

# Family Violence Appellate Project

Hello everyone, and welcome to Family Violence Appellate Project's webinar.

Before we get started, a few logistical notes:

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# **Confidentiality and Privilege: A Training for California Domestic Violence Advocates (2018)**

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Funding provided by California Partnership to End Domestic Violence.

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# What is FVAP?

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Family Violence Appellate Project provides free appellate representation to low-and moderate-income survivors of domestic violence (DV) throughout California in cases involving restraining orders, child custody, and other DV issues.

# What is FVAP?

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- A statewide provider of legal information and support for DV providers
- Based in Oakland, serve all of California
- Screened hundreds of requests for assistance since we started in 2012
- Building a body of published appellate decisions helping survivors of abuse in CA
- Providing trainings on many topics to attorneys and advocates

# Today's Training

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- We will cover:
  - I. Confidentiality and privilege  
9:00 – 10:30  
Break 10:30-10:45
  - II. Mandated reporting  
10:45 – 12:35 (*with 5 minute break*)  
Lunch 12:35-1:35
  - III. Responding to Subpoenas  
1:35-2:20  
Break 2:20-2:35
  - IV. Immigration  
2:35-3:20  
Break 3:20-3:35
- Focus Group Discussions 3:35-5:00

# Thanks!

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- Thanks to Marci Fukuroda, and Manatt, Phelps & Phillips LLP, who wrote “Legal Issues for Domestic Violence Shelters in California”, published in 2007 by California Women’s Law Center.
- Funding came from Blue Shield of California Foundation.
- Parts of this training are based on that document.

# Thanks!

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Other parts of the training are based on materials from:

- The Confidentiality Institute, Alicia Aiken, JD
- National Network to End DV  
and
- Battered Women's Justice Project.

Thanks!

# Training Overview

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## I. Confidentiality

- A. Introduction
- B. Protecting Confidential Client Information, including Laws Prohibiting the Disclosure of Personally Identifying Client Information
- and Laws Prohibiting the Disclosure of a Shelter's Confidential Address

## II. Privileges

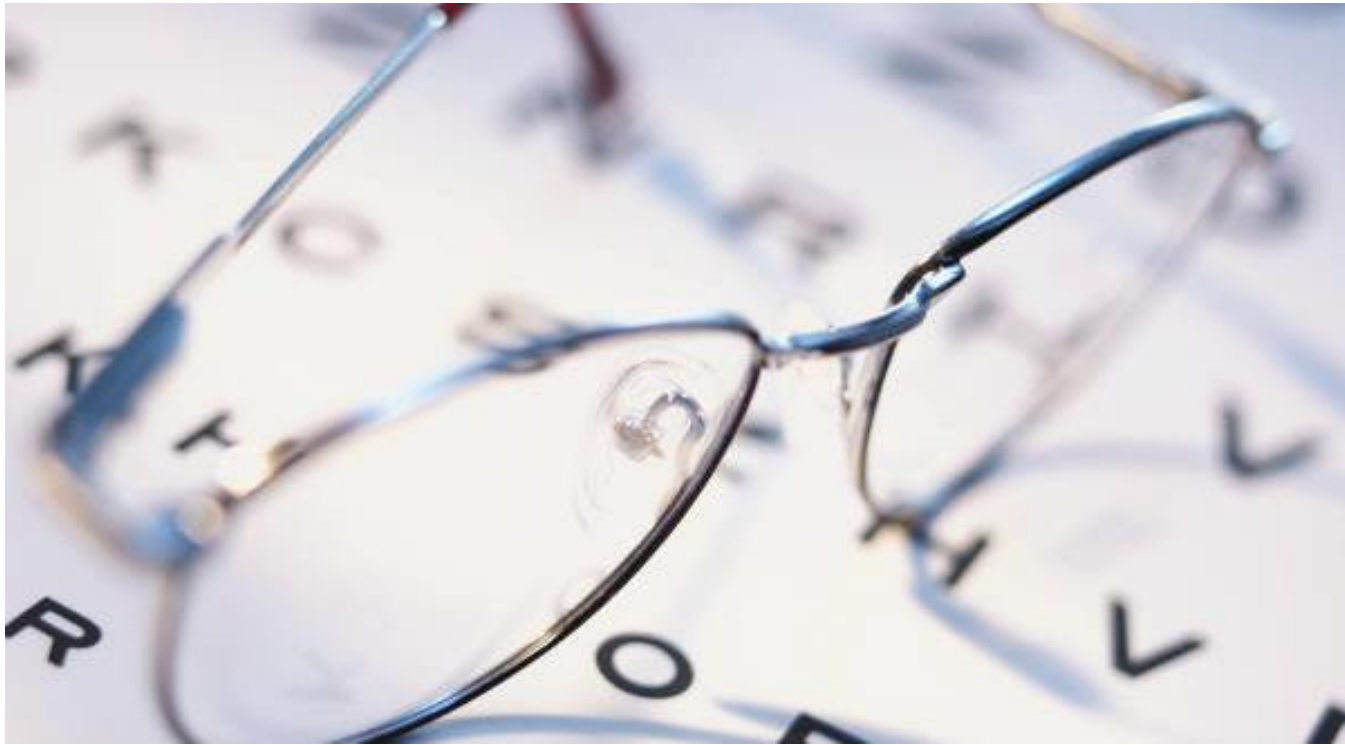
- A. Introduction
- B. The Domestic Violence Counselor-Victim Privilege
- C. Other Relevant CA Privilege Laws



# I. Confidentiality

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Quiz time!



# A. Introduction

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- DV shelters protect safety of clients by keeping their information confidential
- This can be challenging
- Shelters may be served with subpoenas
- Private and government funders may require personal information about clients
- Law enforcement, prosecutors and child protective workers may seek information when investigating cases

# A. Introduction, continued

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- State and federal law protect client information, with some exceptions (e.g., child abuse)
- They also dictate how to respond to requests for information
- All employees and volunteers need to know how to effectively protect confidential information and to understand the legal rights and obligations the laws create for shelters and their clients.

