



Confidentiality Policy Considerations and Recommendations:

A Resource Manual for Michigan Domestic and Sexual Violence Programs

Second Edition

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How to Use this Manual

The following best practice considerations have been developed as a tool for Michigan domestic and sexual violence service provider programs to use while developing and revising confidentiality and record keeping policies. While legal experts have reviewed this manual, the recommendations are offered only for educational purposes.

Nothing in this manual should be construed as legal advice.

Programs must draft their own confidentiality and record keeping policies in consultation with an attorney hired to represent the interests of the program and the board of directors. This is particularly important because for some of the areas covered in this manual there is an absence of statute or case law. Statutory citations, case law and court rules referenced in this manual are accurate as of March 2018. However, programs must be aware that statutes may be revised by the legislature in the future. In addition, agencies should be aware that statutes may be affected by subsequent court rules, attorney general opinions, rules of evidence, or case law.

With regard to language, please note that throughout this manual, the term “they” is used as a gender-neutral pronoun, even where it may refer to a single individual. Further, please note that the term “victim” or “survivor” along with other potential terms are used to refer to individuals who are surviving sexual or domestic violence. This wording is never intended to discount the strength of survivors, but is merely used in keeping with the applicable context.

While some parts of this manual may be applicable and of use to forensic nurse examiner programs, confidentiality and record keeping for these programs encompasses a broader area of law that is beyond the scope of this manual.

The manual is divided into two sections:

Section I: Policy Recommendations and Considerations for Michigan Domestic Violence and Sexual Assault Programs

Section II: Discussion of Relevant Law

SECTION I

Policy Recommendations and Considerations for Michigan Domestic Violence and Sexual Assault Programs



Chapter 1. Introduction: General Policy Considerations

A. Confidentiality: Essential to Serving Survivors

The success of the counselor–victim relationship is based upon the development of the victims’ trust that they may confide sensitive and intimate information fully and freely to their counselors. Confidentiality is essential for effective counseling because without an assurance of confidentiality, victims may avoid treatment altogether or may withhold certain personal feelings and thoughts because they fear disclosure.¹

Programs providing services to survivors of domestic and sexual violence become involved in particularly private and personal areas of people’s lives. Confidentiality is critical to the services and advocacy provided. It is a fundamental underpinning both of client and provider safety and the integrity of services.² The harm of disclosure to those seeking counseling or shelter is palpable: many counselors agree that when told that the private information revealed during counseling sessions may be used in court, there is a drastic change in the dynamics of the counseling relationship. Knowledge of the possibility of disclosure has led some survivors to refuse or avoid counseling, advocacy services, or shelter.

For survivors of domestic and/or sexual violence, confidentiality may be more than just an issue of privacy—it may be one of life and death.³ Indeed, peer-reviewed research has demonstrated that the risk of homicide by a controlling partner increases nine-fold upon separation.⁴ Many survivors of domestic and sexual violence have been threatened with further harm or death if they reveal what their assailants have done.

Programs that provide services to survivors of domestic and sexual violence often face challenges regarding confidentiality policies from other systems in the community. Individuals in systems such as the criminal justice, child protective services, health, mental health, the defense bar and welfare have started to recognize their role in assisting domestic violence and sexual assault victims, and often work collaboratively with domestic violence and sexual assault programs. In their efforts to provide help, such individuals may look to service providers for information pertaining to individual survivors. While often well meaning, these individuals and systems may be unaware or may not fully understand the complex nature of the confidentiality restrictions placed on programs by law, policies, and survivors’ wishes. Such requests for information can put programs in the difficult position of being perceived as “uncooperative” with other agencies or systems, especially those who may have provided information to the

¹ Bonnie J. Campbell, U.S. Dept. of Justice, Report to Congress: The Confidentiality of Communications between Sexual Assault or Domestic Violence Victims and Their Counselors, 17 (1995).

² See, e.g., Jennifer Bruno, *Pitfalls for the Unwary: How Sexual Assault Counselor-Victim Privileges May Fall Short of Their Intended Protections*, 2002 U. ILL. L. REV. 1373 (2002).

³ See New Mexico Coalition Against Domestic Violence, *Maintaining Safe & Trustworthy Servs. For People Endangered by Domestic Violence*, 11 (2014) (hereinafter “N.M. Manual”).

⁴ *Id.*

domestic violence or sexual assault program in the past. The best response to these challenges are sophisticated and well-reasoned confidentiality policies and protocols.

Privacy needs are particularly pronounced for survivors of sexual violence. For example, for a victim of sexual violence, the need for autonomy and control over their body, the private details of their life, and the decisions that must be made relative to the assault (including whether and how to participate in a criminal prosecution and how to respond to disease and pregnancy exposure), and safety from future attack are often essential to recovery.

B. General Guidelines for Updating and Developing a Confidentiality Policy

As programs develop or review confidentiality policies, the following general guidelines should be considered:

- The policy should contain a section on philosophy and rationale outlining the importance of confidentiality to survivors and the programs that serve them.
- The policy should be created with informed legal advice on relevant state and federal law by an attorney well versed in these issues.
- The policy should outline specifics of how client confidentiality is protected.
- Consideration should be given to difficult issues or situations that have occurred or may arise in the programs' local community as well as the state.
- The policy should be shared with the programs' community partners, including law enforcement, prosecutors, civil justice, counselors, therapists, child protection workers and others working to assist survivors.
- The policy should be in writing and the subject of ongoing training and supervision. Staff, board, and volunteers/interns should be trained on the policy and be required to sign an agreement that they understand and will abide by the policy. Specific provisions should be made to anticipate role conflicts that may arise for certain individuals and appropriate safeguards should be put in place.
- The policy should be made available in a format and a language that is accessible to all clients. This includes alternate language appropriate for the service area, Braille, and audio recording.
- The policy should be reviewed and updated regularly, or whenever changes in relevant law are made.

C. Retaining Corporate Counsel

It is essential that domestic violence and sexual assault programs have access to legal representation to protect the interests of the program and the clients that it serves. Securing access to legal counsel may require considerable short-term effort, creativity, and commitment of time and resources. This may be especially true for programs in smaller communities or rural areas. Nevertheless, making this a priority, preferably before crisis arises, is critical for the programs' long-term survival and viability.

The attorney or attorneys representing the program for the issues of confidentiality and record

keeping should have expertise in non-profit corporate liability and understand confidentiality laws and practice. When responding to subpoenas and warrants, an attorney with expertise in criminal or civil practice issues, depending on the origin of the order, should be consulted. It is helpful to retain an attorney who is well versed in domestic violence and sexual assault laws, although if the person is committed to the program, this expertise can be gained over time. While it is important to have an attorney who will give well-reasoned legal counsel, they also need to be willing to look for ways to support the program's mission, purpose and goals.

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Chapter 2. Confidentiality and Privilege: The Fundamentals

A. Authority for Programs to Create Confidentiality Policies

The relationship between counselor and domestic violence or sexual assault victim is one that has been supported through numerous state and federal statutes and court rulings. Like other human services providers and organizations operating adult crisis lines, there is a common expectation of confidentiality from those seeking services and those in the community who refer individuals to domestic violence and sexual assault programs. In addition to this widely held social expectation, Michigan domestic violence and sexual assault programs may rely on a combination of statutory privilege, court rulings, opinions, and federal funding regulations in asserting their authority to develop confidentiality policies that serve to further the interest of their clients and their program.

Though the concepts of privacy, confidentiality and privilege are inter-related, they differ in important ways. Privacy refers to a domestic violence victim/survivor's right to control their own personal information. Privilege refers to the right to prevent the disclosure of personal information that was shared in confidence. Alicia Aiken, Executive Director of The Confidentiality Institute explains the difference between these concepts this way:

- Privacy is "I decide who knows my information";
- Confidentiality is "You commit to protect my information"; and
- Privilege is "They can't make you share my information."⁵

B. Statutory Communications Privileges

Nearly every state, including Michigan,⁶ has adopted either a statute or related rule to recognize the Domestic Violence or Sexual Assault Victim-Counselor Privilege.⁷ In addition to this privilege, most programs have staff to whom another statutory privilege may apply, such as Social Workers, Licensed Professional Counselors, Family Counselors, Psychologist/Psychiatrists, Clergy, Attorneys or Physicians. Refer to Section II of this manual for a legal discussion of the Domestic Violence/Sexual Assault Victim-Counselor Privilege and other privileged relationships. Programs need to carefully consider which statutes apply to their organization based on their current and potential staff composition. Michigan generally holds that the victim, client, or patient is the holder of such professional privileges, which means that programs are charged with carefully guarding clients' information.

⁵ *Id.* at 11.

⁶ Mich. Comp. Laws § 600.2157a.

⁷ Am. Bar Ass'n, Domestic Violence/Sexual Assault Advocate Confidentiality Laws (2014), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20Advocate%20Confidentiality%20Chart.authcheckdam.pdf.

C. Federal Grant Regulations on Information Disclosure

Programs that receive federal funding are limited in the information they may disclose. The Violence Against Women Act (“VAWA”)⁸ and the Family Violence Prevention and Services Act (“FVPSA”)⁹ as well as supporting regulations to the Victims of Crime Act (“VOCA”),¹⁰ contain strong confidentiality provisions that limit the sharing of victims’ personally identifying information. These rules require all grantees, subgrantees, and partners receiving funding through these programs, to protect the confidentiality and privacy of persons to whom those grantees and subgrantees are providing services. Grantees may not require victims to sign a release of this confidentiality as a condition of receiving services.

Grantees may not disclose, reveal, or release personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees’ and subgrantees’ programs, regardless of whether the information has been encoded, encrypted, hashed, or otherwise protected. “Personally identifying information” means information about an individual that may directly or indirectly identify that individual. In the case of a victim of domestic violence, dating violence, sexual assault, or stalking, it also means information that would disclose the location of that individual.¹¹

The only circumstances under which a grantee may share personally identifying information are: (1) When the victim provides written, informed, and reasonably time-limited consent to the release of information (“a release”); (2) When a statute compels that the information be released; or (3) When a court compels that the information be released.¹² Notably, consent for release may not be given by the abuser of the minor, incapacitated person, or the abuser of the other parent of the minor.¹³ If a statute or court compels the release of information, the grantee or subgrantee releasing the information must (1) make reasonable attempts to provide notice of the release to affected victims and (2) take steps necessary to protect the privacy and safety of persons affected by the release.¹⁴

Where grantees have various divisions, some of which receive funding and others do not, then the division(s) of the organization that is providing grant-funded services may not share personally identifying information with other divisions of the organization.¹⁵ That said, the VAWA Confidentiality Provision applies to all operations of the victim service provider or victim services division/component, even if the relevant funding is only for a small part of those

⁸ 34 U.S.C. § 12291(b)(2).

⁹ 42 U.S.C. § 10406(c)(5).

¹⁰ 28 C.F.R. § 94.115.

¹¹ 34 U.S.C. § 12291(a)(20).

¹² 34 U.S.C. § 12291(b)(2)(C).

