Advocacy Challenges in a CCR: Protecting Confidentiality While Promoting a Coordinated Response

Sandra Tibbetts Murphy

January 2011

The Battered Women's Justice Project
1801 Nicollet Ave S. Suite 102 Minneapolis, MN 55403
technicalassistance@bwjp.org
800-903-0111, prompt 1

Funding for this project was made available through the US Department of Health and Human Services, Grant #90EV0375. The viewpoints contained in this document are solely the responsibility of the author(s) and do not represent the official views or policies of the department and do not in any way constitute an endorsement by the Department of Health and Human Services.

Advocacy Challenges in a CCR: Protecting Confidentiality While Promoting a Coordinated Response

Sandra Tibbetts Murphy[1]

Introduction

Effective and safe advocacy on behalf of battered women requires stringent adherence to the protection of their information. Confidentiality remains one of the most basic caveats of advocacy: A survivor's information is not shared outside the program unless she gives the staff permission to do so. This protection reflects and reinforces three vital goals of advocacy: 1) to preserve a battered woman's safety and further retaliation from her abusive partner; 2) to provide the privacy needed to allow a battered woman to talk freely with an advocate and share details of her abuse in order to effectively plan for safety; and 3) to place control of information in the battered woman's hand, thus recognizing and reinforcing her autonomy. In fact, there is evidence that victims may not seek legal assistance, counseling or help altogether without an assurance of confidentiality from an advocate or counselor.[2] Based on trust, a core component of the advocacy relationship remains the preservation and protection of confidential information.[3]

When and how confidential information is protected varies among the states. Different protections, and levels of protections, apply to confidential communications depending upon a number of factors, including: to whom the communication was made; who else was present when the communication was made; where the communication occurred; what information was shared; and how information about that communication is protected. Many states have enacted statutory privileges for advocates that protect a battered woman's information from a forced release. For advocates in several states, however, there is no statutory or court rule providing this protection.[4]

Improper handling of survivor information and records can cause great harm to individual victims. Obviously, the release of information about a survivor's residence or location can make her accessible to the perpetrator and thus endanger both her and her children. Additionally, some

---

[1] Sandra Tibbetts Murphy serves as an Attorney Advisor with the Battered Women's Justice Project and its Legal/Policy Team.

[2] Report to Congress*: The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation* (1995).

[3] A "confidential communication" is defined as a statement made under circumstances showing that the speaker intended the statement to be heard only by the person addressed. Thus, if the communication is made in the presence of a third party whose presence is not reasonably necessary for the communication, it is not privileged. A "privileged communication" is defined as those "statements made by a certain person within a protected relationship . . . which the law protects from forced disclosure on the witness stand at the option of the witness . . . ." Hence, whether a "confidential communication" is "privileged" depends on the relationship between the parties and the circumstances under which the communication is made.

[4] For listing of state confidentiality provisions, please see *State Statute Chart 2010*, The Confidentiality Institute, available through www.confidentialityinstitute.org.

kinds of information about a survivor or her children can provide ammunition to an abuser seeking to punish or intimidate her through custody battles or child protection complaints. Finally, release of certain information to the abuser, even through his attorney, can complicate or harm the state's case in any criminal proceeding brought against the perpetrator, thereby placing survivors in further jeopardy. Beyond the effects on individual victims and their particular circumstances, the improper handling or disclosure of such confidential information can have a chilling effect on other victims within a program's community and may limit their willingness to seek assistance from the program.

In addition to the vital protection of confidentiality, advocates have long recognized the need to collaborate with various agencies, legal and other, to ensure that system interventions on behalf of battered women prioritize victim safety. Referred to as a "coordinated community response" (or "CCR"), these collaborations take many forms and have differing members but have an overall goal of coordinating services within a community to enhance responses to victims. Many states have enacted laws that encourage or mandate the formation of multidisciplinary teams to encourage coordination in communities around domestic violence (*e.g*. coordinating councils, dv/cps teams).[5] In fact, the Office on Violence Against Women grant programs often require evidence of such coordination for eligibility for grant funds.[6] The primary function of a CCR approach prioritizes the sharing of information among community partners as a means of creating effective policy and tracking and monitoring cases.[7]

It is between these two principles – the need for confidentiality and the need for collaboration – that a conflict exists for advocates. How does an advocacy program balance these two seemingly competing interests? How does an advocacy program remain an effective partner within a CCR while still protecting the confidentiality of the battered women it serves?