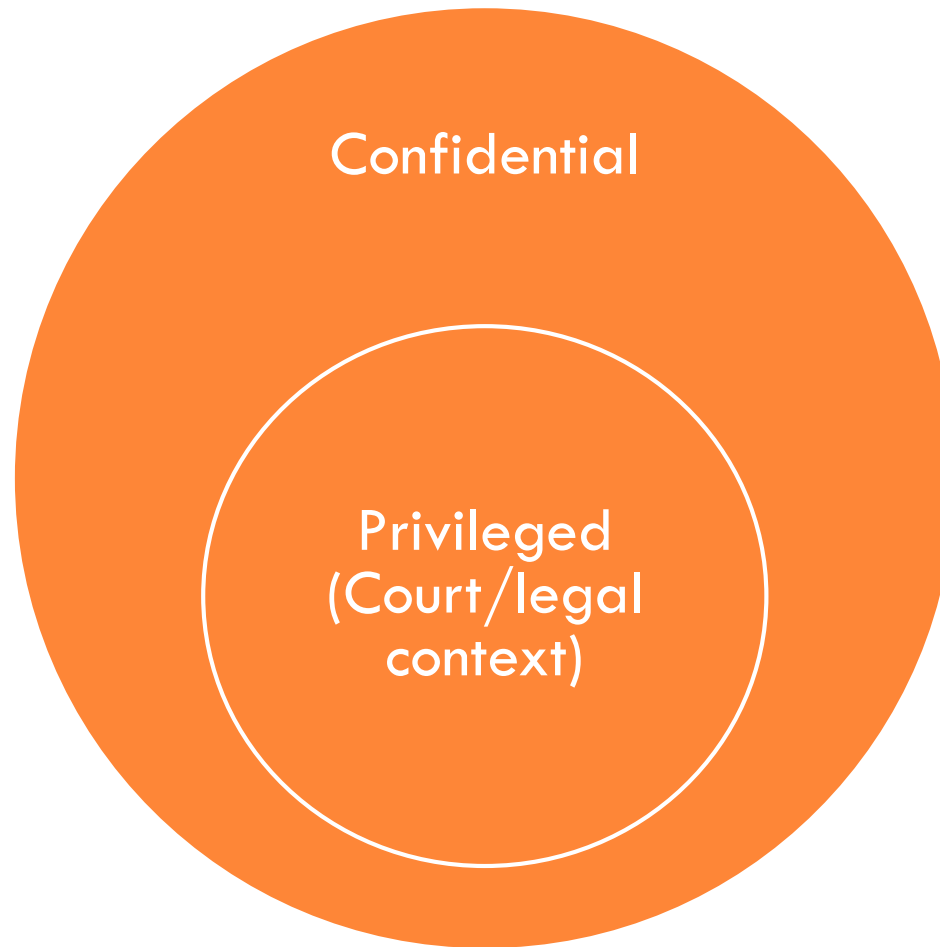
# B. Protecting Confidential Client Information

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- *Privacy*: personal choice whether to disclose info.
- *Confidentiality*: responsibility to protect someone else's choices about disclosure.
- *Privilege*: legal rule prohibiting disclosure of private info against someone's will.
- (See handout from NNEDV & Confidentiality Institute)

# B. Protecting Confidential Client Information

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# B. Protecting Confidential Client Information

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- *Question:*
- Why do confidentiality and privilege matter if my client has already told many people about the abuse?

# B. Protecting Confidential Client Information

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- *Possible Answers:*
- 1. State law mandates that DV counselors keep the information confidential.
- 2. The client may not want the information shared with certain parties.
- 3. The client may not want the information used in court.
- 4. The information might be used against the client.
- 5. Other answers?

# B. Protecting Confidential Client Information

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- Laws Prohibiting Disclosure of Personally Identifying Client Information
- An important part of confidentiality
- CA law prohibits funders from requesting or requiring use of software that includes personally identifying information about victims of DV, dating violence, SA, or stalking
- Personally identifying info includes name of client or children, home address, email address, phone number, SSN, DOB (year is ok), etc.



# B. Protecting Confidential Client Information

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- *DV Shelter-Based Programs Act:*
- Show of hands: who here gets marriage license fees from your county?
- If you do, this Act prohibits the county from requiring personally identifying information about clients, employees, volunteers, or shelter address
- County may request only number of people requesting services, number served, description of social and economic characteristics of clients
- Exception: reporting child abuse, discussed below

## B. Protecting Confidential Client Information

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- *Violence Against Women Act:*
- Show of hands: Who here receives VAWA \$?
- VAWA prohibits agencies from disclosing personally identifying information about clients who are victims of DV, dating violence, SA, or stalking
- Includes information about people who merely request or are denied services by agency
- Exception: reporting child abuse, as discussed below

# B. Protecting Confidential Client Information

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- Federal Laws Prohibiting Disclosure of Personally Identifying Client Information:
- *HUD Funding and Homeless Management Information System (HMIS)*
- National computerized database that collects personal information about clients
- VAWA prohibits victim service providers from disclosing personally identifying information
- “Victim service provider” = non profits including rape crisis, DV shelters, DV transitional housing, similar programs (not general homeless housing programs)

## B. Protecting Confidential Client Information

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- Federal Laws Prohibiting Disclosure of Personally Identifying Client Information, continued:
- *Question:* What if CA law is stronger and more protective than federal law re confidentiality of client information?
- *Answer:* The strongest and most protective law is what you should follow.

## B. Protecting Confidential Client Information

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- Laws Prohibiting Disclosure of Personally Identifying Client Information, continued:
- Try to determine if another way to accomplish purpose without agency releasing personally identifying information.
- If you have to disclose this info, get client's consent in writing.
- Give only minimum amount necessary to accomplish client's purpose or meet reporting requirements, such as in child abuse cases.

