with the ABA's Rules of Professional Conduct; (6) disclosure is necessary to establish a claim or defense on the lawyer's behalf, between the lawyer and client; or (7) when disclosure is required by law or a court order.²⁴ The privilege may also be waived if the client voluntarily discloses privileged information in a public or private setting.²⁵

The attorney-client privilege extends to individuals that act as the agent or employee of the attorney²⁶. Statements made by a client to the attorney's employees or agents are privileged because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential. Similarly, communications made to an attorney through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication, generally will be privileged. The scope of the privilege is not defined by the third parties' employment or function, however; it depends on whether the client had a reasonable expectation of confidentiality under the circumstances.²⁷

Thus, depending on the facts of each situation, some of the communications by the victim to other employees of a domestic violence program that are working as an employee or agent of an attorney may be protected by the privilege. Programs which serve domestic violence victims that employ both attorneys and advocates should consider making a determination if their organizational structure cloaks the advocate in the attorney client privilege or not and act accordingly.

- **Sexual Assault Counselors/Rape Crisis Counselors and Clients**

Rape crisis counselors are neither required nor allowed to disclose communications made to or by a client in the course of the services provided unless the client authorizes such disclosure, the client threatens to commit a crime or other harmful act, or the client initiates charges against the rape counselor.²⁸ Communications made to a clerk, stenographer, or other person working for the same

and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services." NY CLS CPLR § 4503(a)(1).

²³ American Bar Association, Center for Professional Responsibility, http://www.abanet.org/cpr/mrpc/rule_1_6.html, accessed 8/22/08.

²⁴ Id.

²⁵ People v. Mitchell, 58 NY2d 368, 461 NYS2d (statements made by the client to a paralegal in a waiting area where others were present waived the privilege).

²⁶ CPLR 4503(a)

²⁷ See People v. Osorio, 75 NY2d 80 (1989); Stroh v. General Motors Corp. 213 AD2d 267, 623 NYS2d 873 (1st Dept. 1995).

²⁸ "A rape crisis counselor shall not be required to disclose a communication made by his or her client to him or her, or advice given thereon, in the course of his or her services nor shall any clerk, stenographer or other person working for the same program as the rape crisis counselor or for the rape crisis counselor be allowed to disclose any such communication or advice given thereon nor shall any records made in the course of the services given to the client or recording of any communications made by or to a client be required to be disclosed, nor shall the client be compelled to disclose such communication or records, except: (1) that a rape crisis counselor may disclose such otherwise confidential communication to the extent authorized by the client; (2) that a rape crisis counselor shall not be required to treat as confidential a communication by a client which reveals the intent to commit a crime or harmful act; (3) in a case in

employer as such sexual assault counselor are also privileged. Thus, communications by a victim to a sexual assault counselor or another employee during the course of counseling are privileged and may not be required to be turned over pursuant to a court order.

Social Workers and Clients

Similar to the section related to rape crisis counselors, § 4508 states that a licensed masters in social worker or licensed clinical social worker shall not be required to disclose communications made by a client, or his/her advice to the client, as made in the course of his/her employment.²⁹ Similar to the sexual assault counselor, communications made to a clerk, stenographer, or other person working for the same employer as such social worker are also privileged. This, however, is a more narrow privilege than the expanded protections afforded an agent under the attorney-client privilege. The commentaries in McKinney's states that this privilege appears to apply only "when appropriate agents of the social worker are present during a social worker client consultation or such agents become aware of the communications while performing their administrative duties"³⁰.

A social worker is not bound to keep these communications confidential if the client authorizes such disclosure, the client threatens to commit a crime or other harmful act, or the client initiates charges against the social worker or the client is a child and reveals that child was the victim of a crime. The social worker privilege could also be waived if the client's disclosures are made in the presence of a known-third party.³¹ However, if these limited exceptions do not apply, the communications by a victim to a social worker or another employee during the course of counseling are privileged and may not be required to be turned over pursuant to a court order.

- **Domestic Violence Advocates**

The communications between a domestic violence advocate and a victim have not been afforded a privilege under New York Law. Courts have rejected arguments that there is a common-law privilege between a "battered woman and her counselor".³² Thus, if a court order only seeks the communications between a domestic violence advocate and the victim, the program, under most situations, must turn over the information, it is not privileged.

However, under certain fact patterns an advocate may be acting as an agent of the attorney or the client or as an employee of the same employer that employees a social worker or rape crisis

which the client waives the privilege by instituting charges against the rape crisis counselor or the rape crisis program and such action or proceeding involves confidential communications between the client and the rape crisis counselor." NY CLS CPLR § 4510(b).