¹³ 34 U.S.C. § 12291(b)(2)(B)(ii).

¹⁴ *Id.*

¹⁵ See 28 C.F.R. § 90.4(b)(2)(iii); U.S. Dept. Of Justice, Office on Violence Against Women, *Frequently Asked Questions on VAWA Confidentiality Provision*, (2017) (hereinafter OVW FAQ on VAWA Nondisclosure).

operations. For instance, if a grantee organization operates a domestic violence shelter and a food bank, and a client comes to the domestic violence shelter, the shelter would need a release from the client before the shelter may contact the food bank on the client's behalf.¹⁶

D. Health Insurance Portability and Accountability Act

Some programs may be covered by the Health Insurance Portability and Accountability Act ("HIPAA").¹⁷ HIPAA ushered in a "strong federal policy in favor of protecting the privacy of patient medical records."¹⁸ HIPAA requires that covered entities, which include health insurance plans and health care providers that transmit health information electronically, maintain confidentiality.¹⁹ Specifically, HIPAA prevents disclosure of "protected health information," which means individually identifiable health information, but has several exceptions.²⁰ HIPAA specifically allows disclosure to a government authority or social services agency if required by law or if the individual patient agrees to the disclosure.²¹

E. Freedom of Information Act

Both the federal and state governments generally grant access through Freedom of Information Act ("FOIA") requests to public records. Access to such documents is often thought to be a cornerstone of our democracy. FOIA has important limitations. First, because FOIA only pertains to public bodies or agencies, domestic violence and sexual assault programs are not generally subject to Michigan's state FOIA unless they are primarily funded by state or local government.²² Under the federal FOIA, private organizations are not public bodies, regardless of their funding, unless a federal agency exerts significant control over the organization.²³ If an individual threatens action against a DV/SA program under FOIA, that individual may be misinformed about FOIA's scope. Nonetheless, programs should consult the program attorney whenever a request for information is made under FOIA. Another limitation to be aware of is

¹⁶ *Id.* at 3.

¹⁷ 42 U.S.C. § 1320d.

¹⁸ *Thomas v. 1156729 Ontario Inc.*, 979 F. Supp. 2d 780, 782 (E.D. Mich. 2013) (internal quotation omitted).

¹⁹ 42 U.S.C. § 1320d.

²⁰ *Id.*

²¹ 45 C.F.R. § 164.512(c).

²² Mich. Comp. Laws § 15.232(d)(iv); *Sclafani v. Domestic Violence Escape*, 255 Mich. App. 260, 270; 660 N.W.2d 97, 102 (2003). One possible exception to this rule would be if an agency receives government funding on a fee-for-service basis. *Id.*

²³ See *Kubick v. Child & Family Services of Michigan, Inc.*, 171 Mich.App. 304, 307; 429 N.W.2d 881 (1988); *Forsham v. Harris*, 445 U.S. 169, 177–87 (1980) (holding that data generated by a privately controlled organization that received federal grants (grantee), but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA, setting forth a test for control requiring that the federal government engage in "virtually day-to-day supervision" in order to render a grant recipient an agency under FOIA). Local agencies should keep in mind that the grant information related to federal and state grants could potentially be the subject of a FOIA request to the state or federal agency that issued the grant. See also 5 U.S.C. § 551(1).

that the judiciary is not subject to FOIA, meaning that documents filed with the court will not be accessible through FOIA requests (see section II for more regarding the accessibility of court records).²⁴

F. Determining Client Status

Determining when and how someone becomes a client is an essential component of a confidentiality policy. Not all individuals who contact a program should, or need, to be afforded status as a program client and the accompanying protection of the program confidentiality policy. For instance, a person who makes disclosures in the context of a community prevention-related presentation would not be considered a client covered by federal confidentiality provisions unless they later sought services.²⁵ Policy addressing this issue may be important if a program decides to disclose information about an individual who contacted the program under false or threatening pretenses, such as a perpetrator posing as a survivor. Federal confidentiality provisions protect “persons receiving services” but the VAWA Confidentiality Provision does not cover identifying information about offenders if the organization provides services to offenders.²⁶

There are several factors to consider in making this determination. Considerations include the mission, purpose and scope of the services that your program is designed to provide, the statutory requirements that specifically apply to your staff (their other professional degrees or affiliations) and the laws that apply to your program. Other factors include the means by which initial contact is made, the type of assistance requested and the determination of the individual’s eligibility for services.

G. Information to be Kept Confidential

The policy should make clear what must be held confidential. It should cover all information about the client including identity, status as a client or resident of the program. In addition, programs may want to prevent disclosure of certain information regarding staff members, volunteers and board members.

H. Parties Bound by Confidentiality Policies

Program policy should outline the individuals bound to hold information confidential. In general the policy should apply to all staff, volunteers, interns, and board members. Staff, board, volunteers and interns should be trained on the policy and be required to sign an agreement stating that they understand and will abide by the policy.

I. Staff Fulfilling Dual Roles

²⁴ Mich. Comp. Laws § 15.232 (d)(iv).

²⁵ OVW FAQ on VAWA Nondisclosure at 8.

²⁶ 34 U.S.C. § 12291(b)(2); OVW FAQ on VAWA Nondisclosure at 5.

There may be some circumstances where individuals who would otherwise be covered by the policy are in roles where confidentiality does not or cannot apply. Domestic violence or sexual assault program staff placed in or working with another agency's office/system (criminal justice, welfare, and housing) may not be able to provide "confidential services" because of the limitations and/or needs of the collaborating agency. For example, a program may place a legal advocate in the prosecutors' office to assist with interviewing survivors in preparation for trial. In this case the staff member would be considered an "agent" of the prosecutor, and information that they obtain will not only be disclosed to the prosecutor but may also be disclosed to the defense. While these types of arrangements can be beneficial to survivors, the program and the collaborating agency, confidentiality protocols and agreements must be carefully developed in advance. The staff member and all supervisory personnel must clarify what is and is not confidential, especially for staff people who are assigned to different part-time positions. Other staff need to know what information can be shared with these individuals for the purpose of consultation and case management. Protocols must include full disclosure to the client both verbally and in writing regarding the scope and limitations of confidentiality in these situations, as well as other agencies that provide confidential services.

J. Board Members

It is understandable that programs would seek board members who have expertise with the issues facing survivors of domestic violence or sexual assault. Programs should carefully consider whether a particular prospective board member will face untenable challenges in avoiding conflicts or maintaining appropriate confidentiality and discretion. Some individuals who are knowledgeable about victim services, such as those involved in law enforcement, state government, or the judiciary, may knowingly or unknowingly have contact with a survivor who is receiving services from your program. As a general rule, confidential information regarding individual cases should not be shared in board meetings. However, the potential for board members to sometimes be given or have access to confidential information does exist.

K. Other Program Clients

Many programs ask or require clients to sign confidentiality agreements to protect the identity and circumstances of other clients, as well as to safeguard certain program information. While this may be desirable for purposes of underscoring the importance of protecting all clients, it is not legally binding. Nevertheless such agreements may be useful in settings where clients are likely to have intimate knowledge about other clients' circumstances, such as group counseling or shelter settings.

L. File Access

Michigan law does not clearly address the issue of who "owns" the physical files in a counseling relationship. However, based on a Michigan Attorney General Opinion²⁷ regarding medical

²⁷ Michigan Attorney General Opinion, 5125 (1978).

records, in addition to laws pertaining to ownership and access to employee files,²⁸ as well as the opinion of attorneys who have provided consultation to counseling programs, it appears that the file belongs to the program. Support for this opinion includes that the program creates the file specifically for its own purposes, controls the form and content of documentation, and makes the record using its own personal property.

While the program may own the actual file, the client should always have access to the file under reasonable circumstances. Policies often include provisions such as: the file is available during regular business hours, the counselor who has worked with the client and/or supervisor be present, and that appropriate waivers are signed before any parts of the file are copied and given to the client. This is consistent with the above mentioned attorney general opinion. Furthermore, for domestic violence and sexual assault programs, allowing clients access to their file is a necessary component of an empowerment-based counseling perspective.

Agency policies should address which staff members can have access to client files. Ordinarily this should be restricted to staff members working directly with the client, and supervisors. Policies should also include what client information volunteers and student interns have access to. Confidentiality rules allow funders and researchers access only to non-identifying, aggregate statistical information regarding clients. Best practice requires a researcher to sign a confidentiality agreement as well.

Best practice dictates that board members should not have any access to client files or agency records that contain personally identifying information unless the client has signed a release of information authorizing the disclosure or, if for example, the client has sued the shelter and the executive director and the agency attorney have determined that the disclosure is necessary for the agency to defend itself. Board members should also be required to sign confidentiality agreements.²⁹

²⁸ See, e.g. Mich. Comp. Laws Ann. § 423.502 (allowing employees to review files but leaving in place employer ownership of files).

²⁹ N.M. Manual at 16.

Chapter 3. Record Keeping

A. General Record Keeping Considerations

Appropriate record keeping practices benefit both the client and the program. Records are kept for several purposes and in many forms that may be complementary but distinct. These purposes include: the collection of statistics required by funding sources or for program purposes; documentation of the need/eligibility for services; facilitation and documentation of the quality of care and continuity of services; supervision and review of staff performance; and possible protection from liability.

The primary goal of this chapter is to develop confidentiality and record keeping policies that limit third-party access to confidential client data yet provide program staff and directors the information they need.³⁰ To do this, programs must evaluate which information and records are necessary to operate the program and to best serve survivors. For example, staff should maintain enough information in a client's file to verify dates and activities of contact and services, as well as referrals. Generally speaking, *documents and information that are not absolutely necessary for either the survivor or program administration should not be collected.*

B. Record Keeping Cautions

Files kept by domestic violence and sexual assault service provider programs are not generally kept for investigative or evidentiary purposes. But programs must acknowledge the reality that client files can be demanded by court. Programs must also appreciate the scope of a file that goes beyond a physical or paper file. Information about clients may be found in electronic communications, network databases, or other devices and locations with varying degrees of security. When considering the "record," agencies should think about all of these locations.

The most dangerous consequence of keeping records is that they may end up in the wrong hands, especially those of the perpetrator or their attorney. But even if they end up in so-called friendly hands, such as those of the prosecutor in a criminal case against the perpetrator, the survivor's private thoughts and feelings would still be available to someone with whom they were not intended to be shared. In either event, the contents may also be inaccurate, misinterpreted and twisted only to be used against the survivor.

When drafting or updating record keeping policies and practices, programs should carefully balance the benefits of recording certain information against the possible harm that the information could cause the program or the client if that information were released. Well thought out program policies and practices regarding record keeping are essential components of confidentiality policies.

³⁰ N.M. Manual at 13.

C. Components of Record Keeping Policies

Every program should have a written policy on record keeping. The policy should outline some of the following:

- The type of information/documentation that should be part of a client file/record for each program component;
- The types of information/documentation that is not appropriate for a client file or record;
- The individuals authorized to make entries or amendments to the file and process for making those entries or amendments;
- The individuals in the program who have access to the file;
- The designation of a custodian of the records;
- Provisions for file review; and
- Provisions for the maintenance and destruction of files.

