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ADVOCATE NEWSLETTER



Legal Services
Department

RESPONDING TO SUBPOENAS

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Message from the Author:

One of the most frantic telephone calls we receive from a sexual assault program advocate begins with, "Please help me! I just received a subpoena and I don't know what to do..." Indeed, it can be very unsettling to be the recipient of legal documents requesting confidential information about a sexual assault survivor. We are trained to guard this information vigilantly and we build relationships with survivors based on trust in confidentiality. When a court or an attorney then apparently directs us to hand this over, it can send us into a panic.

The aim of this newsletter is to de-mystify the subpoena. By understanding the law in Washington and necessary components of an agency policy, advocates are better equipped to respond to subpoenas diligently, and respectfully of the sexual assault victims we serve.

We have additional resources and information and encourage you to contact us with any questions or comments.

Sincerely,
Kelly O'Connell, Staff Attorney
WCSAP Legal Services Department

DISCLAIMER:

The legal information provided in this newsletter should not be considered legal advice. Whether a particular factual situation is contrary to federal or state law will depend on a number of circumstances specific to the victim. If you or your client needs legal advice, you should consult an attorney. Laws change both as the result of legislative and court decisions. The information here is current as of February 2007.

WHAT YOU NEED TO KNOW ABOUT THE LAW

Generally the communications between a survivor of sexual violence and a sexual assault advocate at a community sexual assault program are confidential and protected by state law as private communications, also referred to as privileged communications. The two laws related to the confidentiality of communications between a survivor of sexual violence and a sexual assault advocate are RCW 5.60.060 (the sexual assault victim and advocate privilege) and RCW 70.125.065 (records of rape crisis centers are confidential). Last year, Washington also passed a privilege law giving victims of domestic violence similar privileged communications protection. Thus community based advocates at domestic and sexual violence programs in Washington State have the ability to assert privilege to protect their conversations and records from disclosure in court as well.¹

The confidences shared between a sexual assault victim and an advocate often involve highly personal information which may include intimate details about the assault, perhaps prior victimization or substance abuse issues, and their feelings about what has happened to them. Because survivors trust us with this very private and personal information, it is our obligation to make every effort to ensure that their information remains private and confidential. The privilege law protects the information the survivor shares with the advocate. Thus if the privilege is to be waived, it must be done by the survivor/client. This means it is always the survivor's decision when and if to release any of her private information after fully understanding the consequences of that choice. Since the information and privilege belong to the survivor, the first question we should always ask when faced with a request for client information is, "What does the survivor want?"

"Rape crisis centers cannot promise a client that advocates are immune from being subpoenaed and compelled to testify."

Legal Privilege

Privilege laws are rules of evidence that prevent certain confidential information from being disclosed. In general, privilege laws protect the confidentiality of information shared between a professional and a client, such as between doctors and their patients and attorneys and their clients. The law states that a sexual assault advocate cannot be forced to share information about her conversations with a victim. However, there are exceptions to this such as informed consent release, mandatory reporting requirements, and a threat of harm to self or others, or a court order.

Additionally because the specific language of the statute uses the word "may" instead of "shall" e.g. "a sexual assault advocate **may** not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate," the privilege is a *qualified* one, not absolute. This means the sexual assault victim - advocate privilege is not bulletproof and the client's private information may be released despite our best efforts to protect it. Therefore even though the confidentiality of the communications between victim and advocate is

¹ RCW 70.123.075

“Since the confidential records kept by a rape crisis center are subject to judicial review and possibly disclosure, it is critical that your agency have policies guiding recordkeeping of client information.”

protected by state law and should be respected, rape crisis centers cannot promise a client that advocates are immune from being subpoenaed and compelled to testify.

Confidentiality of Rape Crisis Center Records

The confidentiality of rape crisis center records in Washington is also qualified. This means that if the defense lawyer asks for the client’s records, (by making a motion in court), the judge may decide to review the evidence (client records) and determine whether there is any information that is relevant to the case.² This is called an *in camera* review. While conducting the *in camera* review, the judge performs a balancing test weighing the harm to the victim if the information is disclosed and allowed into court as evidence against how probative the evidence may be for the defendant. Probative means tending to prove or disprove.

The law in Washington that recognizes the confidentiality of a survivor’s records at a rape crisis center is RCW 70.125.065. It states that unless certain steps are taken to request the rape crisis center records in court, they are confidential and are not subject to disclosure.

Because the confidential records kept by a rape crisis center may be subject to review by a judge and possible disclosure, it is critical that agencies have policies guiding recordkeeping of client information. Some important considerations for recordkeeping policies include but are not limited to the following:

- What information is recorded and why?
- What materials and documents are kept and where?
- Who has access to client files?
- What is the clients’ understanding of their file?
- How does a client access their file or get a copy?

If you would like assistance developing your agency’s recordkeeping policy, please contact the WCSAP Legal Services Department.

