

# What Can We Talk About?

## Common Rules and Regulations



It is important for all members of a sexual assault response team (SART) to understand one another's different professional and ethical obligations *before* the team discusses active or closed cases. Team communication must be informed by an understanding of who can share information and when, and what tools should be used to document an understanding of these limitations.

What follows is not intended to be an exclusive list of the rules that apply, but rather a guide for what teams should consider prior to establishing a case conversation process.

### **Memorandums of Understanding**

It is recommended to have a current team Memorandum of Understanding (MOU) (sometimes called an interagency agreement) as a foundation prior to discussing active or closed cases. The MOU makes clear that all involved agencies are committed to improving their response to sexual assault. The MOU uses the power of the entire team to prompt necessary change. It is best practice to add to or create a new MOU among team members to describe the 1) the agreed-upon purpose of discussing cases 2) role of each team member during case discussion 3) limitations of each team member during case discussion (those limitations are outlined in this document) 4) how victim privacy will be protected during case discussion and 5) an articulated process for amending the process in the event of a concern or a grievance.

### **Laws/Statutes**

Reference and discuss relevant state laws and statutes including mandatory reporting, data practices acts, and privilege requirements. Some states have specific provisions for what information can be shared with regard to crime victims. For example, some states have specific requirements for law enforcement to share information with local advocates on cases involving domestic violence. Often distinctions are made between what *shall* versus what *may* be shared under certain conditions. A team will benefit from discussions of these laws and the policies each agency has developed with regard to them.

## **Confidentiality/Privilege**

Certain professionals enjoy the protection of having their conversations with clients protected from disclosure. For example, in some states, advocates have this privilege. There are limits on privilege, however. While attorneys enjoy an attorney/client privilege, prosecutors do not represent victims (they represent the community prosecuting the defendant) and therefore have a duty to disclose exculpatory evidence to the defense under *Brady v. Maryland*. This also includes acknowledgment of who is a mandated reporter. Team members should be aware of the confidentiality/privilege obligations held by member of the team, and devise a case conversation process that handles this accordingly.

## **HIPAA**

Most medical providers, including Sexual Assault Nurse Examiners (SANEs), are bound by the Health Insurance Portability and Accountability Act (HIPAA). HIPAA provides national standards for protecting the privacy of health information. If Medical professionals are on your team, it isn't appropriate for that medical professional to share medical information about the patient/victim with the other team members. In addition, it is imperative to protect the neutrality of individual SANEs and SANE programs in order for their evidence collection expertise to be accepted in court with a minimal level of bias toward the victim or prosecution process.

## **Funding Restrictions**

Often funding sources include restrictions about how information about clients can be used (and often how it is to be collected and stored). Several common sources of funding for victim services include the Victims of Crime Act (VOCA), the Family Violence and Prevention Services Act (FVPSA), Children's Justice Act (CJA) State and Tribal Grant Programs, and the Violence Against Women Act (VAWA). For example, under the Violence Against Women and Department of Justice Reauthorization Act of 2005, Office of Violence Against Women (OVW) grantees and sub grantees may not release identifying information about victims served with OVW funds without a written release or disclosure mandated by statute or court order.

In addition, all public and private institutions of post-secondary education participating in federal student aid programs are subject to Title IX (which provides that sexual harassment and sexual assault are forms of sex discrimination) and the Cleary Act which requires reporting of aggregate information about crimes committed on campus. If your team exists in a campus context or you have team members from post-secondary educational institutions, familiarize your team with

the mixture of regulations related to student privacy and reporting requirements in advance of starting case conversations.

### **Written releases of information**

A written release of information should be limited to a specific person or agency, for a specific and limited purpose, and for a limited duration of time (i.e. the release is valid for a specified number of days after date signed and a new release is required when the time limit has been exceeded). The release should also specify *how* information will be shared (phone/mail/email). Government agencies may also have data privacy rules that dictate certain elements that must be present in a release or may dictate how often releases must be obtained.