# B. Protecting Confidential Client Information

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- Laws Prohibiting Disclosure of Personally Identifying Client Information, continued:
- Give client options re how information is transmitted to other agency: email, phone, letter, fax, Dropbox, etc., so client can choose what is most secure.
- Waiver by client should be very time-limited: a few minutes, hours, or days. NNEDV/Confidentiality Institute recommend the shorter the better.

## B. Protecting Confidential Client Information

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- Keeping Shelter Addresses Confidential:
- Misdemeanor to *maliciously* disclose confidential location of a DV or trafficking shelter
- Custody & visitation orders should keep address of victim/parent confidential
- If shelter applies for funding under DV Shelter-Based Programs Act, county may *not* require disclosure of shelter's confidential location or identity of resident, employee, or volunteer

## B. Protecting Confidential Client Information

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- Keeping Shelter Addresses Confidential, continued:
- CA has *public policy* to protect confidentiality of shelter locations, other information that could jeopardize person's safety
- If you are faced with request or court order to disclose shelter address, you may cite to these laws even if they don't specifically apply
- Offer to provide your business address
- Consult with an attorney, or FVAP



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## II. PRIVILEGES

# II. Privileges: A. Introduction

State law recognizes statutory privileges that protect client information –

- ▣ Domestic Violence Counselor-Victim Privilege
- ▣ Sexual Assault Counselor-Victim Privilege
- ▣ Human Trafficking Caseworker-Victim Privilege
- ▣ Psychotherapist-Patient Privilege (we will not discuss)
- ▣ Attorney – Client Privilege (we will not discuss)
- ▣ Doctor-Patient Privilege (we will not discuss)
- ▣ Etc.

## B. The DV Counselor-Victim Privilege

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- Evidence Code sections 1037 and following - See handout – take a minute to skim this.
- Protects confidentiality of communications between a DV victim/survivor and their DV counselor.
- Goal: to encourage DV victims to seek counseling and help by enabling them to safely and confidentially discuss their situation and options with a qualified DV counselor.
- Counselor may have to testify if court orders it.

## B. The DV Counselor-Victim Privilege

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Applies when **testimony** or **records** are sought as part of:

- a legal (court) matter,
- administrative hearing (e.g., Labor Commissioner, Workers' Comp Appeals Board, Social Services hearing), or
- another proceeding (e.g., Congressional or legislative hearings).

## B. The DV Counselor-Victim Privilege

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Victim has legal right to:

- Refuse to testify about protected information (including court, deposition, written declaration);
- Refuse to disclose or produce writing, object, or thing related to protected information (e.g., notes, photos); and
- Prevent another person from testifying or producing writing, object, or thing related to the information.

## B. The DV Counselor-Victim Privilege

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- Privilege applies only if requested information about client is in fact kept confidential.
- Privileged information should never be released to third parties without client's consent, even when request is not made in connection with formal proceeding.
- Example: father's attorney sends letter requesting children's shelter records since father has joint legal custody order.

## B. The DV Counselor-Victim Privilege

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- Difference between “privilege” and “confidentiality”
- Legal privileges, like DV Counselor-Victim Privilege, protect information that is confidential.
- However, not all confidential information is privileged.
- To have legal status of being privileged, information not only must be communicated to DV counselor, but third party (e.g., abuser) must be trying to use it in a legal proceeding.

## B. The DV Counselor-Victim Privilege

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- The difference between “privileged” and “confidential” information arises when DV agency is served with subpoena or court order demanding disclosure of confidential information.
- DV agency/counselor and victim can assert DV Counselor-Victim privilege and refuse to disclose the confidential information.
- However, there are times when courts may order confidential information to be disclosed (e.g., in some child abuse cases – discussed later on).



## B. The DV Counselor-Victim Privilege

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- *Example:*
- A DV survivor just entered the shelter. In her intake interview she stated that there are no current court proceedings (criminal, family law, juvenile court, etc.).
- The next day when the two of you are alone she tells you, a DV advocate, that she thinks the latest incident of abuse by her boyfriend might be her fault.
- *Question 1: Is this statement confidential?*
- Show of hands: Yes or No?

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Yes.
- Statements made to DV advocates who have completed required training are usually confidential.
- (As noted above, we will cover the child abuse exception to confidentiality in a later part of this training.)

## B. The DV Counselor-Victim Privilege

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- Question 2:
  
- Is the same statement by this new shelter resident that the abuse might have been her fault *privileged*?
  - *Show of hands:*
    - Yes or
    - No?

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Yes, if third party, such as alleged abuser, tries to obtain statement or document to use in *court proceeding*, issue of privilege arises.
- Here, statement could be helpful to abuser in defending against criminal charge of DV.
- If abuser found out about it and tried to get DV advocate to testify, advocate should assert privilege.

## B. The DV Counselor-Victim Privilege

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- It's great that CA has such a privilege in our laws
- But most challenges to client information occur in daily life, where privilege and courts are not involved
- Strong confidentiality practices, discussed above and later on, protect survivor privacy all the time

## B. The DV Counselor-Victim Privilege

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*Question:* Who holds the privilege?

*Show of hands:*

- DV counselor?
- The agency?
- The client/victim of DV?

## B. The DV Counselor-Victim Privilege

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- *Answer:* Victim of DV holds the privilege.
- This is the only person who can decide whether to disclose privileged information.
- If victim has guardian or conservator, they can decide, unless they are accused of DV against victim.
- Former clients continue to hold the privilege.

## B. The DV Counselor-Victim Privilege

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- *Difference between holder of privilege and who can claim privilege on holder's behalf:*

Question: Who can claim the privilege, other than the holder?

*Show of hands:*

- DV agency?
- DV counselor?
- Victim's next of kin?