Review of Confidentiality Requirements for Advocates[8]

Legal requirements for confidentiality come in many forms, including federal and state laws, funding contracts and rules of court. Like the variety of forms, the extent or degree of protection afforded that information also varies. At the federal level, confidentiality protections are required as conditions of funding in the Victims of Crime Act (VOCA), Family Violence Prevention and Services Act (FVPSA) and Violence Against Women Act (VAWA) grant programs. Both VOCA and FVPSA impose rather generic confidentiality mandates on grant

[5] See e.g. MN Stat. §626.558.

[6] OVW Fiscal Year 2010 grant solicitation, The Community-Defined Solutions to Violence Against Women Program (formerly the Grants to Encourage Arrest and Enforcement of Protection Orders Program) at http://www.ovw.usdoj.gov/docs/fy2010-comm-defined-solutions.pdf.

[7] Paymar, Michael, et. al., *Building a Coordinated Community Response to Domestic Violence: Trainer Guide*, Praxis International (2010).

[8] Adapted from Julie Kunce Field et al., *Confidentiality: An Advocate's Guide*, Battered Women's Justice Project, Sept. 2007 (rev'd), available at www.bwjp.org/resources/advocacy.

recipients, requiring programs to "honor confidentiality," to protect any client records and limit disclosure of the location of shelter facilities.[9]

The Violence Against Women Act provides a more specific definition of the kinds of information subject to confidentiality restrictions for its grant recipients, as well as the limited exceptions or waivers. Pursuant to VAWA, grantees (and subgrantees) are prohibited from disclosing any "personally identifying information" about a client.[10] Such personally identifying information includes the more obvious details such as names and addresses, but also any details about a survivor that, when combined with other information, thus becomes personally identifying.[11] The VAWA further prohibits the disclosure of such information unless compelled by statute or court mandate, or upon completion of an informed, written and reasonably time-limited release executed by a client.[12] The VAWA confidentiality protections, however, do not prohibit a grantee from providing non-identifying, aggregate data for reporting, evaluation or other data collection purposes.

The types and levels of confidentiality protections given by state statutes, case law or court rules vary; these sources protect confidential information and records from disclosure in a variety of ways and in differing degrees. Advocacy information in different states may enjoy different types of privilege, from an absolute protection to the more common qualified protection. As with the VAWA provisions, battered women can waive these state-granted protections by signing a release. Additionally, if a third party is present during a battered woman's meeting with an advocate, the confidentiality protection is waived, unless that third party serves only to facilitate the communication, such as an interpreter. These state-level authorities commonly include exceptions to confidentiality protections – situations where disclosure to some extent is mandatory. The most common exceptions include mandatory reporting of child abuse or neglect, disclosure when there is imminent risk of death or serious harm to an individual, or reporting the impending commission of a serious crime.[13]

Overview of Record-Keeping Practices[14]

Clearly, domestic violence programs must keep some files and program records related to the delivery of their services to battered women and children. Records serve as useful tools for strategic planning and budgeting, to document services provided and to meet reporting requirements for funding sources. Records provide helpful documentation of the need for services and may facilitate communication among staff at the program. Additionally, many

[9] Victim of Crime Act (VOCA), 42 U.S.C. §10604(d), 28 C.F.R. Part 22; Family Violence Prevention and Services Act (FVPSA), 42 U.S.C. §10402(a)(2)(E).
[10] Violence Against Women Act (VAWA), Section 3, 42 U.S.C. §13925 (2007).
[11] Id. The specific definition reads as follows: "information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault or stalking, including … name or address; contact information…; social security number or date of birth; racial, ethnic or religious identity; or any other information that would serve to identify an individual."
[12] Id. If an advocacy program is mandated by statute or court order to release a battered woman's information, the VAWA provisions also require the program to notify the battered woman of the impending disclosure.
[13] The Confidentiality Institute's Summary of State Laws Related to Advocate Confidentiality (2010) provides state legal citations and discussion on state privilege and legal definitions, and is updated periodically, *supra* n. 3.
[14] Adapted from *Confidentiality: An Advocate's Guide, supra* n.7.

survivors choose to have advocates share at least some of their documented information with various public agencies, and program files help track these authorized communications. Data from records may also assist in research projects or the auditing of program operations. Record-keeping, or more precisely the information contained in records, however, can endanger battered women as there is always a risk that such confidential information will be shared or disclosed with the survivor's consent. Even in states with statutorily-recognized victim/advocate privilege, courts may overrule the privilege's application and order the release of information. Stated otherwise, anytime a program documents and retains information about a survivor, she loses some control over the information; the information is always vulnerable. Therefore, it is imperative that domestic violence programs and advocates develop sound record-keeping policies that facilitate program services while also preserving confidentiality to the greatest extent possible.