DEVELOPING A POLICY FOR RESPONDING TO SUBPOENAS

It is critical that community based agencies have a policy on how to deal with receiving subpoenas so that staff and volunteers know what to do. At a minimum an effective policy should address how the victim will be notified about the request and how the subpoena will be processed and responded to by the agency. Notifying the victim is important and deserves thought before

² RCW 70.125.065

³ “Informed consent” means that the victim is informed of and understands the potential risks and consequences of releasing her private information before authorizing the release of her private information.

“In Washington, a subpoena may be issued by a judge or an attorney of record.”

“Failure to comply with a subpoena may be considered contempt of court and can result in arrest.”

contacting them and simply informing them because it can be very upsetting for a client to receive this information. Well thought out policies will likely incorporate specific commitments that the agency will provide the client such as how far the agency will go to fight a subpoena.

It is important that the agency has the ability to do what it says it will do in its policy. For example, if your agency’s policy states that it will take every legal action necessary to fight any and all subpoenas, then your agency should have a plan for obtaining the legal services to do so - such as through relationships with attorneys who provide pro bono work for your agency or the funds to pay for legal representation. Similarly the policy should also address how to facilitate a client’s agreement to have their information released. At a minimum, the agency must obtain the client’s informed consent³ and a written release of information.

Clients should also be informed that private information they share with the agency will be kept confidential and that there are also some risks of disclosure, such as through legal proceedings or by a waiver of privilege. As advocates, it is our responsibility to inform survivors of the differences between agency policies regarding confidentiality and Washington State laws about privilege. Clients need to be informed under what circumstances the advocate or agency will disclose their information (e.g., informed consent release, mandatory reporting requirement, threat of harm to self or others, court order, etc) and be provided with a copy of the agency’s policies.

The final page of this newsletter contains a sample policy on responding to subpoenas. This sample will not be appropriate for every agency, although the topics it addresses provide a good framework for drafting a policy that is agency specific.

ACTION PLAN: QUICK TIPS IF SERVED WITH A SUBPOENA

1. Do not reveal any information to the person serving the subpoena.
2. Look up agency’s policy and follow it! (If the policy does not answer your question, ask your supervisor).
3. Make sure that management (e.g., Executive Director, supervisor) is aware of subpoena immediately.
4. Read the subpoena:
 - To whom is it directed? The Program? An advocate?
 - Who is asking for the information?
 - What are they asking for? Testimony? Document production?
 - Do you have the information? If so, how? If the requester is successful, what information will they get?
5. What does the victim want?
 - Follow policy for notifying the victim. (This should be as soon as

“It is important that the agency has the ability to do what it says it will do in its policy.”

possible!) Don't panic the victim.

- Have a clear understanding of what the subpoena is asking for and what information your agency has so you can communicate it clearly to the victim.
- If the victim wants to release the requested information, obtain informed consent and a signed written waiver for release of information.

6. Document the facts:

- When was the subpoena received? How was it served?
- Document compliance with the policy (e.g., when the victim was contacted, etc.)

7. Ask questions and seek help if you need it.

FREQUENTLY ASKED QUESTIONS

What is a subpoena?

Sometimes, a court or an attorney will try to order an advocate or victim to testify about the confidential communications between a victim and an advocate. When this happens, the sexual assault program or victim may receive a legal document called a subpoena.

A subpoena is a legal document issued either by the court or a lawyer requiring the appearance of a witness at a court hearing, a deposition or administrative hearing. In Washington, there are two types of subpoenas: a subpoena to appear and testify and a subpoena “duces tecum” that requires the witness appear with documents. CR 45(a) & (b).

How does a subpoena need to be served?

A subpoena may be served by any suitable person over 18 years of age, by exhibiting and reading it to the witness, or by giving him or her a copy, or by leaving such copy at his or her home. When service is made by any other person than an officer authorized to serve process, proof of service shall be made by affidavit. CR 45(c).

Does the subpoena need to be signed by a judge?

No. A subpoena may also be issued by an attorney of record. CR 45.

Does a subpoena have to provide me with a certain period of time before testifying or producing documents?

Superior Court Rule 45 does not specifically require that a subpoena provide a witness with a certain number of days before being required to testify at a deposition or trial. However, logic dictates that there must be enough notice to allow for objection to a subpoena.

“The information being requested belongs to the victim.”

Can I ignore the subpoena?

Failure to comply with a subpoena may be considered contempt of court and can result in arrest. It is not advisable to ignore a subpoena, even if you or your agency feels it is improper or was not effectively served. Your agency should have a policy for how to respond to a subpoena. Often a phone call to the requesting party or a letter from an attorney on behalf of your agency explaining the confidentiality laws will be enough to get the subpoena withdrawn. It is also important to always inform the victim that you have received a subpoena for her information - regardless of whether your agency believes the subpoena is valid or enforceable.

