

Confidentiality Between Victim Advocates /Survivors and the Tribal Criminal Justice System: Statutory/Funder Requirements and Best Practices

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What is Confidentiality?

- Ethical duty
- Can arise with client divulges information to certain professionals
- Information that is meant to be held in confidence or kept secret
- Statements that are meant only for the ears of the person addressed
- Can only be disclosed with client consent, subpoena or court order



Confidentiality so important to survivors!!

- Survivors seek safety, but they also want healing
- Holding the abuser accountable through the justice system is just one part of the healing process
- Healing also comes through counseling and validation, which victim advocates provide
- Counseling and validation are processes that require confidentiality
- Survivors will not participate in the justice system if they cannot have a “safe” space to explore what has happened and learn about their options
- Survivors cannot engage in counseling and assessing options if they believe their conversations will be disclosed
- *Even in governmental victim services programs, the government can guarantee confidentiality for certain conversations between survivors and victim advocates*



The “safety” lens v. the “legal” lens

Victim Services: Safety First

Address safety concerns before participating in investigation

Find another way to get evidence if survivor safety is threatened

Goal is survivor safety and healing

Justice System: Accountability

Investigate thoroughly for a strong case

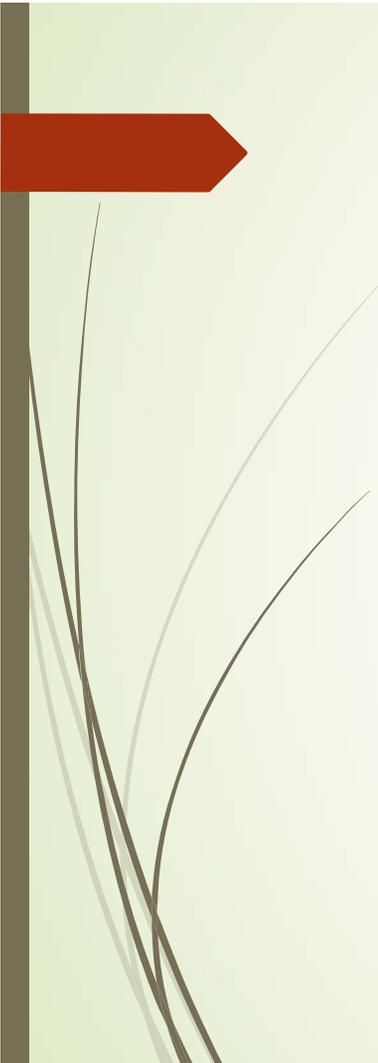
Ensure that the best evidence—including survivor testimony is available

Goal is to hold the offender accountable



Conversations Between Victim Advocates and Survivors Must Be *Confidential*: What Does That Mean In Practice and Law?

- ▶ Do not share personally identifying information with anyone outside of the victim services program, except:
 - ▶ In cases of emergency
 - ▶ Where certain information is mandated by law (mandatory reporting)
 - ▶ Unless the program obtains consent from the survivor. The consent must be:
 - ▶ Voluntary
 - ▶ Informed
 - ▶ Time- and activity-limited
 - ▶ Signed by the survivor



Best Practices: Who has the authority to decide what information is shared?

- ▶ Where a statute recognizes confidential or privileged communications between a survivor and a victim advocate, it is up to the survivor to decide what information can be disclosed
- ▶ Exception: Mandatory reporting or imminent danger
- ▶ The survivor's case notes at the victim services program belong to and are controlled by the survivor and the program may respond to a subpoena by saying this
- ▶ The victim services program cannot release information without the written, time-limited, signed consent of the survivor
- ▶ The role of victim services is to give the survivor information needed to make that decision, including identifying the consequences of certain choices



Each tribe has the sovereign authority to develop a victim-centered and supportive trauma-informed criminal justice system

- ▶ Survivors turn to the tribal justice system to obtain protection and relief from abusers' violence and coercive abuse
- ▶ Tribal prosecutors want tools to appropriately investigate and prosecute the case
- ▶ Tribal courts need good evidence to make findings, apply the law and come to a decision that delivers justice
- ▶ Victim advocates need tools to help survivors achieve safety and justice