Even the most careful record-keeping practices, coupled with zealous protection of program files, cannot create a completely inviolable wall against disclosure. Eventual disclosure and misuse of any such information cannot be predicted. One thing that is predictable, however, is that even the most neutral and objective information, if disclosed, can compromise the privacy, safety or legal interests of a battered woman. Information that appears helpful to a battered woman from a program or advocate perspective could be used, unforeseeably, to her detriment. Therefore, programs must be prepared for any potential court-ordered release of sensitive information by balancing the need to collect and maintain certain kinds of information against the need to protect the safety and privacy of battered women. Domestic violence programs have fiduciary responsibility to protect confidential communications and records of the battered women they serve. While it is necessary that programs keep client case files and program records to provide effective services, manage shelters and advocacy programs, and to satisfy funding agencies, it is equally critical that they do so in a manner that best protects battered women's information.

"Less is Best"

The most effective record-keeping practice adheres to a "less is best" philosophy; that is, records and files include only the most basic and limited information about and from the battered women served. Rather than including lengthy descriptions of a battered woman's safety plan or her efforts to comply with a court-imposed parenting plan, records should be limited to confirmation of the types of services provided to her, such as shelter, legal advocacy, or economic planning. A form with checkmarks indicating services accessed, rather than narrative descriptions of the use of any such services, is much more protective of a battered woman's privacy and safety, even if such information ends up being disclosed. Clearly, some information must be included in these client files, such as emergency contacts and basic medical needs, in order for the program to protect itself from any possible liability. Such information, however, can be in checkmark or brief "fill-in-the-blank" format and should be limited to the absolute minimum needed.

Securely Located

All records, whether client files or program management information, should be maintained in secured locations, providing access only to designated and necessary staff. Program records, such as financial documents and personnel records, should be stored separately

from survivors' individual files (*e.g.*, shelter intake files), and only designated staff should have authority and ability to review such files or make notations in them. Board members should not have access to individual files or program records, except in specific situations determined by the director and the program's legal advisor. Funders and researchers should have access to only aggregate statistical information.[15] SafetyNet, a program of the National Network to End Domestic Violence (NNEDV), has specific and more detailed recommendations regarding storage and access of records and challenges posed by technology and electronic records, and are often available to discuss particular issues or practices.[16]

Retention and Destruction

When a battered woman is no longer using any of the domestic violence program's services, certain records should be destroyed. This purging should not occur until she has ceased use of all of the program's services, not just after leaving shelter. Each program must have a written policy regarding the retention, access and destruction of survivors' files and other sensitive program records, delineating a length of time such records are maintained and how they are destroyed. Different types of files may have distinct retention and destruction schedules. Funding agencies may have specific time requirements for retention of records. Once adopted, all staff must strictly adhere to the written policy. Destruction or purging of files, however, should not occur if the program is involved in any litigation implicating such information. Once program staff has received a subpoena for documents, or has notice that such a subpoena is forthcoming, the program has a duty to preserve all records subject to that subpoena; this would be a specific exception to the program's policy for record destruction.

Of course, there may be, and often are, many situations in which a battered woman will choose to share her information with those outside of the advocacy program, or even ask an advocate to do so. An advocate's role in such a situation is to ensure that a battered woman is making such a decision with full awareness of all possible consequences and an appreciation for the possible unforeseeable consequences. Again, once a survivor shares information about her herself and her situation, she loses some control over how that information is shared or used. When choosing to share information with workers in other "systems," it is a better practice to help the battered woman to have those discussions directly, with the assistance and accompaniment of an advocate. For those times, though, when a battered woman wants her information kept confidential, minimal record-keeping practices may often alleviate potential effects a forced disclosure could have on her safety or legal outcomes.

CCR Challenges

Overview

For advocates, participation in a CCR program presents various challenges to their obligation of confidentiality. There are the challenges presented in individual situations when helping a battered woman decide whether to share information or helping protect her information

[15] The Violence Against Women Act of 2005, section 5, 42 U.S.C. §13925.
[16] The Safety Net Project of the National Network to End Domestic Violence (NNEDV), www.nnedv.org/nnedvprojects/safetynet.

from legal challenges. There are challenges created by an approach that encourages collaboration and information-sharing among professionals who have different obligations and responsibilities. There are challenges created by legal rulings and precedents which require careful consideration of what could happen to information in different arenas. Advocates must balance their obligation to protect confidentiality with their vital role in formulating and assessing a community's response to domestic violence.