D. General Components of a Client File

Information Required by Funding Sources or for Program Purposes

Most funding sources require the tracking of certain information such as units of service, type of service, dates of service, and other statistics. Additionally, programs may track statistical information to raise community awareness locally or to understand their service population when developing programming or outreach goals. If identifying information or a direct link back to the original source is not required by the funding source or for research integrity, such statistical information should be kept separately.

Agency /Administrative Documentation

All agencies should keep documentation that advises clients of their rights and responsibilities as service participants and gives information about relevant program policies. This is not only in keeping with an empowerment philosophy of providing the client with as much information as possible but may also provide the program with some protection from liability. This documentation is usually more extensive for programs providing shelter to clients. Agency administrative forms may include: release for obtaining emergency medical care; emergency contact information; acknowledgement of voluntary participation in services; acknowledgement of receipt of program guidelines; waivers to release the program of responsibility for lost or stolen property and/or injury to client or children; releases of information; and acknowledgement of receipt of program policies such as program confidentiality policy.

Documentation to Determine Eligibility for Services

Information should be gathered at the initial contact in order to determine if there is a basis for initiating services and to identify immediate needs and safety concerns. While the degree of detail may vary depending on the type of service requested/provided, documentation should include a determination of eligibility for services based on objective, consistent criteria. This not only assures that the program is serving individuals in keeping with its mission, but also may be used to clarify decisions regarding those not served.

Case Notes

Case notes generally include the following types of information: survivor defined goals and reasons for seeking assistance; documentation of advocacy efforts made on the survivors' behalf; and documentation of progress toward those goals or modification of goals. Case notes generally summarize the survivor's progress toward meeting their goals. Case notes should contain enough information to refresh the memory of the counselor working with the client, rather than a detailed or verbatim account of the interaction. Case notes may also be useful in the coordination of services between staff working with the same client (e.g. between case manager and legal advocate).

Notes and observations documented should be objective in nature. Notes of evaluation or opinion should be avoided except for the determination for eligibility of services, required disclosure of information, or under circumstances approved by a counseling supervisor. All case notes should be signed and dated so that their entry can be tracked.

Several audiences should be kept in mind while a counselor is making case notations. These audiences include the client, other program staff who may be working with the client, staff supervisor, funders, and those who may potentially gain access through a subpoena or release. The client should always be considered a primary audience. Counselors should never write anything in case notes that they would not want the client to read.

Documentation Specific to Communal Living Programs

Programs that operate a shelter facility usually keep documentation that is necessary due to the particular requirements of communal living, such as information regarding the clients' compliance with house guidelines or interactions with other residents. Whenever possible, such information should only be kept in a separate log and destroyed when no longer necessary for the purpose for which it was intended. Documentation regarding shelter guideline violations or warnings that are kept in client files could be harmful to clients if those files are released. It may be necessary to keep some information of this nature in the client file, for example to document reasons for asking a client to leave shelter or to determine eligibility to receive shelter services in the future. This type of information should be recorded in a way that is least likely to be harmful to the client if the file were ever released.

Information that Should NOT be Included in Client Files

It is the program's responsibility to ensure that files include the information necessary to provide quality services to the client and to satisfy program requirements. However, unnecessary and potentially harmful information is often included in a client's file out of convenience, habit or inexperience. Therefore, record keeping policies should not only address the information to be recorded but should also specify what information does not belong in the file. Counselors and supervisors should be trained to carefully evaluate file entries for adherence with the program's record keeping policy.

The following are policy considerations for information that should not be included in a client's file:

- Poems, journals, creative writing or any mention thereof should never be a part of a client's file. While a client may want to share these with the counselor, such materials should always be returned to the client. If relevant, the counselor may note that a particular topic was discussed but should not necessarily reference the source. If program files were subpoenaed, the mention of the client's journal could expose the journal to disclosure as well.
- Verbatim statements: These statements can be used to impeach the client. Nothing that specific is ever necessary to the program, unless it is to document the basis for a required disclosure report to Child Protective Services or in a situation involving an individual's intent to harm themselves or others (see chapter 5).
- Evaluative notes reflecting the opinion or judgment of the counselor.
- "Factual" notations regarding client-reported dates, times, and sequence of abuse or other events should be avoided. This type of information should be general (as required for assessment purposes) rather than specific (as would be used for investigative purposes). Specifically, detailed documentation is unnecessary for the program's purposes. In the event of worker inaccuracies or incomplete recall on the part of the client, specific documentation could be used to impeach the client's credibility.
- Papers or other items that a client asks to be kept for safe-keeping including written statements or letters—these should be kept in a place that the client has secured access to.
- Notes, memos, or internal communications from volunteers or other staff regarding client.
- Any identifying reference to another client of the program.
- Information received from sources other than the client. Files, records, or summary of files or records obtained under release from other organizations should not be kept in the file. Such records are kept by the originating program. Such information should be reviewed and then offered to the client or destroyed when no longer necessary. If the information is needed again, the program should execute a new release and obtain a new copy of the information.
- Documents or statements containing legal opinions should not be included in the client's file. This may breach attorney client privilege and may be discoverable through the program's records should they be subpoenaed. Actual court decisions or legal conclusions, Personal Protection Orders, or other documents of public record may be kept in the file.

E. Individuals Authorized to Make Entries into Client Files

Record keeping policies should clearly outline which staff, volunteers or interns have permission to enter information in the client files, and under what circumstances notations may be made. The following recommendations should be considered:

- Required or standard program paperwork can be completed by staff, volunteers, or interns specially trained and assigned such duties.
- Evaluation and determination of eligibility for services should be made and noted only by staff.
- Case notes should be made only by staff member(s) assigned to work with the client or the staff member's supervisor.

It is best practices that most volunteers and interns not be authorized to make entries in client files without close supervision. Counseling notes of student interns should be kept in the

student's supervision file and destroyed when no longer necessary for the purposes of the internship. If student notes or records go to an outside instructor, all identifying client information must be removed. In situations where an intern is the "staff" assigned to provide services, such as a student intern in a master's-level social work program, the intern's case notes should be reviewed and co-signed by the staff member assigned to supervise the intern.

F. Access to Client Files

Record keeping policies should outline who has access to client files. It is recommended that access to files be on a need-to-know basis. This would include a staff person providing direct services, consultation, supervision or a volunteer or intern working under the direction of staff, with permission to access a specific file. To comply with federal confidentiality requirements, funders conducting audits must do so without seeing a client's personal information. To be able to strike this balance, funders may conduct a random review of client files with all personally identifying or potentially identifying information redacted.³¹

Agency policy should allow clients access to their files under reasonable circumstances. Policies often include provisions such as: the file is available during regular business hours, with the counselor who has worked with the client and/or supervisor present while the client reviews the file, and that appropriate waivers are signed before any parts of the file are copied and given to the client.

G. Internal Communication Logs or Memos

Record keeping policies should include protocols for written communications between staff and/or volunteers—including emails and text and other messaging communications. This type of information does not belong in the client's file. Whenever possible, volunteers and staff should verbally communicate essential information regarding clients to the staff person who is assigned to that client. When verbal communication regarding clients is not an option, communications should be made in a memo or shift change form. Shelter logs or other updates should use first names only whenever possible. Volunteers and staff should be trained that these logs need to be factual rather than evaluative and interpretive. Such documentation should be maintained only for the period of time necessary to communicate information, and then be destroyed.

H. Corrections or Changes to Client Files

A well-reasoned record keeping policy, staff training and careful and consistent supervision should reduce the need for staff to make changes to client files. Because service providers are not keeping records for evidentiary purposes, when mistakes are made, or inaccuracies are discovered, record keeping policies should allow for changes to be made. Programs should consider developing policies to allow for file corrections or changes under the following circumstances:

³¹ N.M. Manual at 17.

- Entries that are inconsistent with the program record keeping policy should be corrected or deleted. If the inappropriate documents originated from the client, those documents should be returned to the client.
- Any materials, entries, documentation, or case notes made by someone not authorized to do so should be removed and destroyed.
- A client, after having the opportunity to review their file, should be able to request the deletion or removal of information that they believe to be inaccurate, irrelevant, outdated or incomplete. If the worker/supervisor does not agree, the disagreement should be noted, and the file should remain as is. Any documentation required by funding contract or program policy should remain in the file; however, corrections that are agreed to should be made.

Changes should never be made in response to subpoena or court order for the purpose of avoiding an adverse ruling on behalf of the client. If there is a subpoena, the client should be given the opportunity to review their file. If any corrections are necessary, they should be made only in accordance with the program's already-established policy for making changes in records and only after consultation with the executive director and the program's attorney.

I. Maintenance of Records

Client records should be kept in a locked and secure location. Access to this location should be restricted. Program supervisor(s) should conduct periodic review of files during the course of service. Files should receive a final supervisory review before they are closed. Files should never be removed from the program's premises without the written authorization of the file custodian.

J. Custodian of the Records

A Custodian of the Records should be named by title in the program's confidentiality and/or record keeping policy. The custodian is usually the executive director of the agency or, in a large agency, the program director. The program confidentiality policy should use the title "custodian of the records," rather than specifying the individual's name, whenever this position is referenced. An individual who is designated as the custodian should understand and agree to be ultimately responsible for the program's compliance with record keeping policies, maintenance and security of the records, and responding to subpoenas for records. An alternate position should be named as custodian of the records in the event of a prolonged absence of the designated custodian.

K. Electronic Records/Communications

Electronic records must generally be treated in exactly the same fashion as any writing on paper. Federal grant confidentiality requirements allow grantees to utilize third-party or "cloud" technology to maintain files if it is handled with sufficient precautions.³²

³² OVW FAQ on VAWA Nondisclosure at 10.

L. Destruction of Records

Agency policy should address how and when client files are destroyed. Clients should be informed of this policy. Retaining records indefinitely prolongs potential damage the records may cause long after the client has discontinued services and into a time when the client could be in a very different life situation. However, the program and clients have an interest in retaining records for a certain period of time. When developing policy, agencies should consider the requirements of funding sources, the liability concerns of the program, and continuity of care for clients. Programs should also consider attempting to notify the client before records are destroyed and offer the client the record if it is believed that such contact would not endanger the client's safety or wellbeing.

M. Confidentiality Practices for Minors

Every domestic and sexual violence program should discuss the ethical issues inherent to serving minors. The range of services will vary from one program to another based on capacity and an internal reckoning with the attendant confidentiality, ethical, and liability issues. Programs should consult counsel to determine the level of liability that can be absorbed in offering such services. There is no age limit under Michigan law for a person to be considered a victim of domestic or sexual violence.³³ Parental permission is not required to provide counseling, hotline, advocacy and prevention education services to a minor. It is recommended that where appropriate, services are provided with the knowledge and assistance of the minor victim's non-abusive parent. Advocates should work with the minor to encourage the minor to inform the parent of the situation that brings them to the program and seek the parent's participation and/or support and/or consent. Minors who are at least 14 years old may consent to limited, outpatient, mental health counseling on their own.³⁴

In those instances where the age or circumstances of the victim requesting services calls into question whether to provide services without parental consent, the program should determine whether it is appropriate to seek parental consent before providing services to the minor. Programs should not deny services to minors based solely upon age but need to use clear, articulated criteria for determining if service is appropriate for each recipient.