## B. The DV Counselor-Victim Privilege

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- *Answer:* DV Counselor, or anyone authorized by the holder of the privilege, may claim it.
- DV Counselor with whom victim communicated **MUST** claim privilege whenever request for victim's confidential information is made in counselor's presence.
- Then counselor consults with holder (usually victim), unless victim already consented to disclosure, or victim is dead and no guardian or conservator.

## B. The DV Counselor-Victim Privilege

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- DV privilege dies with DV victim, unless there is guardian or conservator of victim.
- If there is guardian or conservator, DV counselor/agency should consult with them regarding whether DV counselor should claim privilege.
- Statute does *not* provide that victim's next of kin holds privilege, so they do not.
- We will cover responding to subpoenas later on.

## B. The DV Counselor-Victim Privilege

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- *Tip:* When you first consult with DV victim, ask if they are willing to sign form authorizing members of your staff to claim privilege on victim's behalf. (see handout: Client Authorization... – take a minute to read it)
- This helps protect victim's information if request for information not made directly to DV Counselor or to victim – it might go to Ex Dir. or Director of Operations as controllers of agency records.
- Even without form, information cannot be disclosed unless victim specifically agrees to allow this.

## B. The DV Counselor-Victim Privilege

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Q: *Who qualifies as DV Counselor Covered by Privilege?*

Show of hands:

- 1. Any staff member or volunteer at DV agency no matter what their training/supervision is?
- 2. All staff members and volunteers who counsel DV victims, no matter what their training/supervision is?
- 3. All staff members and volunteers who have completed 40 hour DV training?
- 4. All staff members and volunteers who have worked at DV agency < 6 months, but under supervision of DV counselor who's been there at least 1 year?

## B. The DV Counselor-Victim Privilege

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- *Answer: Only 3rd and 4<sup>th</sup> options are correct.*
- *DV Counselor (without graduate degree in counseling)=*
  1. Employee or volunteer of “DV victim service organization”
  2. who counsels or assists DV victims, and
  3. a. Who has completed 40 hour training for DV counselors,  
OR  
b. If DV counselor has worked at DV agency < 6 months,  
must be supervised by someone with at least 1 year  
experience as DV counselor.

## B. The DV Counselor-Victim Privilege

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- DV Counselors can also qualify if they have a “master’s degree in counseling or a related field,” even if they didn’t complete the 40 hour training.
- E.g., Social workers and therapists who have graduate degrees.
  
- *Note:* A DV counselor employed by a DV agency who works at another agency (e.g., CPS, DA, police department, hospital) is still a DV counselor as long as they fit one of the above categories

□

## B. The DV Counselor-Victim Privilege

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- *Summary: Who is a DV Counselor for purposes of privilege?*
- 1. Completed 40 hour training
- OR
- 2. Has worked at DV agency < 6 months, and is supervised by someone with at least 1 year experience as DV counselor
- OR
- 3. Has graduate degree in counseling or related field

## B. The DV Counselor-Victim Privilege

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- Because privilege does not apply unless someone is a “DV counselor” under the Evidence Code,
- DV agencies need written policies re training or certification process for advocates,
- and records documenting such training, certification, or supervision.



## B. The DV Counselor-Victim Privilege

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*Question: What is a “DV Victim Service organization”?*

- **Answer: A non governmental organization** that provides shelter, programs, or **services to DV victims** and their children.
- Includes DV shelters and other programs whose primary mission is to provide DV services,
- even if it is part of larger agency providing other services to community.

## B. The DV Counselor-Victim Privilege

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*Question:*

What if DV counselor works for a program that is part of a larger agency whose primary focus is *not* DV services?

How to maintain confidentiality so client information is privileged if sought for legal proceeding?

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Create confidentiality wall between DV program records and records of larger agency
- Store DV program records in separate locked filing cabinets and separate databases
- Staff and volunteers for both agencies sign written agreements to keep DV client info confidential from umbrella agency
- Also need wall between mandated child abuse reporters and other employees of same DV agency

## B. The DV Counselor-Victim Privilege

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*Question:*

What if DV agency stores some of its client records in Dropbox, Google Drive, or other cloud-based platforms?

*Answer:*

IT contractors working with DV agency should sign confidentiality agreement.

When storing client records in cloud, as with other client records, less info is best.

## B. The DV Counselor-Victim Privilege

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- If DV agency maintains proper oversight and control of data stored in the cloud or offsite, survivor does not need to consent to storage.
- *Tip:* Check standard terms of offsite storage company to make sure it provides they will not disclose any stored information (non-disclosure agreement, or NDA).

## B. The DV Counselor-Victim Privilege

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*Question:*

Would someone who is a confidential advocate at a college or university in CA qualify under DV Counselor-Victim Privilege?

*Show of hands:*

YES

NO

## B. The DV Counselor-Victim Privilege

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- *Answer: Yes.* In 2017, advocates at institutions of higher education did not qualify for the privilege
- But starting 1/18, they do.
- SB 331 (Jackson) amended Evidence Code section 1037.1:
- “Victim Service Organization” includes “programs on the campus of a public or private institution of higher education with the primary mission to provide support or advocacy services to victims of DV.”

## B. The DV Counselor-Victim Privilege

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*Question:*

Would a DV victim advocate working for Victim/Witness Assistance who completed 40 hours of DV training be able to assert this privilege?

*Show of hands:*

YES

NO



## B. The DV Counselor-Victim Privilege

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- *Answer: NO.*
- Victim/Witness staff work for governmental organizations, i.e., prosecutors' offices, so *do not* qualify under DV Counselor-Victim Privilege, even if job title is "DV advocate."
- *Tip:* This is often confusing for DV survivors, who may assume that all "DV advocates" hold the privilege. If possible, explain this to clients before they meet with Victim/Witness staff.