Victim-Centered Tribal Criminal Justice System

- ▶ Victim autonomy
 - ▶ Victim safety
- 



Trauma-informed Tribal Criminal Justice System

- Realized the widespread impact of trauma and understands the path for recovery
- Recognizes the signs and symptoms of trauma in clients, families, staff and others involved in the system
- Responds fully to integrated knowledge about trauma into policies, procedures and practices, and
- Seeks actively to resist re-traumatization



Stages of Change: Four Steps to Healing

- Moving from hurtful or unhealthy situations to safer and healthy ones

Pre-contemplation (with victim advocate)



Contemplation (with victim advocate)



Preparation (with victim advocate)



Action (with victim advocate and justice system)



NOTE: Breaching the confidentiality of the first three stages may impair the process of change



A CRUCIAL DISTINCTION: Confidentiality and the Types of Victim Service Providers/Advocates

- Prosecutorial victim advocate service provider state/tribal (may be subject to discovery)
- Stand-alone tribal victim advocate service provider (may be subject to discovery unless statute protects records)
- BIA Victim Specialist service provider (may be subject to discovery)
- Federal Victim Specialist service provider (may be subject to discovery)



Definitions from VAWA

Victim Advocate

“[A] person, whether paid or serving as a volunteer, who provides services to victims of domestic violence, sexual assault, stalking, or dating violence under the auspices or supervision of a victim services program.”

Victim Assistant

“[A] person, whether paid or serving as a volunteer, who provides services to victims of domestic violence, sexual assault, stalking, or dating violence under the auspices or supervision of a court or a law enforcement or prosecution agency.”



Confidentiality: Victim Advocates at Victim Services Programs

- ▶ Confidentiality: Survivors of domestic violence can seek assistance and healing knowing that their conversations, questions and discussions will be kept private.
 - ▶ Similar to social worker-client relationship



Confidentiality: Survivors' Conversations with Victim Advocates

- ▶ The survivor controls whether or not information about the case is shared, *unless*
 - ✓ The victim advocate is a mandatory reporter
 - ✓ A court orders the victim advocate to reveal information
 - ✓ Someone is in severe danger and intervention is required to prevent grievous harm or death
- ▶ Victim advocates will not share information about survivors and their conversations and work done with survivors *unless survivor agrees to:*
 - ✓ Written consent, signed by survivor
 - ✓ Time-limited
 - ✓ Outlining the information that can be shared
 - ✓ Identifying to whom the information can be disclosed