Minors are entitled to the privilege of confidentiality under the domestic violence and sexual assault counselor privilege.³⁵ Under federal law, both a minor and a parent or guardian must sign any release for records of services provided.³⁶ Neither an abuser of the minor nor the abuser of the other parent of the minor may provide a release on the minor's behalf.³⁷ It follows that in most instances, confidentiality standards followed for service provision of adults

³³ Mich. Comp. Laws § 600.2157a; 400.1501.

³⁴ Mich. Comp. Laws § 330.1707.

³⁵ Mich. Comp. Laws § 600.2157a.

³⁶ 34 U.S.C. § 12291(b)(2).

³⁷ *Id.*

govern wherever possible in service to minors. Unless a minor appears to be a threat to themselves or others, there is a medical emergency, or there are other exigent circumstances, a minor's confidentiality should be guarded. A minor should be involved in any decision to release confidential information, along with their non-abusive parent, if applicable and appropriate under the circumstances.

MCEDSV

Chapter 4. Client-Initiated or Approved Release of Information

A. Policy Philosophy

Agency policies regarding how and when to release information should first focus on the best interest of the client. Policies need to confirm that survivors own their experience and information about their experience. Executing releases carefully and appropriately is essential to the integrity of the program's confidentiality policy. Complete and careful attention to each release of information request not only underscores for staff and volunteers the importance of confidentiality but also reassures clients of the program's commitment to their privacy and ownership of experience. In general, releases of information should be:

- Clear, concise and limited to a specific purpose to be achieved;
- Time limited, i.e., clearly stating the time frame in which release is approved (the shorter the window of time, the better);
- Specific with regard to:
 - with whom the information should be shared;
 - for what purpose;
 - what information may be shared;
- Individually tailored to the needs of a specific client; and
- Thoroughly reviewed with the survivor.

B. Communication with Third Parties

There are times where a client may ask a counselor to talk to a third party on their behalf and convey confidential information. It is understandable that a client may prefer to have the counselor speak to others in other systems for various reasons (such as avoiding having to tell her story one more time, fear of not being believed or being able to convey all relevant information in an appropriate manner, previous bad experiences etc....). Some counselors believe doing this helps the client as well. Despite the best of intentions, this could jeopardize the client's confidentiality. If a counselor shares confidential information either verbally or in writing with a third party, even with a release, the counselor may abrogate the client's privilege in unintended ways.³⁸

C. Sharing Information with Other Domestic Violence/Sexual Assault

Programs

Information cannot be shared with other programs providing services to survivors without a release of information. While some states may allow this under contract there is no Michigan provision that allows this on a formal or informal basis without a release. This includes

³⁸ For example, any information shared with the prosecutor in a case often must be disclosed to the defense. This could potentially open the entire file to the defense, who may argue that the entire file must be reviewed to put the portion released in context.

confirming whether a client has received services from your organization. Routinely disclosing client information or files, even at the client's request, could compromise current and future clients' confidentiality by setting an expectation with other individuals or organizations that access to such information is easily obtained.

D. Before Releasing Information or Client File

Clients sometimes request that their file, parts of their file or information be released to other individuals or organizations. The program confidentiality policy should outline that prior to the release of information, the counselor and the client should explore alternative ways of sharing the information, and the consequence of each option. The following options should always be considered before the counselor discloses information verbally or any part of the program file is released:

- The client could share the information with the other party verbally. This could be accomplished through a phone call or a face-to-face appointment. The counselor could arrange the appointment and perhaps even accompany the client to the appointment. If the counselor accompanies the client, the client should share the information and the counselor should remain silent.
- The client could provide an independent letter, written documentation or form letter that is not part of the program file or record. The counselor may facilitate this by providing a separate form, which should clearly state on its face that it is not part of the program's records or file.

These options are possible ways to safeguard not only the client's confidential relationship with the program, but also the integrity of other clients' confidentiality.

E. Facilitating Informed Decisions by the Client

A client must make a completely informed decision before the program or counselor releases the file or any other information regarding the client's situation. The client should thoroughly review the file or information that is to be released and be given the opportunity to correct inaccurate, incomplete or false information. Agency policy and practices should include a discussion of the pros and cons regarding the release of the information. Factors to be considered in a discussion with the client should include:

- The confidentiality policy, if any, of the individual or program to which the information/file is being released;
- The likelihood that the release would allow the perpetrator easier access to the client's file and/or information from the counselor, including more information than was authorized by the release;
- The possibility that the agency or individual to whom the records are being released may release the records more broadly;
- The reasonable likelihood that the release of information would help the client in achieving the client's goals;
- The reasonable likelihood that the information would be used against the client in

- achieving client's goals; and
- The possibility that information could be provided by the client directly.

F. Releases in Response to Defense Motions

A client may be faced with the decision to release their file in response to a defense motion in a criminal case. In general, these records are protected by statutory privilege. However, a Michigan Supreme Court decision³⁹ which has been codified by Michigan Court Rule 6.201(C)(2) allows for the discovery of privileged information in certain circumstances, discussed in detail in section II of this manual. When a counselor is working with a client who is faced with this situation, the counselor must make sure that the client understands the process.

The court rule sets a high standard for obtaining confidential records in criminal cases; therefore, the prosecutor may be able to argue successfully against the motion. Counsel representing the client in other matters (i.e. divorce, custody, and lawsuits) or legal counsel for the service provider program may work with the prosecutor to defeat the motion, however they do not have standing to represent the survivor in the criminal matter. If the prosecutor is successful and the defense motion is denied, the client will not have to turn over their records and will be allowed to testify.

If the court grants the defense motion, the client will have to decide whether or not to consent to an out-of-court review of the file by the judge (in camera review) to determine which parts of the file, if any, are necessary to the defense. The client has the right to refuse the release of their records at this point. However, not allowing an in camera review when it is ordered will prohibit the client from testifying for the prosecution. Agreeing to allow the judge to review the records does not necessarily mean that the file will be released to the defense. Possible rulings after an in camera review are:

- The judge may determine that the file does not contain evidence necessary to the defense, in which case the file would not be released to the defense.
- The judge may determine that a portion of the file is necessary to the defense. The client would then have to decide whether or not to allow only those portions of the file to be released.
- The judge may determine that the entire file is necessary to the defense. The client would then have to decide whether or not to allow the file to be released.

If, after an in camera review, the court determines that all or part of the file must be released and the client refuses, they will be prohibited from testifying for the prosecution. This does not mean, however, that the case cannot proceed.

G. Client Considerations Regarding the Decision to Release the File

³⁹ *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557 (1994).

A client facing a court order for the release of counseling files will have to carefully consider the legal and emotional ramifications of that decision. The counselor should help the client explore feelings regarding the assailant's possible access to the counseling records. Talking with the client about feelings regarding the judge reading the file is also important. The client should be encouraged to review the file to examine the scope and accuracy of its contents.

The counselor should also make sure that the client has the opportunity to consult with someone who is qualified to discuss the pros and cons of releasing the file to the court from a legal perspective. If there are other cases pending or anticipated, an attorney retained by the client should review the file with the client to give a legal opinion regarding the potential impact of its contents. If conviction of the perpetrator is important to the client, consulting with the prosecutor when making this decision is essential.

If the client decides to comply with the court order to release the records, the programs should still execute a written release of information in keeping with program policy. An order for records to be turned over to the court must be directed to the client rather than the program.

H. Working with the Prosecutor

Programs should work with their prosecutor's office to develop a general policy that all defense motions to gain access to client files will be opposed. Regardless of what is in the records, the prosecutor can often argue that the defense has not met the requirements, as outlined in the court rule, to override the statutory confidentiality privilege. Even if it is believed that there is no information contained in the counseling records that would be useful to the defense or damaging to the case, the client may feel that being forced to release the record is a further form of harassment and violation. In cases where the victim is not particularly opposed to the records being released to the judge, the motion should still be opposed because of the possible implications this may have on future cases. Arguing against the release of the records will put the defense bar on notice that these motions are not automatically granted. In addition, it may serve to educate the court and possibly protect future clients facing such motions. If in a particular case the prosecutor and the client agree that it would be beneficial for the prosecutor to have access to the file (thereby giving de facto access to the defense), the victim may initiate such release rather than allowing it to be originated by the assailant or ordered by the court.

I. Client Requests for Counselors to Provide Testimony

A client (or counsel representing a client) may request that the counselor who worked with the client provide testimony or affidavit on behalf of the client in a criminal case or civil action.⁴⁰

⁴⁰ In this section the witness is a person who has actually worked with the client and has access to the client's file and other information. While this counselor has expertise on the client, it is different than providing expert witness testimony on the nature and prevalence of domestic violence or sexual assault. A counselor should never be chosen to provide general expert testimony on the nature and prevalence

While this may be very helpful in some cases, the possible ramifications should be carefully considered before making such a decision. Possible concerns include:

- Providing any testimony in open court, or providing an affidavit or deposition, may jeopardize the confidentiality of the entire counselor/client relationship including making the entire client file admissible. While the prosecutor or attorney representing the survivor may not ask for this information, under cross-examination, the file may be used to question the counselor's credibility, opinion, or objectivity.
- The mere inclusion of the counselor on the potential witness list may open the file to discovery especially in a criminal case where it could be argued that the file is necessary for the defense to prepare for the cross examination of that witness.

Nonetheless, after careful consideration there may be some cases in which it is determined that the testimony of the counselor would be beneficial to the client. Program policy should address how decisions are made in each individual case as to whether or not a counselor will provide testimony. Program policy and practice should ensure that the following considerations are made:

- Consideration of the client's wishes;
- Assessment of whether or not the client is making a fully informed decision;
- The likelihood that the testimony will help rather than hurt the client;
- Ramifications to the program and the program's position in the community;
- The counselor's comfort level and ability to testify; and
- Supervisor consultation and approval of the decision.

Blanket or general releases to consult with individuals outside the program and other agencies should never be executed. Releases of information should be as narrow and specific as possible.

J. Executing a Written Release of Information

When the client makes the decision to release any portion of the file, or allow information about their situation to be communicated, a release of information should be executed. Program policy regarding the release should require that the release be in writing and signed and dated by the client and counselor/advocate or designated person. The client should be informed at the time the release is signed that it can be revoked at any time. Once information is released to another person or program the agency will not be able to retrieve it, but revocation will prohibit the agency from further release of the identified information and release of additional information. Standard components of the written release of information include:

- The name of the individual or organization to whom the information will be released;
- Beginning and ending dates indicating the time period for which the release is effective;
- The scope and nature of the information to be released;
- The purpose for which the information is released;

of domestic violence in a case involving one of their clients.