## B. The DV Counselor-Victim Privilege

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*Question:*

What kind of information is protected by the privilege?

*Answer:* A “confidential communication” – information exchanged in confidence between victim and counselor in course of their relationship.

Includes written, oral, or other information re: abuse, children of victim and abuser, relationship between victim and abuser.

## B. The DV Counselor-Victim Privilege

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- Broad definition of confidential communication that is subject to privilege:
- *Smith v Superior Court* (118 Cal.App.3d 136 (1981)) (therapist/client privilege): even identity of client = privileged information, including name, address, phone number.
- Disclosing client's identity can reveal fact that client suffers from particular condition.
- Also, protecting identity is part of providing safe and candid forum in which to address problems.

## B. The DV Counselor-Victim Privilege

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- In addition to concerns in *Smith* (not a DV case), DV cases raise serious safety concerns for DV victims.
- It is key to keep the identity of the client confidential in DV cases.

## B. The DV Counselor-Victim Privilege

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*Question:*

Does the privilege apply only to oral communications between counselor and victim?

*Show of hands:*

YES

or

NO

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- No.
- The privilege also applies to written information and information transmitted electronically
- E.g., medical reports, voicemail, emails, texts, and faxes.

## B. The DV Counselor-Victim Privilege

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- “Less is best” in written records re clients
- Ask yourself: is this information actually necessary to record? What is needed to do your work?
- OK to include:
  - ▣ dates of contact with client, referrals, activities
  - ▣ public records like police reports
  - ▣ description of abuser and their vehicle
- Agencies should have written policies re what to include in records, since court may order confidential records to be disclosed in some cases.

## B. The DV Counselor-Victim Privilege

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Do not include:

- Your subjective opinions re client
- Whether client has substance abuse issues
- Diagnoses
- Client's verbatim statements or letters
- Details of safety plan

Information you may think is helpful to client may be used against them



## B. The DV Counselor-Victim Privilege

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*Question:*

How should DV Counselor communicate with other staff their opinion re client, or other information that might be used against client, if counselor does not record this in client file?

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Best to communicate *orally* with other staff if there is information that might be used against client, since privilege is not absolute –
- i.e., court might order records to be disclosed
- We will discuss that later in section on subpoenas

## B. The DV Counselor-Victim Privilege

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*Question:*

What is a “confidential communication,” for purposes of the DV Counselor-Victim Privilege?

□ *Answer:*

- A communication made in a manner which, so far as victim is aware, discloses information to no **unnecessary** third parties.

## B. The DV Counselor-Victim Privilege

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- *Example:* DV counselor and victim are having a conversation in reception area of administrative office, surrounded by people who can easily overhear their conversation.
- *Question:* Is their communication confidential, and thus privileged if third party seeks to use it in court?
- *Show of hands:*

YES

NO

## B. The DV Counselor-Victim Privilege

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- *Answer: No.*
- The victim does not have a reasonable expectation that anything she/he says during conversation is “in confidence,” so it would not be privileged if someone else wanted to use it in court.
- It is critical that consultations between DV counselors and victims take place in private, out of presence and earshot of third parties, so they are *confidential*, and thus also *privileged*.

## B. The DV Counselor-Victim Privilege

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*Question:*

What if one DV counselor consults with another counselor at same agency in private office, discussing client's situation?

Does that waive privilege?

*Answer:*

No, because second counselor is being consulted for purpose that client is trying to achieve and communication is not in public setting

Second DV counselor is a "necessary" third party

## B. The DV Counselor-Victim Privilege

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Ensuring privacy is not always easy.

- DV counselor may be in public place with victim: hospital, courthouse, at scene of DV incident.
- *Question:*
- What should DV counselor do to maintain confidentiality in this situation?
- *Answer:*
- Counselor should consult with victim in separate area or room, away from third parties.

## B. The DV Counselor-Victim Privilege

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- *Question:*
- What if they are talking on the phone? How can the DV counselor ensure that the communication is confidential, so the privilege applies?
- *Answer:*
- Ask victim if they are alone; if not, ask them to move to private place or ask third parties to leave area.



## B. The DV Counselor-Victim Privilege

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- “Necessary” *third parties*: Sometimes communications disclosed to third parties are still privileged:
- 1. If third party’s presence furthers interest of victim in the consultation, or
- 2. Disclosure to third party is reasonably necessary to transmit information between victim and counselor, or
- 3. Disclosure to third party is reasonably necessary to accomplish purpose for which counselor is consulted.

## B. The DV Counselor-Victim Privilege

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*Examples of necessary third parties:*

- Victim needs ASL or oral non-English language interpreter
- Caretakers and support people for disabled DV victim or if victim needs emotional support in order to speak to DV counselor
- Staff or volunteers who are not “DV counselors” but who are working under supervision of counselor and are assisting client
- *Tip:* document in client file why third party was present

## B. The DV Counselor-Victim Privilege

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*Example:*

- What if client makes statement to student intern who works under supervision of licensed psychologist on staff but intern has not completed 40 hour training?
- Is statement covered by DV counselor-victim privilege if someone is seeking it for court?
  - *Show of hands:*
    - Yes or
    - No?

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Yes. This is protected.
- Students working under the supervision of professional subject to a legal privilege are covered by that privilege.

## B. The DV Counselor-Victim Privilege

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- *Question:*
- What professionals subject to various privileges might work in DV agencies?

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Lawyers
- Licensed clinical social workers
- Psychotherapists
- Anyone else?
- Anyone working under their supervision is covered by their privilege.

## B. The DV Counselor-Victim Privilege

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- DV counselor can use expertise of others on staff or volunteers without destroying privileged nature of communication that victim is sharing
- However, victim's communication with third party must be made in confidence and DV counselor must supervise third party's interactions with victim.
- Counselor and third party should check in often regarding what is happening with victim.