²⁹ "A person licensed as a licensed master social worker or a licensed clinical social worker under the provisions of article one hundred fifty-four of the education law shall not be required to disclose a communication made by a client, or his or her advice given thereon, in the course of his or her professional employment, nor shall any clerk, stenographer or other person working for the same employer as such social worker or for such social worker be allowed to disclose any such communication or advice given thereon; except (1) that such social worker may disclose such information as the client may authorize; (2) that such social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act; (3) where the client is a child under the age of sixteen and the information acquired by such social worker indicates that the client has been the victim or subject of a crime, the social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry; or (4) where the client waives the privilege by bringing charges against such social worker and such charges involve confidential communications between the client and the social worker." NY CLS CPLR § 4508(a).

³⁰ McKinneys Commentary on CPLR § 4508, p. 285.

³¹ *People v. Alaire*, 148 AD2d 731, 539 NYS2d 468.

³² *People v. Ramsey*, 174 Misc. 2d 304, 305, 665 N.Y.S.2d 501, 501 (New York County Sup. Ct., 1997).

counselor and if the communication was obtained in the course of obtaining legal counsel, social work counseling or rape crisis counseling one may be able to argue that the communication is privileged. This, however, is a very fact specific argument which requires counsel by an attorney before attempting to claim this privilege. Advocates, however, must be very careful to ensure that these privileges are not inadvertently revealed, as was discussed above, in the presence of a third party which could result in the waiver of the privilege.

VAWA

The Violence Against Women Act, under 42 USC § 13925, sets out the conditions upon which VAWA funds will be distributed. When VAWA was reauthorized in 2005 this section was amended to forbid all those receiving funds under VAWA from disclosing any personally identifying information of a victim.³³ This prohibition against disclosure of personal identifying information is applicable to VAWA grant programs and all other federal, state, tribal or territorial grant programs, unless the program receives the written authorization of the victim to release the information.³⁴

However, if personal identifying information is compelled by a statutory or court mandate a program can turn over the information, but the program must then make reasonable attempts to notify the victim of the disclosure and must take reasonable steps to protect the privacy of the victim

While personal identifying information may not be shared between grantees (state funders) and subgrantees (programs) aggregate information may be shared for reporting, evaluation or data collection purposes.

HMIS

The Homeless Management Information System (HMIS) is a computerized database that collects information on homeless individuals that receive services through programs that are funded through HUD's supportive housing assistance program.³⁵ This system collects individual identifying information. The Violence Against Women Reauthorization Act of 2005 amends HUD's statutes pertaining to HMIS and what information can be collected from domestic violence shelters. 42 USCA § 11383 states:

“In the course of awarding grants or implementing programs under this section, the Secretary shall instruct any victim service provider that is a recipient or subgrantee not to disclose for purposes of a Homeless Management Information System personally identifying information about any client. The Secretary may, after public notice and comment, require or ask such recipients and subgrantees to disclose for purposes of a Homeless Management Information System non-personally identifying data that has been de-identified, encrypted, or otherwise encoded. Nothing in this section shall be construed to supersede any provision of any Federal, State, or local law that provides greater protection than this paragraph for victims of domestic violence, dating violence, sexual assault, or stalking.”

HUD's Office of Planning and Development is working on establishing regulations that would provide guidance to programs about how to present information regarding individuals without

³³ 42 USC 13925(b)(2)(A)

³⁴ 42 USC 13925 (b)(2) (B)(ii).

³⁵ Federal Register, Friday March 16, 2007 Part III, Department of Housing and Urban Development, The Violence Against Women and Department of Justice Reauthorization Act of 2005: Applicability to HUD Programs; Notice.

identifying information and trying to come up with technological solutions that ensure proper protections of personal identifying information. To date, HUD has not issued these guidelines and not come up with a method to encode this information, as a result, information pertaining to domestic violence victims serviced under a program funded by HUD's housing assistance program are only required to submit aggregate information about victim's served to HUD and not required to supply individual identifying information.³⁶

CONCLUSION

The issue of confidentiality and privilege is very complicated and fact specific. This memo is intended as merely a broad overview of New York's laws and regulations relevant to the issue of confidentiality and privilege and the intersection of these regulations with the requirements under VAWA and HMIS. If an issue of confidentiality emerges each individual program should consult an attorney to determine what information is confidential, if there is an exception to the blanket rule of confidentiality that requires disclosure or if a privilege may apply which would prohibit disclosure pursuant to a court order.

³⁶ Id.