- The means by which the information will be transmitted (verbally, writing, hand delivered, etc.); and
- A place for the client and counselor/advocate or designated person to sign and date the release.

It is important that every release be tailored to the specific client, situation and information to be released. Many agencies use standard forms to execute releases. If such forms are used they should allow the counselor space to be detailed and specific.

K. Emergency Verbal Release of Information

When drafting confidentiality policies, agencies should carefully consider the option of allowing emergency verbal releases of information. Only under the rarest of circumstances should a client be able to authorize a release of information by phone or means of communication that doesn't allow the client to read over and sign the release. Programs whose confidentiality policies include this type of release as an option should also include the following safeguards in their policy:

- The counselor, advocate, or designated person who is accepting the verbal release of information should be certain of the identity of the client.
- The "emergency circumstances" necessitating verbal release should be clearly documented.
- The release should be witnessed and signed off on by another staff person.
- The scope of the information to be released should be as narrow as possible.
- The verbal release should be followed up with a written release as soon as possible.

L. Revocation of Release of Information

The client should be able to revoke the release of information at any time. Revocation for releases of information should be in writing whenever possible however, agencies should accept verbal revocation whenever it is offered and then obtain it in writing as well.

M. Release of Information Originating from Another Agency or Individual

A release of information, approved by the client, but initiated by another program or individual should not be considered sufficient to release program files. Program policies should require that the standard internal protocol for release of information be followed. This process is not meant to be more cumbersome for clients; instead it is meant to ensure that the client has the opportunity to review the file and fully understand the potential consequences of releasing the information.

N. Denials of Client Requests for Release of Information

In general, the position advanced in this manual is that survivors own the privilege of whether or not to release the contents of their files. In keeping with empowerment philosophy, it is

important that the counselor's judgment not be substituted for the client's in regard to what is in the client's best interest. Therefore, denying a client's request for release of records should be done only in rare and carefully considered circumstances.

However, just as there are circumstances where the program will disclose information without a release, there may be times when the program resists releasing records even when the client authorized the release. Circumstances may include:

- The program believes that the client has been coerced by the perpetrator;
- The information could be obtained in another manner and the program's interest in the appearance of confidentiality to past, future and current clients could be jeopardized; or
- The program believes that the client has been coerced by representatives of another agency or organization to release the files in the spirit of "cooperation" even if they don't want to do so and it would be contrary to the client's best interest.

Note: Releases under Michigan Court Rule § 6.201(C)(2) should not be denied under this rationale. While an argument could be made that such a release is "coerced," a program should not make a decision that would prohibit the survivor from testifying in a criminal case if they so choose.

Policy regarding the denial of a client's request should specifically outline:

- The individual who can make that decision;
- The circumstances under which such a decision can be made; and
- Procedures for informing the client and thoroughly discussing the reasons along with information on how the client can appeal the decision and access a grievance procedure.

Chapter 5. Program-Initiated Disclosure

A. General Considerations

Clients should be informed at the time services are initially provided that there are some situations under which a program is required to disclose certain information even in the absence of a release. Program policy should specifically list such circumstances and how clients will be informed of this, for example:

- Medical emergencies;
- Threats of harm to client by another actor or self;
- Threats of harm to others; and
- Reports to child protective services.

B. Medical Emergency

Many programs inform clients at the initiation of service that if there is a medical emergency, limited information deemed to be necessary to address the medical situation may be released by the program in order to facilitate medical care. These are usually situations that are determined to be severe or life threatening to the client or the client's children, and the client is not able to communicate essential medical information to medical personnel either because the client has been incapacitated or is unavailable. Emergency medical situations can present confidentiality challenges for staff working in domestic violence shelters and emergency responders. The shared goal of both domestic violence advocates and emergency medical responders is to help survivors/patients through a medical emergency and get them to safety and better health. In such instances, programs should recall that the goal of confidentiality laws and policies is to put survivors in control of their own information.

Accordingly, when survivors enter shelter, program staff should have conversations with survivors about whether they have any health concerns that staff should be aware of, whether survivors want any specific information shared in the case of a medical emergency (such as drug or other allergies), and whether there is a safety plan that could be put into place that would allow the survivor to communicate even if unconscious (such as a medical alert bracelet). Shelter programs should also seek pertinent emergency medical releases of information at intake. Whenever possible, a survivor who is conscious at the time of a 9-1-1 call should be allowed and encouraged to speak with emergency responders themselves. If necessary to communicate on a survivor's behalf, staff should never share any information beyond what is necessary to assist health care providers and if possible, should avoid providing identifying information (for example, staff might state that a survivor "appears to be in their thirties" rather than the survivor's birthdate).

To avoid strained relations with emergency responders, programs should consider developing relationships with such agencies before there is an emergency so that responding agencies are aware of confidentiality requirements and will not be surprised or consider a program unhelpful.

C. Threats of Harm to the Client

Many program confidentiality policies include provisions to make reports to law enforcement and/or others when they believe a client's safety or welfare is in serious and imminent danger. Disclosure of confidential information under such circumstances should be limited only to information deemed necessary to safeguard the client and/or the client's children. In many policies such information includes identifying information about the client, the suspected nature of the imminent harm and the basis for such conclusion. Policies that allow for this type of disclosure should specify who in the program is authorized to make such decisions and what type of supervisory review is required.

Another common exception delineated in many confidentiality policies is to allow release of information when a client makes credible threats of suicide or serious harm to self.⁴¹ The policy should specify who can make such determinations and how the determinations are made. Provisions should be made for careful and thorough client assessment in these situations before confidential information is disclosed. If, after such assessment, the determination is made that it is necessary to release confidential information, the information released should be limited to only that which is necessary to safeguard the client's well-being and to provide necessary treatment.

D. Credible Threat of Harm to Others

Statutes pertaining to the duty to warn a third party about a credible threat of harm are different for various professions that have statutory confidentiality privileges with their clients.⁴² In addition, various professional organizations have issued guidelines regarding duty to warn. In Michigan, the statutory duty to warn that would most likely apply to domestic violence or sexual assault service provider programs would be the social worker confidentiality statute.⁴³ The social worker duty to warn imposes "a duty to disclose a communication or portions of a communication made by a client who is a recipient of mental health care and makes a threat of physical violence against a reasonably identifiable third person and the patient/client has the apparent intent and ability to carry out the threat in the foreseeable future."⁴⁴

It is not clear whether or not domestic violence or sexual assault programs or workers who are not specifically covered by this statute have an affirmative duty to warn. Programs should consult an attorney regarding their duty to warn and possible liabilities that could result if they do not warn when a credible threat has been made. Program policies should address how to handle situations when a survivor makes a credible threat of harm to another individual.

⁴¹ Depending on the professional credentials or affiliations of your agency or a particular staff member, a report under these circumstances may be mandatory.

⁴² See, e.g., Mich. Comp. Laws § 330.1946 (imposing a duty to warn on some medical professionals).

⁴³ Mich. Comp. Laws § 330.1946.

⁴⁴ *Id.*

Policies should likely require disclosure of confidential information deemed necessary to prevent such action when (a) an explicit threat of imminent serious physical harm or death to a clearly identified or identifiable victim or victims has been made; (2) the survivor has the apparent intent and ability to carry out the threat; (3) the counselor determines that the client has not been dissuaded from taking such action; **and** (4) there is a substantial likelihood that the client will act upon the threat (note that all four requirements must be met).⁴⁵ If at all possible, a warning should be made without disclosing personally identifying information about the survivor. Parties to be notified often include appropriate law enforcement, the intended victim, or another person who may be able to notify the intended victim of imminent danger. If a warning is made, the client should be informed. Policies that allow for this type of disclosure should specify who in the program is authorized to make such decisions and what type of supervisory review is required.

E. Reports to Child Protective Services

Most workers in DV/SA programs fall under the mandated child abuse and neglect reporting statute.⁴⁶ Mandated reporters include psychologists, marriage and family therapists, licensed professional counselors, certified social workers, social workers, social work technicians, school administrators, school counselors or teachers, law enforcement officers, or regulated child care providers.⁴⁷ Reports made by domestic violence or sexual assault program staff to comply with mandatory reporting laws are expressly permitted under state and federal law.⁴⁸

In general, a program's child protective reporting policies should include the circumstances under which a report should be made. Careful consideration should be given to determine whether the specific circumstance falls under the definition of child abuse and neglect outlined in section two of the Child Protection Law.⁴⁹ This definition delineates what types of harm and relationship between the child and perpetrator require/allow such reporting. Not all "harm" to a child will meet this definition, and all people possess implicit biases that can be easily triggered in circumstances involving parenting and child care. Providing survivor-centered, intersectional services demands that we challenge those biases.

To avoid strained relationships with child protective services, programs should work in advance on a policy level with child protective services to determine what the law actually requires be disclosed and educate child protective services to expect only that amount of disclosure and then no more.

⁴⁵ See Arizona Coalition to End Domestic Violence, *Confidentiality FAQ*, 13 (June 2014) available at <http://www.azcadv.org/azcadv2014wp/wp-content/uploads/2014/06/Confidentiality-FAQ-6-2014-final.pdf>.

⁴⁶ Mich. Comp. Laws § 722.623(c). Notable exceptions would be volunteers or student interns and attorneys who are on staff with regard to privileged or confidential communications, see Mich. Comp. Laws § 722.631.

⁴⁷ Mich. Comp. Laws § 722.623.

⁴⁸ Mich. Comp. Laws § (1)(c); Mich. Comp. Laws § 600.2157a(2); 34 U.S.C. 12291(b)(2)(E).

⁴⁹ See Mich. Comp. Laws § 722.622.

Michigan law does not require a worker to report or communicate confidential information to child protective service personnel investigating a report initiated by another source, unless the worker independently has reasonable cause to suspect child abuse or neglect. However, if the worker subsequently has reason to believe that there has been child abuse or neglect, then a report must be made if the worker is mandated to report by law.

Individuals authorized to Make Oral or Written Reports on Behalf of the Program

For the protection of the program this should be clearly defined: To satisfy liability concerns and in keeping with the policy recommendations that only staff should be allowed to enter information into client files, only staff should be allowed to make child protection reports on behalf of the program. In addition, limiting program reporting to staff promotes greater accountability to assure that the statutorily required reporting timelines are followed. Policies should further require that before reports are made, a supervisor must give consultation and review—but consulting with a supervisor alone does not discharge a mandatory reporter's duty unless it is concluded that there is no reasonable cause to suspect child abuse or neglect. Supervisor review is critical for staff who are not mandated reporters by law. Only "employees" of agencies can be considered mandatory reporters, and accordingly federal law precludes disclosure of client information by non-employees.⁵⁰

Communication of Volunteers' Concerns Regarding Child Abuse and Neglect to Appropriate Staff

In keeping with policy that volunteers and interns not be allowed to make official notations in records, such reports should be made orally to appropriate staff as delineated in program's volunteer policy. Such policy should cover circumstances for conveying information in a timely manner especially when volunteers are working autonomously without the direct supervision of staff, e.g., overnight coverage, on-call volunteers, etc.