## B. The DV Counselor-Victim Privilege

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- *Question:*
- What if DV counselor asks MD or therapist to evaluate client?
- Is the report to DV counselor confidential?



## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Yes.
- Courts have held such reports covered by attorney-client privilege where attorney requested them, so should be covered by DV Counselor-Victim Privilege.
- *Tip:* Before asking third party to become involved with client, review their confidentiality agreement to make sure it keeps client information confidential.

## B. The DV Counselor-Victim Privilege

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- DV counselors can also ask for similar reports, which are confidential:
- Reasonably necessary to transmit information about victim's condition to counselor;
- Also furthers interests of victim;
- And helps accomplish a purpose of victim's consultation with DV counselor.
- Reports may also be protected by physician-patient privilege or therapist-patient privilege.

## B. The DV Counselor-Victim Privilege

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- *Question:*
- What if victim discloses information in a support group at the agency?
- Is that information confidential, thus privileged?
  - *Show of hands:*
    - YES or
    - NO

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Yes.
- Participating in support groups is reasonably necessary to accomplish a purpose for which victim consulted DV counselor – to obtain supportive services that help victim recover from abuse

## B. The DV Counselor-Victim Privilege

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- *Question:*
- What should DV counselor do if not sure if third party is covered by these exceptions?

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Advise client that any information shared with third party will (or may) not be protected by privilege.

## B. The DV Counselor-Victim Privilege

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- Even if third party clearly falls within one of the exceptions, still best to have them sign agreement: information being disclosed is confidential and privileged, they must not disclose information to other third parties.

## B. The DV Counselor-Victim Privilege

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- *Waiving the Privilege:*
- Confidential information protected by privilege may be disclosed
- 1) if privilege is *waived*
- or
- 2) information falls within an exception to privilege.



## B. The DV Counselor-Victim Privilege

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- *Question:*
- Who can waive the privilege?
- Show of hands:
- DV counselor?
- Victim?
- Victim's guardian or conservator?

## B. The DV Counselor-Victim Privilege

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- *Answer:*
- Holder of privilege (victim or their guardian or conservator) is ONLY person who can waive privilege
- Exception: mandated reporter can waive privilege (discussed later in this training)
- Agencies need written policies re:
  - Confidentiality of communications with clients,
  - Client's informed consent for waiver/release,
  - How clients are informed about these policies

## B. The DV Counselor-Victim Privilege

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- *Question:*
- *How can holder waive privilege?*
- *Answer:* 1. Consenting to disclosure of privileged information, or
- 2. Voluntarily disclosing information to third party, or
- 3. Failing to claim privilege when protected information was requested on previous occasion.
- We will discuss each of these in turn.

## B. The DV Counselor-Victim Privilege

92

- 1. *Consent*
- *Question:* What does consent to disclosure consist of?
- *Answer:* Any statement or conduct that indicates consent is sufficient to waive privilege.
- *Best practice:* take steps to ensure DV counselor obtains clear, specific consent from client before disclosing privileged information.

## B. The DV Counselor-Victim Privilege

93

- 1. *Consent should be informed:*
- Counselor should advise client of scope, limits of privilege, & potential consequences if waived
- *Consequences:* once that information is waived for one purpose, it's *waived for all purposes*, which means the counselor could no longer claim the privilege in another context, unless there is limiting language in a written consent form specifying for what purposes the client is agreeing the information can be used

## B. The Counselor-DV Victim Privilege, continued

94

- *Question:* What is an example of waived “for all purposes”?
- *Example:* If your client agrees to waive the privilege to allow you (DV counselor) to talk to Child Protective Services, later on the abuser could require you to testify about that information in a restraining order, divorce, or custody case.
- (But you should still try to assert the privilege.)

## B. The DV Counselor-Victim Privilege

95

- 2. *Consent should be in writing:*
- Helps clients understand significance of waiving privilege
- Creates record in event DV counselor is faced with later request for information
- See handout

## B. The DV Counselor-Victim Privilege

96

- *Question:*
- What if you are on the phone with client, it's an emergency, and a third party is asking for confidential client information, but you can't get written consent from client?



## B. The DV Counselor-Victim Privilege

97

- *Answer:*
- Try to set up 3 way call with client and other agency, so client communicates their consent to release specific information over phone
- Or you can read consent form to client on phone, note they ok'd it on X date, then get their signature later on ASAP.

## B. The DV Counselor-Victim Privilege

98

- 3. *Consent should be narrowly tailored:*
- Goal is to accomplish specific purpose for which information is being disclosed.
- DV counselor can adapt standard consent form to address client's individual needs.
- Best to limit type and amount of information that is disclosed.

## B. The DV Counselor-Victim Privilege

99

- *Consent should be narrowly tailored, continued:*
- Common ways to limit client's consent to disclosure:
- Specify entity or person to whom information is being disclosed; and
- State purpose for which it's being disclosed; and
- Specify type and scope of information being disclosed.

## B. The DV Counselor-Victim Privilege

100

- *Consent should be narrowly tailored, continued:*
- Always place time limit on client's consent, the shorter the better; can extend time later if needed.
- If client signs waiver but no information is disclosed in that time period, privilege is not waived.
- Any later request for the same information would require a new consent form.

## B. The DV Counselor-Victim Privilege

101

- Consent to waive privilege should not be obtained by coercion or duress. To be valid, must be voluntary.
- This may arise if client signs waiver at scene of DV incident
- Client may be in crisis, not understand waiver
- Client may think signing is condition of getting help from police or others
- Best practice is to wait until calmer time.

## B. The DV Counselor-Victim Privilege

102

- *Avoid blanket consent forms* as condition of receiving services that allow counselor to disclose privileged information to police, child welfare agencies, funders, etc.
- Clients feel pressure to do this in order to get services
- This is not informed consent re which information might be released to which third party.
- *Best practice*: ask client to sign form when dealing with specific request for client's confidential information.