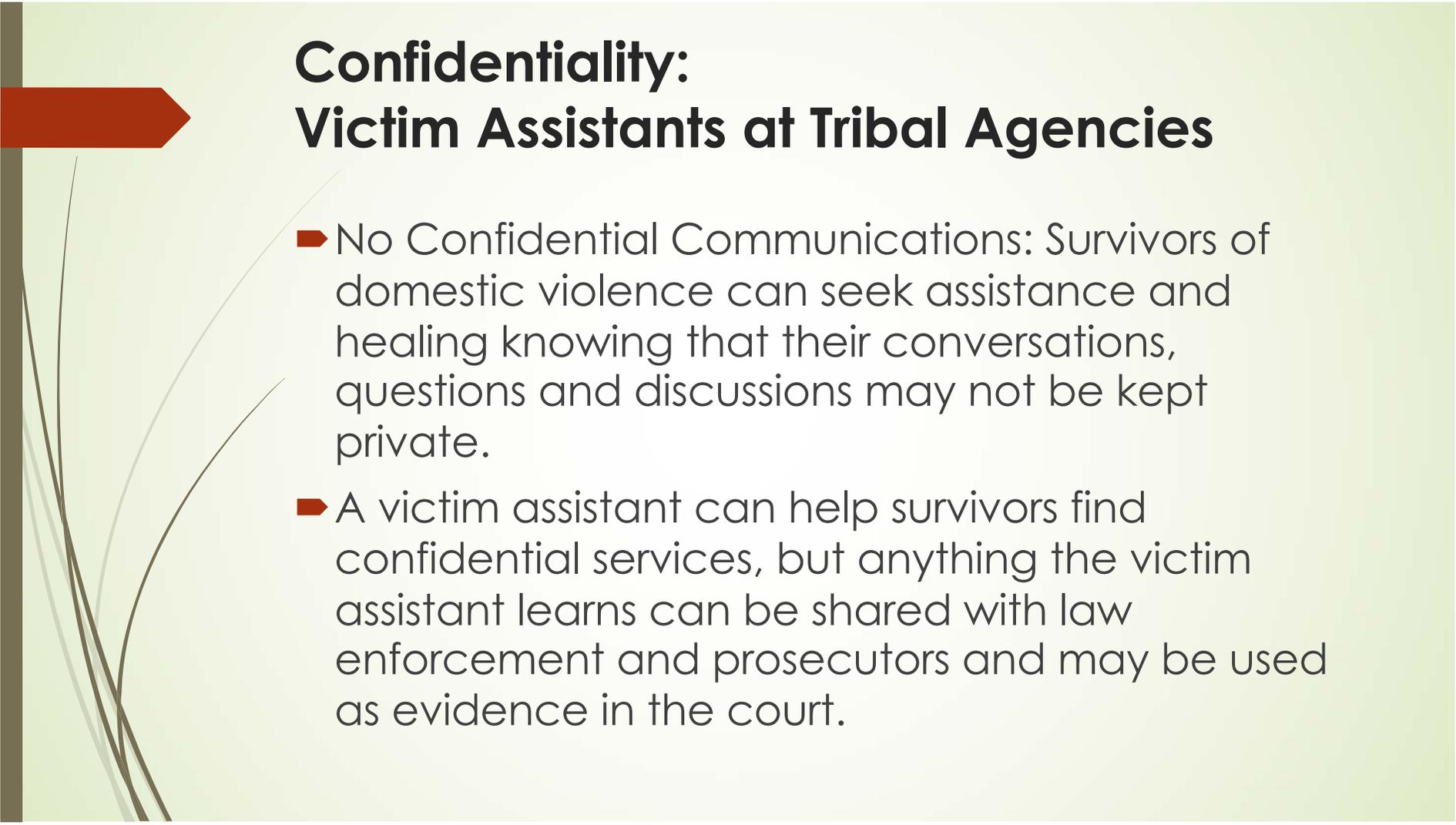
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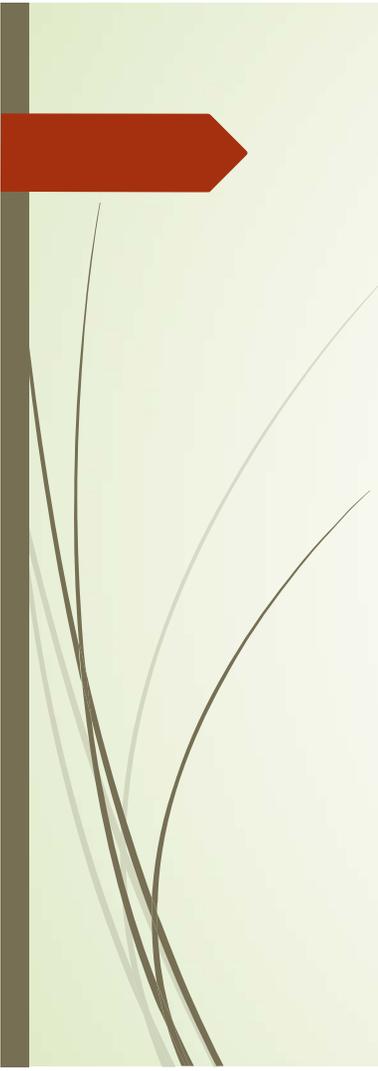
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Confidentiality: Victim Assistants at Tribal Agencies

- No Confidential Communications: Survivors of domestic violence can seek assistance and healing knowing that their conversations, questions and discussions may not be kept private.
- A victim assistant can help survivors find confidential services, but anything the victim assistant learns can be shared with law enforcement and prosecutors and may be used as evidence in the court.