Scope of Information to Be Reported

The Child Protection Law requires specific information to be reported if known and available. If certain required information is not known or available at the time of the report, but later becomes known or available, a follow-up report should be made. However, a program does not have the duty to complete an investigation or go to extensive lengths to discover information to complete a report. Subsequent discovery of additional instances of abuse or neglect should be reported.

Documenting the Report

Programs should keep documentation proving that such reports were made and a copy of the report in one place, not in separate client files. A client file may include an annotation simply stating that a report was made and the date and time.

⁵⁰ See 34 U.S.C. 12291(b)(2)(E) (allowing disclosure only where the state statute compels it); and MCL 722.623(c) (making an "employee" of an organization ordinarily precluded by federal statute from making disclosures a mandatory reporter in the same manner as other mandatory reporters).

Care should be taken not to disclose confidential client information that is not directly related to the circumstances of the child abuse or neglect or is not necessary for the safety or protection of the child. It is possible that providing more detailed information than that which is required, absent a court order, may potentially expose the worker or program to a civil action for breach of confidentiality and would violate federal funding rules. Programs should decide on a case-by-case basis whether or not to resist court orders seeking information that the program does not believe to be required by the Child Protection Law.

When the Client is Not the Suspected Perpetrator

In many cases of suspected child abuse or neglect disclosed to or discovered by the program, the identified perpetrator is someone other than the client. Where the client is willing to make the report, they should be given the opportunity and ability to do so. Many programs believe that they have complied with reporting requirements if they witness or assist the client making such an oral report, followed up by a written staff report to file. If the client declines to make the oral report themselves, they should be informed that the report will be made by the worker (unless the worker determines that giving the client such information before making the report will jeopardize the child).

When the Client is the Suspected Perpetrator

A report should be made in accordance with program policy and applicable statute and in a manner that is likely to afford the child the greatest degree of safety possible. The client should be given prior notification that a report will be made only if it is determined that providing such notification will not risk the safety of the child. If it is determined that it is not safe to notify the client before the report is made, the client should be notified of the program's actions at the earliest appropriate time.

It must be clear that the program's first duty is the protection of the child. However, this does not negate the program's duty or obligation to protect the confidentiality, interests, rights or safety of the client as long as they do not conflict with the protection of the child. Furthermore, the program should advocate for the client in other areas or assist them in complying with requirements to retain/regain custody of their children if the program believes that such action will not put the children at risk.

After the Report

After the report is made, a release of information or a court order is generally required for ongoing communication with child protective services personnel for follow-up conversations during the investigation. In the scenario where child protective services personnel want to come to the shelter to investigate an abuse or neglect report, the shelter may not disclose the presence or absence of the child or the survivor but should talk to the parent about speaking to investigators themselves.⁵¹ DV/SA programs should meet with their local governmental

⁵¹ This is because VAWA, VOCA, and FVPSA confidentiality require that no personally identifying information be disclosed. E.g. 34 U.S.C. 12291(b)(2). Specifically, programs may not "disclose, reveal, or

agencies regarding these confidentiality requirements in advance of any crisis situation to avoid strained relationships. Agency staff may be presented with subpoenas or warrants associated with child welfare investigations and cases that should be handled in the same manner in which other types of subpoenas and warrants are managed.⁵²

F. Knowledge of Criminal Acts Committed by a Client

Domestic violence and sexual assault can happen to anyone. The mission of most agencies is to provide services to all survivors. A guiding principle of this work is that no one, regardless of other life circumstances, deserves or should be blamed for the violence perpetrated against her or him. Programs should expect that they will receive requests for services from survivors who have committed crimes in the past. Some of these individuals may have criminal investigations pending at the time they request or are engaged in services. The survivor may or may not disclose this information to the counselor.

In some cases, the criminal matter may be completely unrelated to the reasons why the individual is seeking assistance. In many cases, the unresolved criminal case is related to the domestic or sexual violence. Often clients will be asking for assistance or advocacy to deal with this matter, as they would other advocacy needs. In domestic violence cases in particular, it is well documented that batterers often falsely accuse the victim of crimes and use the criminal

release any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees' and subgrantees' programs, regardless of whether the information has been encoded, encrypted, hashed, or otherwise protected." The only exceptions are as follows: by statute or court mandate. 34 U.S.C. 12291(b)(2)(C) AND "Nothing in this section prohibits a grantee or subgrantee from reporting suspected abuse or neglect, as those terms are defined and specifically mandated by the State or tribe involved." 3. Mich. Comp. Laws § 722.623(1)(a) is Michigan's mandatory reporting law, which requires that a person who is a mandatory reporter make an oral and written report. It also says that "Any employee of an organization or entity that, as a result of federal funding statutes, regulations, or contracts, would be prohibited from reporting in the absence of a state mandate or court order. A person required to report under this subdivision shall report in the same manner as required under subdivision (a)."

⁵² For instance, a child protective services worker may present an order issued by the Family Division of the Circuit Court. This will generally not be issued to the agency, but rather to the survivor. The Child Protective Services Manual advises workers to obtain an order from the Family Division: "If there is evidence and/or allegations that indicate imminent risk of harm to the child, and the whereabouts of a child cannot be verified and/or the parent or legal guardian refuses to cooperate, the worker must . . . Petition the Family Division of Circuit Court to take temporary jurisdiction of the child and order the parent or legal guardian to make the child available for an interview by CPS." PSM 713-08 Special Investigative Situations page 7-8 February 1, 2017. This would be considered a court order, but the agency should consult with an attorney to consider whether a protective order is appropriate and should notify the survivor before turning over any materials or engaging in testimony. An administrative subpoena for testimony or production of records. This would come about in connection with a request to expunge an individual's name from the state registry. 717-3 Administrative Hearing Procedures December 1, 2016. Manuals available at:

<http://www.mfia.state.mi.us/OLMWeb/ex/PS/Mobile/PSM/PSM%20Mobile.pdf>.

justice system as tools of their abuse. In other situations, victims have been compelled or threatened into participating in criminal activity by their assailants.⁵³ These considerations must be kept at the forefront in this complex area of confidentiality policy development.

In general, confidentiality statutes don't authorize the disclosure of suspected prior criminal acts.⁵⁴ An individual's presence on the program's premises or status as a client also may be protected information, even if the individual is wanted by law enforcement. While assisting a client with the intent of avoiding arrest or detection may lead to obstruction of justice charges, providing services, in keeping with the program's mission, purpose and philosophy, (such as counseling, legal advocacy and even shelter), to a client who is suspected or charged with committing a crime is not, in and of itself, against the law. A program should clearly inform all clients that the program's confidentiality policies would not protect them if a search or arrest warrant were executed on the program's premises.

Under rare, extenuating circumstances, a program may determine that an individual, because of a history of prior criminal acts or for other reasons, poses a threat to the program, staff or other clients. Under such circumstances a program may deny some or all services to that individual, although efforts should be made to obtain assistance for the individual through other means. Denial of services to a survivor under such circumstances, however, does not require the program to breach confidentiality by notifying law enforcement. Privilege statutes that may apply to program staff may in fact prohibit such a report.⁵⁵

In the situation where a client is suspected/accused of committing a crime against the program, program personnel or another client, a police report may be made. Such an occurrence is not "communication" ³⁵ from the client and therefore is not specifically protected. However, care must be taken not to divulge information other than what is necessary and relevant to the report. Details of their case history and all other information that is considered confidential must be protected.

In cases where a program has reason to believe a client is going to commit a crime that would harm another individual, the program may have a duty to warn (see above).

G. Release of Information After Client Death

Michigan law makes no reference to the confidentiality of communication or records between a client and a domestic violence or sexual assault counselor after the client's death. Other Michigan statutes regarding such privileged counseling relationships are also silent, but most

⁵³ See, e.g., Beth E. Richie, *Compelled to Crime: The Gender Entrapment of Battered Black Women* (Routledge 1995).

⁵⁴ The major exception being child abuse or neglect, Mich. Comp. Laws § 722.623.

⁵⁵ See *infra* section II.

privileges continue after a client's death, with the privilege passing to the decedent's heirs.⁵⁶

However, a court in certain cases may decide to compel disclosure of confidential information based on a claim that the interest of the decedent and the party seeking disclosure are congruent or in a case where a defendant shows information in the record to be necessary for their defense.

There are times after the death of a client when the program may decide that there is a need to release information that has been conveyed through confidential communications or contained in files. The authority to take such action may rest on the determination that disclosure is in keeping with the interests of the deceased client, is necessary for the protection of the community as a whole or is necessary for the protection of the program. However, this type of action should be balanced with the need of the program to zealously guard confidentiality in most other circumstances. It must not appear to survivors, legal system personnel, or the community that the program in any way abrogates privilege to satisfy its own sense of justice.

Therefore, the program should carefully develop policies to determine whether and how to release information after a client's death. Policy should reflect this decision is made on an individual case-by-case basis rather than a blanket statement that privilege is terminated after a client's death. Individual case considerations should include:

- If disclosure would serve the interests of the deceased client;
- Whether or not disclosure of the information is necessary to protect the interest or safety of specific parties (i.e. children, parents);
- How disclosure would affect the interests of justice and the protection of the community as a whole;
- Whether permission or support of an executor or personal representative of the estate can be obtained; and

If information has been formally requested by the prosecutor or an attorney representing the victim's interests through a motion.

⁵⁶ See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding the attorney-client privilege survives the death of the client, observing that the only possible exception would be where a defendant's due process concerns may be at stake).

Chapter 6. Subpoenas, Writs and Warrants

A. Policy Development

It is imperative that programs develop written policy and protocol regarding their response to warrants, writs and subpoenas before being faced with such a situation. Program board, staff, and volunteers must be thoroughly trained on such policy and procedures immediately upon involvement with the program. While decisions on how to ultimately respond in a particular case may vary depending on the circumstances, the procedure followed by those associated with the program in initially responding to the warrant or subpoena must be consistent.

Given the complexity of this topic, this manual will only address the issues of subpoenas, writs and warrants in broad terms to allow programs to become familiar with general issues that should be covered in their policies. Such policy and protocol must be developed in consultation with an attorney who has expertise in this area of criminal law, understands confidentiality issues, has been retained specifically to protect the program's interest, and is familiar with local law enforcement practice issues.

B. Subpoenas

A subpoena is an order directing an individual to appear in court as a witness and/or to produce records or physical evidence in a court proceeding. The court, prosecutor, or an attorney for a party in criminal or civil case may issue a subpoena.

C. Subpoenas of Person

Programs may receive subpoenas for a staff person, volunteer, board member, client or former client. Subpoenas of a person must be given directly to the person named. If a process server or another individual attempts to serve program staff with a subpoena for a client (or other program staff), responding staff should not confirm or deny the knowledge of any such individual, and must not accept the subpoena. If, however, the server leaves the subpoena, staff should call the appropriate supervisor and the program attorney to decide how to proceed.