## B. The DV Counselor-Victim Privilege

103

- *Question:*
- Can minors consent to disclosure of their client records without consent of parent or guardian?
  - *Show of hands:*
    - Yes or
    - No or
    - It depends?

## B. The DV Counselor-Victim Privilege

104

- *Answer:*
- It depends.
- If minors are legally allowed to receive services from you without consent of parent or guardian, they may also consent to disclosure of their information without consent of parent or guardian.
- If parental/guardian consent is needed before DV agency can serve minor, they and minor must both sign release of confidential information form.
- *Tip:* When working with teens, try to use non-mandated reporters.



## B. The DV Counselor-Victim Privilege

105

- *Question:*
- What if DV agency receives form client signed at another agency requesting DV agency records?
- *Answer:*
- Best practice: meet with client, advise re consequences of waiver, determine whether client is voluntarily requesting disclosure of these records
- If client agrees, have client sign specific waiver form allowing DV agency to release records
- DV agencies need written policies re this situation

## B. The DV Counselor-Victim Privilege

106

- If DV agency often receives blanket release forms from other agencies (e.g., CPS, HUD),
- Consider meeting with other agency to discuss why such forms are problematic in terms of DV Counselor-Victim Privilege
- Discuss what procedures would be better
- E.g., Time-limited waivers asking for specific information
- Tell them that DV agency needs to meet with client - victim holds privilege, consent needs to be voluntary and informed

## B. The DV Counselor-Victim Privilege

107

- *Basic elements of client's consent:*
- In writing, dated and signed by client
- Name of person/entity authorized to disclose information
- Name of person/entity to whom information is to be disclosed
- What information will be disclosed and purpose
- Client has been advised of and understands info is protected by DV counselor-victim privilege and/or other laws
- Date or event upon which consent expires

## B. The DV Counselor-Victim Privilege

108

- *Note re Mandated Reporters:*
- If DV counselor who is *not* a mandated reporter of child abuse is transferring confidential information to another DV agency, first ask if recipient *is* a mandated reporter.
- If they are, and there are no employees at the receiving agency who are *not* mandated reporters, discuss options with victim client before transferring the information.

## B. The DV Counselor-Victim Privilege

109

- *Question:*
- Can the holder of the privilege revoke consent to disclosure of privileged information?
  - *Show of hands:*
    - Yes
    - or
    - No?

## B. The DV Counselor-Victim Privilege

110

- *Answer:*
- Yes, the victim/survivor can revoke consent to disclosure at any time
- Orally or in writing

## B. The DV Counselor-Victim Privilege

111

- *Voluntary disclosure:*
- Holder can waive privilege by disclosing significant part of the communication to third party not covered by an exception described above
- Privilege is waived only with regard to that one subject, not all communications with DV counselor

## B. The DV Counselor-Victim Privilege

112

- *Voluntary disclosures*, continued:
- Holder must disclose “significant part” of the communication
- So if client discloses only that they sought treatment from DV counselor, not waiver of privilege as to all communications with counselor
- DV counselor can provide client with letter confirming they sought services without waiving privilege
- Don't include opinion that client is victim of DV



## B. The DV Counselor-Victim Privilege

113

- *Voluntary disclosure*, continued:
- Disclosure must be *intentional* to constitute waiver
- E.g., if DV counselor *accidentally* includes document from client file in package to third party, no waiver because client did not intend disclosure

## B. The DV Counselor-Victim Privilege

114

- *Voluntary disclosure*, continued:
- *Question:*
- What if client tells friend about conversation with DV counselor, and asks friend to keep this information confidential? Is privilege waived?
  - *Show of hands:*
    - Yes or
    - No?

## B. The DV Counselor-Victim Privilege

115

- *Voluntary disclosure*, continued:
- *Answer:*
- Yes.
- Privilege is waived even if client asks friend to keep this confidential, because client *intentionally disclosed information* about conversation with DV counselor

## B. The DV Counselor-Victim Privilege

116

- *Voluntary disclosure*, continued:
- Privileged disclosures do not waive confidentiality
- E.g., client asks DV Counselor to send records to their attorney
- Client's communications with attorney are covered by attorney-client privilege
- Counselor can ask client to sign release form stating that this is intended to be confidential communication to attorney, so not waiving DV counselor-victim privilege.

## B. The DV Counselor-Victim Privilege

117

- *Failure to claim privilege:*
- If holder has ability and opportunity to claim privilege but fails to do so, it is waived.
- Failure to claim privilege can be manifested through words or conduct.

## B. The DV Counselor-Victim Privilege

118

- *Limits to privilege* –
- Counselor must advise victim orally or in writing prior to beginning:
  - 1. Child abuse reporting (we'll discuss this later)
  - 2. Client is danger to self or others
  - 3. “Qualified” privilege

## B. The DV Counselor-Victim Privilege

119

- *Danger to self or others:*
- Has anyone here worked with a survivor who you felt was a danger to themselves? What did you do?
- What about a survivor who you felt was a danger to others? How did you handle this?
- The Evidence Code does not address this for non-therapists, there are no cases on point, there is no federal duty to warn others.
- Confidentiality still applies.
- Do you have an agency policy on these?

## B. The DV Counselor-Victim Privilege

120

- *Question:*
- What if shelter resident becomes unconscious?
- *Answer:*
- Confidentiality still applies
- In an emergency when you can't get consent to release client's confidential information, give responders as little information as possible (e.g., 42 year old woman turned gray, then passed out)
- Best to have written agreements with residents prior to emergencies allowing disclosure of information



## B. The DV Counselor-Victim Privilege

121

- *Question:*
- What does “qualified privilege” mean?
- *Answer:*
- The court may order the agency to disclose the victim’s information.
- This may occur if the court decides the information is relevant to the proceeding
- *and* its value outweighs any negative impact that will result from disclosure.
- This will be covered in subpoena part of this training.