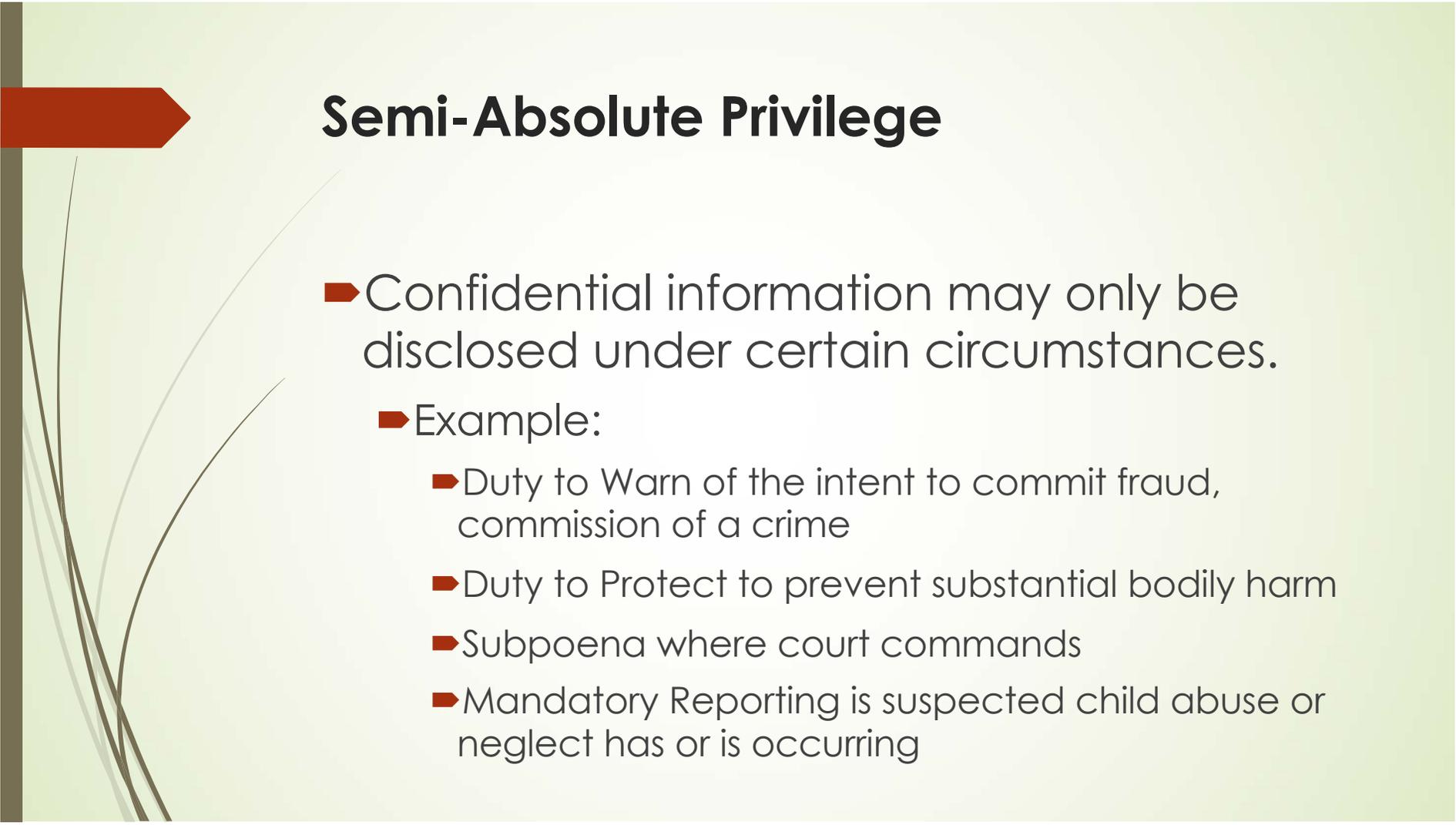
➤ **Remember**—once confidential information is released to a tribal government agency, that information may become part of the public record and visible to other tribal government personnel—and perhaps even members of the public. It can never be private again.