What is a Motion to Quash?

Your agency may wish to fight the subpoena in court - this is typically done by an attorney for your agency filing legal documents with the court asking that the subpoena be set aside. This is called a "motion to quash" the subpoena. Generally, attorneys for your agency will argue that because of the sexual assault advocate privilege and/or the confidentiality of rape crisis center records, the disclosure of confidential information required by the subpoena is not allowed. A motion to quash can also be based on improper service, improper procedure used to request the materials or a variety of other laws that may protect the information.

What if we need an attorney to help us fight the subpoena?

Ideally, your agency will have established a relationship with an attorney or attorneys in your community who are willing to offer their legal services *pro bono* (for free) to the rape crisis center. If your agency has decided to fight a subpoena in court, this is a good time to call upon those relationships, (or create one) to obtain legal assistance. WCSAP Legal Services is able to assist such attorneys by providing sample motions to quash and other technical assistance as well. Please inform any attorney your agency may utilize of the WCSAP Legal Services Department and our ability to provide legal support, resources and assistance to them.

If you need an attorney referral, please contact WCSAP Legal Services. WCSAP maintains a list of attorneys who have received training from WCSAP on sexual assault issues and have volunteered to take referrals from rape crisis centers. Please note our attorney list consists of attorneys that would like to take referrals - they have not agreed to provide any pro bono services. Therefore when contacting these attorneys - or any attorney in your community for assistance discuss up front what their fees for service are and whether they may consider providing services to your agency for free or at a reduced cost. For assistance in developing attorney referrals in your region, please contact Kelly O'Connell, staff attorney at kelly@wcsap.org.

WCSAP is committed to fostering a culture of respect, dignity and autonomy for all individuals. We recognize that disrespect, ignorance and the abuse of disparities in power are the roots of sexual violence. To that end, WCSAP endeavors to engage with agencies and individuals who share our commitment.

SAMPLE POLICY ON RESPONDING TO SUBPOENAS

All services provided by this Program are confidential. The Program recognizes the very personal and private nature of the information that may be shared by those dealing with the trauma of sexual assault. The Program is committed to honoring the choices of survivors and to provide services in a manner that facilitates client empowerment. The Program will take all necessary steps under this policy and Washington and federal law to preserve the privacy rights of those who receive its services, unless expressly authorized by the client to do otherwise.

The Program will respond to subpoenas in a manner that protects the confidentiality of the survivor.

Anyone attempting to serve a subpoena should be directed to _____ [Option: the business office]. The Executive Director has been designated as the “custodian of records” for the purpose of responding to subpoenas. Subpoenas requiring a witness to bring documents under his/her control should be served on the custodian of records at the business office. The Executive Director must be notified immediately of all subpoenas, threats of subpoenas or attempts to serve subpoenas.

The Program will attempt to notify a survivor as soon as it receives a subpoena concerning the survivor. When the program cannot contact the survivor, and without informed consent from the survivor, confidentiality will be maintained.

No one at the Program will release any information regarding the survivor without informed consent from the survivor. No information about any survivor will be released in response to a subpoena until:

- The survivor releases the information by written waiver with informed consent, or
- The Court, after hearing reasons why the information should not be released, orders that the information be released.

A subpoena, even one signed by a judge, does not require the automatic release of files or other information. Without informed consent of the survivor, the Program will resist disclosure and make every effort to object to the subpoena, including filing all necessary court motions or objections.

In the event the Program receives a subpoena to disclose information regarding the Program, its services or its staff, the Program may need to seek protection. Even when the survivor gives informed consent to release their records or authorizes the Program to testify, the Program reserves the right to seek and follow legal advice about whether there should be limitations to the disclosure for the protection of the Program and/or its staff.

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LEGAL PUBLICATIONS AT WCSAP

- **Beyond the Criminal Justice System: *Transforming Our Nations Response to Rape*** (Attorney Practice Manual)
- **Know Your Rights Booklet** (Spanish, Russian, Vietnamese)
- **A Survivor's Guide to Filing a Civil Law Suit**
- **Developing Pro Bono Attorney Referrals**

BROCHURES

- **Housing** (Spanish)
- **Privacy**
- **Legal Issues**
- **Sexual Assault Protection Order**

NEWSLETTERS

- **Victim Impact Statements**
- **Employment Rights for SA Victims**
- **Financial Compensation for SA Victims**
- **Washington's Sexual Assault Protection Order**
- **Responding to Subpoenas**

ARTICLES OF INTEREST

- ***A New Tool for Safety: Washington's New Sexual Assault Protection Order***
(Washington State Bar News, June 2006)
- ***Understanding Crawford***
(National Sexual Violence Resource Center Newsletter, Spring 2005)
- ***Addressing the Civil Legal Needs of Sexual Assault Victims***
(Washington State Bar News, April 2004)