## B. The DV Counselor-Victim Privilege

122

- *Question:*
- What if counselor works for *DV Response Team* with police and/or prosecutors?
- *Show of hands:*  
Who here is part of DVRT or DART?
- DVRTs (or DV Abuse Response Teams, DARTs) are formal partnerships between law enforcement, prosecutors, victim service providers, and other community professionals to provide support to victims at scene of DV incident, and later on.

## B. The DV Counselor-Victim Privilege

123

- DVRT's can lead to confusion among team members and DV victims re whether counselor's communications with victim are privileged
- Other team members (police, DA's) *not* subject to statutory privileges
- Police and DA's have different objectives than DV counselors do – they are gathering evidence, while counselor is providing support to victim

## B. The DV Counselor-Victim Privilege

124

- Even as part of DVRT, DV counselor's communications with victim are privileged
- Ensure that conversation with victim is private, out of earshot of other DVRT members
- Tell victim of scope & limits of privilege
- Tell victim that victim's communications with other DVRT members may not be privileged

## B. The DV Counselor-Victim Privilege

125

- *Question:*
- What if the victim/survivor wants another person present during the interview with the DV counselor at the scene of the incident?
- Does this destroy the privilege?
  - *Show of hands:*
    - Yes or
    - No

## B. The DV Counselor-Victim Privilege

126

- *Answer:*
- No,
- since the support person is present to assist the victim in talking to the DV counselor, his or her presence should not destroy confidentiality.
- However, exclude the suspected abuser even if victim says s/he wants them present for support!

## B. The DV Counselor-Victim Privilege

127

- Prior to an interview with law enforcement, prosecution, or defense attorney, the DV advocate shall advise the victim of any applicable limitations on the confidentiality of communications between the victim and the DV advocate.
- DV advocate here includes Victim Witness staff.
- Anything said to Victim/Witness staff may have to be disclosed to prosecutor.

## B. The DV Counselor-Victim Privilege

128

- *Role Play:*
- Break into pairs
- One of you is DV counselor, other is DV victim at scene of DV incident
- Other members of DVRT are present (2 officers)
- What do you say to victim? To officers? Practice.
- Report back – How was that? Was it hard? What's the best way to handle this situation?



## B. The DV Counselor-Victim Privilege

129

- DV Counselor may be present when victim talks to other members of DVRT
- Counselor is there to provide emotional support
- DV Counselor/Victim privilege does NOT apply to such communications
- Do NOT sign any MOU that requires counselor to share victim's confidential information with other members of DVRT – only victim can waive privilege

## B. The DV Counselor-Victim Privilege

130

- *DV agencies serving on task forces (e.g., county family violence councils):*
- Still need specific release from each survivor (unless dead) to discuss anything about their case
- Written blanket agreement with other task force members to share information about mutual clients is unenforceable, does not comply with Evidence Code requirements for DV Counselor-Victim privilege

## B. The DV Counselor-Victim Privilege

131

- *Support Letters:*
- *Question:* Can a DV Counselor submit a declaration or letter in support of client's family law case or application for restraining order?
  - *Show of hands:*
    - Yes?
    - No?
  - It depends?

## B. The DV Counselor-Victim Privilege

132

- *Answer:*
- Generally best to just submit letter confirming that client sought services (see above)
- Be cautious about becoming a witness unless client asks for this, as it waives privilege
- Advise client of ramifications of waiver
- Get client's written consent before writing declaration or letter
- If client consents, counselor may be subpoenaed – we will discuss this later in section on subpoenas.

## B. The DV Counselor-Victim Privilege

133

- *Teen victims of DV:*
- If minor is sufficiently old and mature (generally 12+), can exercise their own privilege rights
- However, if teen has legal guardian or conservator, that person holds privilege on behalf of teen
- Verify parent's status as legal guardian before assuming they hold privilege; their rights may have been terminated

## B. The DV Counselor-Victim Privilege

134

Counselor may have to report under child abuse laws  
– we will discuss this later

- Critical to advise clients 12+ of possible mandate to report child abuse at beginning of conversation
- Part of mandate to tell all clients of any limits on confidentiality, as discussed above
- Also important as part of building trust with client, so client can decide what to tell counselor

## C. Other Relevant CA Laws re Privilege

135

- 1. *Sexual Assault (SA) Counselor-Victim Privilege:*
- Show of hands: Who works at an agency that also handles SA cases?
- Even if your agency is not specifically funded to handle SA cases, this shows up in DV cases a lot
- Scope and model of SA Counselor-Victim privilege are generally the same as DV Counselor-Victim privilege

## C. Other Relevant CA Laws re Privilege

136

- SA Counselor-Victim Privilege, continued:
- *Differences between the 2 privileges:*
- 1. DV counselor privilege dies with victim, unless they had a guardian or conservator, as mentioned previously, but SA counselor privilege continues
- After death, personal representative of SA victim (executor or administrator of estate) holds privilege



## C. Other Relevant CA Laws re Privilege

137

- SA Counselor-Victim Privilege, continued:
- 2. No express exception in the SA statute re mandatory child abuse reporting, unlike DV privilege
- Some SA programs interpret this to mean counselors don't have to report child abuse, other programs require child abuse to be reported
- *No court decision clarifying this issue*
- Until courts rule on this, policy is up to agency
- We will discuss this in the mandatory reporting section

## C. Other Relevant CA Laws re Privilege

138

- *2. Human Trafficking Caseworker-Victim Privilege:*
- Show of hands: Who here deals with survivors of human trafficking (HT)?
- Traffickers sometimes also commit DV or SA
- DV Counselor–Victim Privilege and HT Caseworker-Victim Privilege are similar
- As with DV privilege, after death of HT victim, no one holds privilege

# Review The Same Quiz

139

- Please take the quiz again and compare your answers to the first time you took it.



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# Questions?

# Thank You!

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