D. Subpoena of Records or Property (*Duces Tecum*)

Subpoenas of records or program property can be served on any officer of the program, member of the Board, or Board Designees, but they must name the proper "custodian of records." A custodian of the records is a person designated by the program who is responsible for maintaining control over the records and has the sole authority to bring records to court in response to a subpoena. Programs should be aware that the custodian of the records faces the possibility of contempt of court for refusing to comply with the subpoena.

Subpoenas for records or property are only effective when personally served on the custodian

of the records or the person having possession, custody, or control of the property to be produced. If an attempt is made to serve a program with a subpoena *duces tecum* and the responding staff person is not the custodian of records or person named on the subpoena, the staff person should state that they are not authorized to accept subpoenas and refuse to accept it. The responding staff person does not have to disclose the name of the custodian of the records, even if asked. If, however, the subpoena is left anyway, the appropriate supervisor should be notified and the program attorney should be contacted to decide how to proceed.

A subpoena *duces tecum* to a client or another person who is not the custodian of records is not effective because that person doesn't have control of the file. However, this does not excuse the individual subpoenaed from appearing in court to state that they do not have such control. The individual may then be asked by the court to name the custodian and may be held in contempt if they know and do not do so. The court can reissue the subpoena with the custodian properly named and the program will then have to decide how to respond.

E. Responding to Subpoenas

Subpoenas should never be ignored, and even if a subpoena is only signed by an attorney, it is given the effect of a court order, so the program must be prepared to respond or seek another court order excusing its response. Policy regarding the program's response to subpoenas should include who is authorized to accept subpoenas (only the designated custodian of records or the person specifically named), procedures for contacting the program attorney and procedures for notification of the survivor regarding the subpoena. If the subpoena is directed toward a current, former, or potential client, no confirmation or denial of the program's knowledge of the individual as a client should be disclosed. The subpoena should not be accepted.

However, programs should never ignore a subpoena even if they believe that it was not properly served, time requirements were ignored, or it is defective in some other way. The appropriate supervisor and the program attorney should always be notified when a subpoena is received, as well as the client to whom the request applies and their attorney.⁵⁷

While a subpoena should never be ignored, agencies may resist compliance through a Motion to Quash or Set Aside the subpoena or a Motion for a Protective Order for the records requested. In some cases, releasing records in response to a subpoena without asserting statutory privilege and attempting to resist in court may open the program to civil liability for breach of confidentiality. The decision of how to respond to a subpoena should always involve the client, the program attorney, and appropriate supervisors. In some cases it may also be appropriate to involve the attorney representing the survivor.

⁵⁷ It often occurs that a subpoena is addressed to or pertains to information involving someone no longer involved with the program, such as a former staff member, or a person who never received services. In such instances, the agency may make a best effort to locate the individual to whom the records pertain to let them know about the subpoena and an analysis should be done regarding how best to respond. Again, a subpoena should not be ignored.

F. Search Warrants

A search warrant is a written order issued by a judge or magistrate directed to a law enforcement officer. It allows the search of a named premises and grants authority to seize specified materials believed to be evidence of guilt in a criminal case, regardless of consent of the person who owns or has control of the premises or property. A search warrant may also allow an officer to search for a named person and take that person into custody if found. By law, a valid search warrant must specifically name the premises to be searched (address and description), the property or materials allowed to be seized, and be dated and signed by the judge or magistrate. There must also be an affidavit (sworn statement) outlining the facts that support the issuance of the warrant. This is often referred to as the affidavit of probable cause. Areas searched and property seized should only be those named in the warrant; however, if the police come across additional “evidence” or illegal material that is in plain sight, it may be taken.

Prior to executing a search warrant the police officer must knock, state their name and purpose and present the occupant with a copy of the warrant, including the affidavit of probable cause. However, police may not comply with this particular requirement if they believe “exigent circumstances” exist. Exigent circumstances may include a belief that evidence is being destroyed or a person subject to the warrant is fleeing.

G. Arrest Warrant or Writs

An arrest warrant or writ is a written order issued by a judge or magistrate directed to a law enforcement officer. It allows the officer to take into custody the person named in the order. That person will then be brought before the issuing judge.

A person who is subject to an arrest warrant or writ of habeas corpus may be taken into custody at any time. If a person subject to a warrant or writ is in a place that enjoys constitutional protection from search (e.g. private property), the police are generally required to obtain a search warrant to enter the property and search for the person to be arrested. Some circumstances, such as the presence of an individual whom the officer reasonably believes committed a felony or an exigent circumstance (e.g., someone is running away or destroying evidence) give officers legal authority to enter without a warrant even if they are denied admittance.⁵⁸

H. Responding to Warrants and Writs

With warrants and writs, there is generally not an opportunity to object to the judge prior to execution of the order. Programs should consider informing local law enforcement of their policy in regard to warrants and writs. Prior knowledge of your program’s policy may reduce conflict if it is understood that the program’s response is in keeping with established procedure rather than a reaction to the specific case. If the police trust the program to be truthful in this

⁵⁸ See, e.g., MCL 764.15, Mich Comp. Laws 764.21.

regard, such policy may prevent a search that would upset and violate the confidentiality of clients, or may be unnecessary if the materials or person being sought are not present.

Programs should recall that abusers are sometimes willing to go so far as to impersonate an officer in order to reach their targets, and so it is always crucial to ask the officer for identification before proceeding. Program staff should ascertain what agency the officer represents and whether or not they possess a warrant or writ, or whether they believe that exigent circumstances exist to allow them to enter the program anyway. Next, program staff should ask that they be allowed to contact their supervisor and that the officers please wait in the car until they are able to do so.

Program staff must make it clear that, due to federal law that imposes confidentiality requirements, they may neither confirm nor deny any personally identifying information about a client or anyone who may or may not have sought services. Accordingly, absent a valid warrant to enter the premises, federal confidentiality requirements prevail.

Sometimes shelter staff have heard or are told that they could be charged with obstructing justice or harboring a fugitive by following these confidentiality guidelines, and so a brief discussion of that law is worth explaining here. Under general common law, both “obstructing justice” and becoming an “accessory after the fact” (i.e., assisting a criminal after the crime has been committed) are criminal offenses.⁵⁹ These offenses have also been codified into Michigan statutes.⁶⁰ Obstructing justice includes a knowing failure to obey a lawful command or the use of force or physical action to interfere with an activity that the individual knows is a lawful duty.⁶¹ In other words, shelter staff who merely state that they cannot confirm or deny the presence or details about a particular individual without a valid court order do not obstruct justice. Further, both the statute and common law offenses having to do with harboring a criminal are crimes that require a specific intent to conceal from law enforcement detection.⁶² This means that giving a person with a criminal history who is also a victim supplies or a place to live does not amount to harboring or serving as an accessory after the fact unless the helper is doing so to assist the criminal in evading justice. For example, courts have found that a person was not harboring because they argued with police over who was really guilty of the crime⁶³ or because they shared a home with an undocumented immigrant who was their

⁵⁹ *People v. Jenkins*, 244 Mich. App. 1, 624 N.W.2d 457 (2000) (holding that one who “agrees, understands, plans, designs, or schemes to commit acts that obstructed or were intended to obstruct administration of law engages in conspiracy to commit obstruction of justice”); *People v. Croushore*, 159 Mich. App. 304, 305, 406 N.W.2d 280 (1987) (holding statutory adoption of harboring a felon did not do away with the common law requirements).

⁶⁰ Mich. Comp. Laws § 750.81d; Mich. Comp. Laws § 750.199.

⁶¹ Mich. Comp. Laws § 750.81d(7)(a).

⁶² See Mich. Comp. Laws § 750.199 (prohibiting concealing someone *with the purpose* of hiding them from police; see also *Bourgeois v. Strawn*, 501 F.Supp.2d 978 (E.D. Mich. 2007) (holding that a man who confirmed to police that his cousin was in the home and ultimately asked him to come out did not engage in harboring merely by telling police that he believed they had the wrong suspect)).

⁶³ *Bourgeois*, 501 F.Supp.2d 978.

romantic partner.⁶⁴ Offering shelter to someone on account of their victimization without knowledge of a person's intent to evade police detection does not rise to harboring. Having this knowledge can assist staff in feeling empowered to follow the law and remain calm in tense situations.

Regardless, under **no circumstances** should shelter staff ever physically obstruct officers from entering a program. Attempting to deny access to a law enforcement officer with a warrant or writ is rarely successful. If staff tries to physically interfere with the execution of a warrant or writ—or even gestures in a manner suggesting they will block the door—they could be arrested and charged with obstruction of justice.⁶⁵ The warrant will be executed or the search will be conducted anyway. Programs should clearly and unequivocally state that they do not consent to any warrantless search at the scene and make careful note of how the warrant is executed. Before cleaning up after a search has ended, programs should video or photograph the areas searched. The validity of the warrant or defects in how the warrant was executed can later be challenged in court.

If the police appear with a search warrant, program policy should direct staff to contact designated supervisory staff and the program attorney immediately. If the program has a generally cooperative relationship with law enforcement, the officer may agree to delay the execution of the warrant until the program attorney and/or supervisory staff arrive to examine it. However, if exigent circumstances exist, the police may enter immediately.

If the police appear with an arrest warrant or writ of habeas corpus they will also generally need a search warrant to enter the premises. In the absence of a search warrant, a law enforcement officer does not generally have the authority to enter a program's premises to effectuate an arrest warrant or writ. Program policy in these instances should include instructing the staff person to neither confirm nor deny the client's presence, immediately contact appropriate supervisory staff, and notify the program's attorney. If the person being sought is known to the program, that person should be notified of the existence of the warrant and should be advised to seek legal counsel to assist in taking care of the matter.

In most cases, an officer appearing at a program with an arrest warrant or writ will also have a search warrant. The program is still entitled to review and inspect the documentation (absent exigent circumstances). If the program believes, after consultation with their attorney, that the orders are proper, it may consider having the named individual come to the door, rather than allowing the police to search. This may be the preferred course of action because an actual search may upset other clients, jeopardize their confidentiality and result in the police having access to individuals and materials that would otherwise be private.

⁶⁴*United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012) (finding defendant did not harbor her boyfriend who was from Mexico and had a deportation order because there was no evidence that defendant concealed her boyfriend or shielded him from detection, and she was not trying to encourage or protect or secrete illegal aliens).

⁶⁵*Brooks v. Rothe*, 577 F.3d 701 (6th Cir. 2009).

If the person named in the arrest warrant is not present and the police have a search warrant, the program should consider adopting a policy to tell the police that the person is not there (without adding any further detail). This policy would be a marked exception for programs that otherwise strictly refuse to confirm or deny knowledge of the presence of actual or potential clients. It is offered for consideration only in this limited circumstance because resistance would not result in preserving confidentiality. Such disclosure may allow the program to avoid an unnecessary search that may be upsetting to other residents. While the program may not legally conceal the whereabouts of a wanted person for the purpose of avoiding arrest or detection, there is no duty to volunteer information to the police regarding the client's whereabouts, even if known. Again, if the person being sought is known to the program, that person should be notified of the warrant's existence and should be advised to seek legal counsel for assistance in taking care of the matter.