MOUs and Partnership Agreements Among Agencies

Domestic violence programs and shelters obtain the vast majority of their operational funding from a variety of grant programs, including federal, state and local sources. Such funding sources, certainly at the federal level, require grant recipients to develop partnerships and collaborations with other civil and criminal justice practitioners in their service area; such collaborations often are demonstrated by contracts or memoranda of understanding between participating agencies. Whether establishing case review teams or space-sharing or other coordination of efforts, these partnership agreements must be carefully drafted so that confidentiality for advocates remains acknowledged, respected and protected.

In any "relationship" agreement, domestic violence programs must clearly identify their confidentiality obligations in comparison to other members of the partnership and have a clear statement that the mere fact of the collaboration does not alter those obligations. Additionally, confidential information must also "look" protected and partnership agreements can help with this by specifying how information is held by the domestic violence program and what types of information can be shared with partners, and under what circumstances.

Any collaboration agreement, especially one that envisions some kind of space-sharing arrangement or multi-disciplinary project, must establish clearly the independence of the domestic violence program and any participating advocate. There must be no question that an advocate who shares space at the police station does not report to the shift commander regarding her work performance; there must be no question that other partners, such as a prosecutor's office, have no oversight of the domestic violence program or its staff or any access to its records. While the sharing of information, appropriately, across agencies is vital to the goals of a CCR, those partnership agreements should not imply the creation of an "agency" relationship between the domestic violence program and other practitioners.[17]

Co-Location of Agencies and Services

Another common manifestation of the CCR approach is that of co-location; this can be multiple agencies sharing one physical site such as a family justice center model or representatives from one agency having space inside another agency's office like an advocate with a desk at the local police department. Such individuals who are hired by, work for and are supervised by the domestic violence program are covered by any privilege or confidentiality

[17] *State v. Rand*, A07-1522 (Minn.App.Ct. Feb. 5, 2008)(unpubl'd)(defense argued that MOU language created "agency relationship" between domestic violence program and prosecutor and thus, any information within advocate's knowledge should be presumed to be in custody or control of prosecutor and subject to discovery requirements; judge ruled that collaboration, without more, did not create such relationship, but did require prosecution to surrender information already shared by advocate).

requirements conferred on other advocates who work for the program.[18] Even if the individual is housed at police department or prosecutor's office, that advocate has the same authority to keep information from battered women confidential as advocates who work primarily in the shelter. As with MOUs or contracts, however, it is advisable to make to make this line of authority explicit in any documentation of the partnership; the advocate is an employee of the domestic violence program, is only subject to supervision and personnel policies of that program, and all records or work product created or maintained by the advocate remain in the sole possession, control and access of advocate in accordance with the program's record-keeping and confidentiality procedures.

Sharing physical space with "non-advocates" creates other practical obstacles to maintaining confidentiality. Advocates placed in these other offices must consider issues that may implicate those protections: Where does the advocate meet with battered women and who else can see or possibly overhear any such conversations? Such placements also present advocates with the challenge of conversations "over the water cooler;" that is, having informal conversations with partners that may inadvertently involve potentially confidential information. Additionally, such shared space arrangements also involve issues around use of technology and access to information in all its forms – written, verbal and electronic. This requires clear agreements among the partners about ownership and access to information – whether on computers or hard drives, available over internet connections, transmitted by fax machines and even images captured by copier machines. To maintain a strong claim of confidentiality in the face of any legal challenge, it is vital that information purported to be protected LOOK protected.[19] No matter its manifestation, however, adherence to good record-keeping practices remains vital in a co-location or shared space arrangement.

Case Review Meetings

Another common manifestation of coordinated community responses is multidisciplinary case review meetings, where partners from different agencies meet regularly to review specific domestic violence cases and each agency's response, as well as suggesting next steps. This sharing of information allows for identification of particularly high-risk offenders as well as possible critique of unsuccessful responses by the partner agencies to a particular case. For such meetings, each partner shares information about the specific case or response, in an effort to better inform and coordinate the actions of each agency. It is this information-sharing that presents a dilemma for domestic violence advocates.

Because these case review teams almost always include law enforcement and prosecution, it is vital that advocates understand the obligations of a prosecutor to share information with a defendant or his counsel in a criminal case. The U.S. Supreme Court in *Brady v. Maryland*[20] sets forth the prosecutor's duty to disclose exculpatory information and is the cornerstone for imputing information held by other agencies to be within the care, custody or control of the prosecution, thus making that information subject to discovery. Prosecutors must

[18] This assumes that such staff comply with all personnel and training requirements for advocates employed with the domestic violence program.