More information on important considerations, how to speak to victims about releases, and the limits of releases is available from the Victim Rights Law Center ( [www.victimrights.org](http://www.victimrights.org)) or the Safety Net Project at the the National Network to End Domestic Violence (<http://www.nnedv.org/projects/safetynet.html>). The Sexual Violence Justice Institute collects sample materials from these agencies and teams and can forward these for review ([svji@mncasa.org](mailto:svji@mncasa.org)).

If your team is considering doing a review of a closed or open case, it is best to obtain permission from both the victim and offender, if possible.

### **Brady Issues**

Under *Brady v. Maryland*, 373 U.S. 83 (1963) a prosecutor is required to disclose certain exculpatory evidence to the defense. The United States Supreme Court held that withholding evidence, “where the evidence is material either to guilt or to punishment” violates due process. The Brady rule applies to evidence that is favorable or material to the defendant. Exculpatory evidence opposes the guilt of the defendant, undermines the credibility of a prosecution witness or supports the testimony of a defense witness. Material evidence is relevant, meaning it is evidence that has “any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action” and there is a reasonable probability that disclosing the evidence could affect the outcome of the proceeding.

The prosecutor must have actual or constructive possession of the evidence in order to be bound under *Brady*. Constructive possession includes evidence in the files of an agency over

which the prosecutor has authority (a police agency investigating the case, potentially the agency for which the Victim-Witness advocate works). If the

Victim-Witness advocate works within the prosecutor's office or the sheriff's office, for example, then the agency test is met and the prosecutor is deemed to have possession over information.

The prosecutor does not have automatic authority over community based advocacy agencies but if the prosecutor and the agency have a tacit agreement to work together in the investigation or preparing the witness for trial, the advocate is part of the prosecution team and may be reached by *Brady*. Physical presence of the advocate at a meeting with the prosecution or law enforcement (without participation) would not automatically make the advocate a member of the prosecution team.

Furthermore, it is not entirely clear if community-based victim service agencies that provide victim services via contract with a law enforcement or prosecution agency would be subject to *Brady*. These agencies are encouraged to review these contracts for explicit language that expressly address the independent nature of their agency with regard to its administration, documentation, and record keeping and seek advice on what protection that language may give.

Awareness of interagency relationships in your jurisdiction is key to understanding whether *Brady* applies. Still, everyone is a potential witness in a sexual assault case and this possibility must always be acknowledged.

## **Subpoenas**

Some professionals may be confused about what information must be shared when a subpoena has been issued. Advocates in many jurisdictions can assert client privilege if served with a subpoena. Victims may consent to release this information. If the victim does not consent to the advocate's testimony the court must conduct a balancing test weighing the public interest and need for disclosure against the effect on the victim and her relationship with the advocate. If the court rules that testimony is required it may also rule on the boundaries of the testimony.

Advocacy programs should set forth procedures for responding to subpoenas (as well as search warrants and service of process).

## Resources

- Battered Women's Justice Project, *Confidentiality: An Advocate's Guide*, (2007).
- The Center for Law & Public Policy on Sexual Violence, *Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions*, (2005).
- Committee of Professional Ethics, Connecticut Lawyer, *Informal Opinion 03-07: Revealing Confidential Information to Parents of a Juvenile Client* (Oct. 2004).
- Jessica Mindlin, Esq., National Director of Training and Technical Assistance, Victim Rights Law Center Nancy O'Malley, Chief Assistant District Attorney, Alameda County, CA, *Confidentiality & The Sexual Assault Survivor* (Jan. 2002).
- Diane Stuart, Office of Violence Against Women, *Memorandum Re: New Requirements under the Violence Against Women and Department of Justice Reauthorization Act of 2005 (P.L. 109-162)*.
- Washington State Coalition Against Domestic Violence, *Model Protocol: On Confidentiality When Working with Battered Women*, (2007).
- National Network to End Domestic Violence, Safety Net Project ([www.nnedv.org/projects/safetynet.html](http://www.nnedv.org/projects/safetynet.html))

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