➤ *Example: A victim advocate may share information about the survivors' confidential location with a victim assistant. What was confidential for the victim advocate may become part of a law enforcement investigation concerning parental kidnapping once shared with a victim assistant.*



Privilege: A Legal/Evidentiary Concept

- ▶ Privileged communications: statements and conversations made under circumstances of assured confidentiality which must not be disclosed
- ▶ Usually protected by statute or case law in the applicable jurisdiction
- ▶ Based upon public policy: one should be able to speak freely to certain persons without fear of repercussions
- ▶ May be waived by the holder of the privilege (the person who communicated the confidential information not the person who heard it)



Semi-Absolute Privilege

- Confidential information may only be disclosed under certain circumstances.
 - Example:
 - Duty to Warn of the intent to commit fraud, commission of a crime
 - Duty to Protect to prevent substantial bodily harm
 - Subpoena where court commands
 - Mandatory Reporting is suspected child abuse or neglect has or is occurring



Qualified Privilege

- ▶ Court will determine whether the information should be disclosed after completing a balancing test and court feels disclosure is appropriate.



PRIVILEGE PROTECTION MAY BE WAIVED

- ▶ Third party in the interview room
- ▶ Providing information to third parties not protected by statutory privilege
- ▶ Information is available in other public forums



A STATUTORY EXAMPLE



“The following persons or entities may not be compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding:

- (1) A victim.
- (2) A victim advocate or victim service provider unless the victim specifically consents to the disclosure in a written authorization that contains the date the consent expires.
- (b) A victim advocate, victim service provider, or victim may not be compelled to provide testimony in any judicial, legislative, or administrative proceeding that would identify the name, address, location, or telephone number of any facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.
- (c) A victim service provider or victim advocate may not require a victim to consent to the disclosure of information concerning confidential communications and confidential information as a condition of the victim receiving services.
- (d) This section does not prohibit a victim from providing testimony concerning an offense.”
- IND. CODE ANN. §35-37-6-9 (West 2008)



A STATUTORY EXAMPLE



“Consultation between crime victim advocate and victim; privileged information; exception

- A. A crime victim advocate shall not disclose as a witness or otherwise any communication made by or with the victim, including any communication made to or in the presence of others, unless the victim consents in writing to the disclosure.
- B. Unless the victim consents in writing to the disclosure, a crime victim advocate shall not disclose records, notes, documents, correspondence, reports or memoranda that contain opinions, theories or other information made while advising, counseling or assisting the victim or that are based on communications made by or with the victim, including communications made to or in the presence of others.
- C. The communication is not privileged if the crime victim advocate knows that the victim will give or has given perjured testimony or if the communication contains exculpatory material.
- D. An accused may make a motion for disclosure of privileged information. If the court finds there is reasonable cause to believe the material is exculpatory, the court shall hold a hearing in camera. Material that the court finds is exculpatory shall be disclosed to the accused.
- E. If, with the written or verbal consent of the victim, the crime victim advocate discloses to the prosecutor or a law enforcement agency any communication between the victim and the crime victim advocate or any records, notes, documents, correspondence, reports or memoranda, the prosecutor or law enforcement agent shall disclose the material to the accused's attorney only if the information is otherwise exculpatory.
- F. Notwithstanding subsections A and B, if a crime victim advocate is employed or authorized by a prosecutor's office, the advocate may disclose information to the prosecutor with the oral consent of the victim.”
- A.R.S. § 8-409 (2013) § 8-409.



How to Protect Survivor Privacy and Ensure Confidentiality: Privileged Communications

- ▶ **BEST PRACTICE:** Victim advocates in non-governmental programs should be able to have privileged conversations with survivors. That is, victim advocates should NOT be compelled to share records, notes or other information related to private discussions with survivors.
- ▶ What does your tribe do?



What is perjury?

- ▶ “Perjury” is a term of art:
 - ▶ A statement under oath
 - ▶ That survivor makes, despite knowing such statement is false
 - ▶ With the intention of misleading the court
- ▶ The role of the victim advocate is to offer healing and help develop safety protections for survivors, not to develop evidence or assist with prosecution
- ▶ Victim advocates are not trained to determine whether survivor has committed perjury; that requires legal training
- ▶ Requiring a victim advocate to identify perjury can have unintended consequences, such as over- or under-reporting or misidentification of the nature of the statement



Thank you!

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