[19] The Safety Net Project of NNEDV has numerous recommendations for domestic violence programs regarding issues of technology sharing and access, *supra* n. 15.

[20] 383 U.S. 83 (1963)

disclose relevant and exculpatory evidence to defense counsel prior to trial. Such evidence may include statements by a battered woman in which she completely recants her prior description of an assault. Exculpatory evidence subject to disclosure is that evidence which is "favorable to an accused" and "material to guilt or punishment."[21] Such evidence is material if it undermines a prosecutor's confidence in the outcome of a trial or if it "may make a difference between conviction and acquittal."[22] A prosecutor is generally responsible for all police documents and information as well as those of a crime lab.[23] The *Brady* obligations have also been held to apply to medical centers that perform SART exams.[24] State case law or rules of court may also require prosecutors to disclose other relevant evidence such as names and addresses of witnesses, statements made by a defendant and any criminal records of a defendant or witnesses. Thus, once information is shared at such a case review meeting, it becomes subject to the prosecutor's duty to disclose under *Brady*.[25]

Advocates, therefore, must be careful about their participation in such meetings. Absent a valid release from a battered woman, of course, an advocate cannot and should not be sharing any information about the case with other team members. This does not mean, however, that advocates play a lesser role in such meetings. To the contrary, these meetings represent a valuable opportunity for domestic violence advocates to engage in vital and necessary system advocacy work. Domestic violence advocates can still talk generally about many things useful to the group, even without sharing specific information about a battered woman. For example, advocates may make suggestions for follow-up investigation or highlight facts evidenced in a police report that indicate higher risk – all based on general knowledge and experience. Such participation is the CCR work needed from advocates –to identify what is or is not working in the collective response of the partners; build, monitor and evaluate changes in the infrastructure of case processing by team members; and ensure attention to the context and severity of violence in each intervention.

It is important to remember, however, that protecting information is only part of effective advocacy practice. There are times when it may be appropriate to share information about a specific battered woman's situation with CCR partners. In fact, safety plans often include the sharing of information with other agencies. For advocates, however, such a sharing must only occur with a valid release from a battered woman, and for that, advocates must assist battered women in understanding how the team operates and how it may be a benefit. Battered women must be informed of every agency that is part of the team, each agency's individual role and

---

[21] *Brady v. Maryland*, 373 U.S. 83 (1963).
[22] *U.S. v. Bagley*, 473 U.S. 667 (1985).
[23] See e.g., *Kyles v. Whitney*, 514 U.S. 419 (1995); *Newsome v. McCabe* , 256 F.3d 747 (7th Cir. 2001); and *In re Brown*, 952 P.2d 715 (Cal. 1998).
[24] See *People v. Uribe*, 76 Cal.Rptr.3d 829 (Cal.Ct.App. 2008).
[25] However, *Brady* does not apply to all governmental agencies, and has been held not to apply to non-governmental agencies whose work is not investigatory in nature or otherwise directed by the prosecutor. See e.g., *U.S. v. Avellino*, 136 F.3d 249 (2nd Cir. 1998); *U.S. v. Morris*, 80 F.3d 1151 (7th Cir. 1996); *People v. Washington*, 654 N.E.2d 967 (N.Y. 1995); and *People v. Berkley*, 549 N.Y.S.2d 392 (N.Y.App.Div. 1990) (set for factors to use in determining if agency and its documents are within prosecutor's control: 1) whether potential cross-examination materials are in actual possession of a primarily law enforcement agency; 2) whether a compelling reason exists to keep information confidential; 3) whether material in question is equally accessible to defendant). For help assessing how *Brady's* requirements or exceptions may apply to specific situations, please contact the Battered Women's Justice Project, 1-800-903-011, ext 1, www.bwjp.org.

purpose, any protections for information that is shared, the risks and benefits of each team member/agency having access to that information, and how team members coordinate their work.

Conclusion

Advocates thus play a critical role in the effective operation of a coordinated response to domestic violence, both in helping to protect the confidentiality of battered women as well as helping battered women assess the risks and benefits of sharing information with other agencies. When deciding whether and what information to share with a CCR team, advocates and BW together should ask themselves the following questions:

- Who is seeking the information?
- For what purpose is the information sought or needed?
- Where else might the information go?

In assisting battered women with this analysis, it is vital that advocates repeatedly inform battered women of their right to confidentiality and privacy, and to obtain informed releases each time a decision is made to share information. By engaging in responsible individual *and* system advocacy work, advocates play a critical role in the effectiveness of any coordinated response to domestic violence.