Section II

Legal Discussion and Interpretation of Relevant Statutes and Case Law

Providers, survivors, and consumers, interact with many different professionals who may gain access to a large volume of information regarding the victim and their children. This information many times is protected from being disclosed by laws concerning confidentiality and privilege. In some instances, these same laws govern what information providers may share with our colleagues in the criminal justice system. Moreover, for survivors work through the different legal aspects of their situation, a variety of statutes, whether criminal or civil, come into play. This, too, may determine whether it is legal or ethical to release certain information about a survivor. It is critical that every service provider agency has a written policy on confidentiality and record keeping; and, it is equally important that every staff member receive training on their program's policy.

To assist you in developing your own agency policy, the following chapters are a discussion of some of the applicable laws regarding confidentiality and court opinions interpreting those laws. This manual is to serve as only a guide for you as you develop your own policy. For a definitive legal opinion in a given area, you should seek the advice of legal counsel. Also, keep in mind that the law is continually evolving. This manual is current as of the date of publication but you will want to review a specific statute for amendments prior to adopting a policy based on the law.

Chapter 7. Confidentiality Basics

A. Confidentiality v. Privilege

Communication is defined as “the interchange of messages or ideas by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception.”⁶⁶ A “confidential relationship” is defined as one that is characterized by trust and a willingness to impart secrets to the other. Thus, if a statement is made in the presence of a third party whose presence is not reasonably necessary for the communication, confidentiality is waived and the communication is not privileged.⁶⁷ A “privileged communication,” is defined as “A communication that is protected by law from compelled disclosure in a legal proceeding or that cannot be used against the person who made it.”⁶⁸ Hence, whether a “confidential communication” is “privileged” depends on (1) the relationship between the parties and (2) the circumstances under which the communication is made.

Evidentiary privileges are legal rules that govern the disclosure or admissibility of evidence in judicial proceedings or other proceedings. This is in contrast to client confidentiality, which is based on ethical guidelines of professions such as physicians, attorneys, and other professionals. Client confidentiality may apply in all situations.

The concept of evidentiary privileges evolved from the objective of fostering and protecting certain relationships valued by society.⁶⁹ The marital privilege, doctor-patient, clergy-penitent and attorney-client are a few of the best-known privileges. In Michigan, a communication is not privileged unless it falls under one of several privileges that have been created by the legislature or through case law.⁷⁰

Some privileges are labeled “absolute,” which means in theory that the holder cannot be required to disclose the information to anyone for any reason. “[T]he more modern approach sees privileges as one of the ways in which society protects and fosters important relationships

⁶⁶ *Communication*, Black's Law Dictionary (10th ed. 2014).

⁶⁷ *Confidential Relationship*, Black's Law Dictionary (10th ed. 2014); Bruno, *supra*, note 2 (explaining that the presence of victim advocates during attorney-client meetings constitutes a waiver of privilege).

⁶⁸ *Privileged Communication*, Black's Law Dictionary (10th ed. 2014).

⁶⁹ See John Henry Wigmore, *Evidence in Trials at Common Law* 2285 (John T. McNaughten rev ed., 1961) (Wigmore's four conditions for establishing the creation of a privilege are:

The communication must originate in confidence that it will not be disclosed; The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; The relationship must be one which, in the opinion of the community, ought to be sedulously fostered; and The injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation).

⁷⁰ Mich. R. Evid. 501.

that involve private communications.”⁷¹ There are two other degrees of protection: “semi-absolute” privilege, where disclosure may be permitted under specified circumstances when public interest is served and “qualified” privilege, where disclosure is permitted when certain criteria are met or a balancing test has been used.⁷² Although the wording used by the Michigan legislature when enacting the sexual assault counselor-client privilege indicates that absolute privilege is intended, the state courts have qualified the privilege; thus, Michigan’s approach is one of “semi-absolute” privilege.⁷³

Privilege has a significant consequence; its very purpose “necessarily excludes relevant and non-prejudicial information from the trial process.”⁷⁴ Because the integrity of the judicial system depends on full disclosure of all the facts, courts rarely expand the number of privileges.⁷⁵ Courts often create exceptions to privileges because privileges tend to frustrate and impede the truth-seeking process, and courts prefer not to overlook threats to public safety for the sake of confidentiality.⁷⁶ Courts want to increase the fact finder’s access to relevant information.⁷⁷ However, the exceptions to privileges are narrowly construed and do not require disclosure every time “a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine witness’ testimony.”⁷⁸

Therefore, the scope of “semi-absolute” privilege is one of complete confidentiality except in “certain enumerated, extraordinary circumstances.”⁷⁹ In criminal cases, Michigan courts will consider a defendant’s request for specifically articulated facts that they believe will be found in counseling records and are essential to their defense of an extraordinary circumstance which will lead to an in camera review.⁸⁰ An in camera review is either a private review by the judge in

⁷¹ Michael Martin, *Waiver of Privilege*, 209 N.Y.L.J. 30 (1993) (citing *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450, 1480-83 (1985)).

⁷² Bonnie J. Campbell, U.S. Dept. of Justice, The Confidentiality of Communications between Sexual Assault or Domestic Violence Victims and Their Counselors 17 (1995).

⁷³ See Mich. Crt. R. 6.201(C)(2) which provides: “If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.”

⁷⁴ Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 Harv. J. on Legis. 255, 256 (1995).

⁷⁵ *United States v. Nixon*, 418 U.S. 683, 710 (1974) in which the Supreme Court stated, “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”

⁷⁶ See Joo, *supra* note 74, at 270.

⁷⁷ Bruno, *supra*, note 2 at 1396.

⁷⁸ See Joo, *supra* note 74, at 270 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987)).

⁷⁹ *Id.* at 276. “There are essentially four specified instances which allow for confidentiality to be breached: when the communication involves a future criminal act likely to cause substantial harm to either the actor or a third party, when a patient uses the counselor in furtherance of a criminal act, when the counselor must defend herself in a suit for malpractice, and if the complainant waives the privilege or introduces any part of the counseling records in evidence.”

⁸⁰ *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557 (1994).

chambers or a hearing when spectators are excluded from the courtroom.⁸¹ If the court is satisfied, following the *in camera* inspection, the records contain evidence necessary to the defense, the court will direct that the necessary evidence be made available to defense counsel.⁸² If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.⁸³

B. Discovery of Information v. Admissibility into Evidence

Admissibility is “[t]he quality, state, or condition of being allowed to be entered into evidence in a hearing, trial, or other official proceeding.”⁸⁴ All evidence that is relevant is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence that is not relevant is not admissible.⁸⁵

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁸⁶ However, evidence that is relevant may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.⁸⁷ In other words, if the evidence unfairly harms the parties involved in the action more than it tends to prove something is true or untrue, it will be excluded. A determination of whether evidence is relevant rests within the discretion of the court, and the court’s determination will not be upset on appeal unless a clear abuse of discretion has occurred.⁸⁸

Discovery is a pre-trial device that is used by one party to obtain facts and information about the case from the other party.⁸⁹ Tools of discovery include depositions, interrogatories, production of documents or things, physical and mental examinations, and requests for admissions.⁹⁰ The court may issue a protective order for a party or person who can show that the discovery will cause the person annoyance, embarrassment, oppression, or undue burden or expense. The court may tailor an order to the need for protection, ranging from holding that no discovery can be had on a particular issue or that certain secrets be carefully guarded through redaction.⁹¹

⁸¹ *In Camera*, Black’s Law Dictionary (10th ed. 2014).

⁸² Mich. Crt. R. 6.201(C)(2)(a)-(b).

⁸³ *Id.*

⁸⁴ *Admissibility*, Black’s Law Dictionary (10th ed. 2014).

⁸⁵ Mich. R. Evid. 402.

⁸⁶ Mich. R. Evid. 401; See also *People v. Brooks*, 453 Mich. 511, 557 N.W.2d 106 (1996).

⁸⁷ Mich. R. Evid. 403.

⁸⁸ *People v. Rimson*, 63 Mich. App. 1, 233 N.W.2d 867 (1975).

⁸⁹ *Discovery*, Black’s Law Dictionary (10th ed. 2014).

⁹⁰ See Mich. Crt. R. 2.302.

⁹¹ Mich. Crt. R. 2.302(C).

There are sanctions for failure to comply with discovery. If a party fails to obey an order to provide or permit discovery, the court in which the action is pending may order such sanctions as are just, such as ordering that the fact that was sought to be discovered be determined in favor of the opposing party, or even a holding that the party who is non-compliant acted in contempt of the court, which can lead to monetary sanctions.⁹² In other words, a decision not to respond to a subpoena could result in a monetary judgment, or fine, against the person who would not comply.

The Michigan Court Rules govern the scope of permissible discovery.⁹³ Parties can request any materials or information concerning the matter, not privileged, which is relevant to the subject matter involved in the pending action.⁹⁴ The information does not have to relate to the claim or defense of the party seeking discovery; it can also relate to the claim or defense of another party.⁹⁵ Discoverable information includes the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter.⁹⁶

A party may not object to the request for information based on the fact that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.⁹⁷

“Michigan has long espoused a liberal discovery policy that permits the discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case.”⁹⁸ This is demonstrated by the court rule’s broad definition of “documents” which includes any “writings, drawings, graphs, charts, photographs, phone records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”⁹⁹ This open discovery rule also means that generally

⁹² Mich. Crt. R. 2.313(B)(2)(a)-(e).

⁹³ Mich. Crt. R. 2.302(B)(1) See also Mich. Crt. R. 6.001(D).

⁹⁴ Mich. Crt. R. 2.302(B)(1).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Hamed v. Wayne Cnty.*, 271 Mich. App. 106, 109; 719 N.W.2d 612 (2006).

⁹⁹ Mich. Crt. R. 2.310(A)(1). It should be noted that any electronic data, such as email, is discoverable under Michigan Court Rules because the definition of documents includes “data compilations.” *Id.* Courts have determined that electronic communications such as email retain any privileged nature that they otherwise would have had. See, e.g., *Laethem Equip. Co. v. Deere & Co.*, 261 F.R.D. 127, 140 (E.D. Mich. 2009). That said, the American Bar Association has determined that attorneys should take special security precautions to prevent inadvertent or unauthorized disclosure of client information when the nature of the information requires a higher degree of security. *ABA Comm’n on Prof’l Ethics & Prof’l Responsibility*, Formal Op. 477 (2017). The Federal Government has clarified that health providers covered by HIPPA can send unencrypted electronic communications if they ensure that the individuals

more information is requested than may actually be used at trial.¹⁰⁰ In other words, information does not have to be admissible to be discoverable. However, privilege does offer some protection for information and has been recognized as “supersed[ing] even the liberal discovery principles of this state.”¹⁰¹

are advised that there may be some level of risk associated with such communications. *Modifications to HIPPA Privacy*, 78 Fed. Reg. 5634 (2013).

¹⁰⁰ Mich. Crt. R. 6.201(C)(1) provides: “Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by . . . privilege.”

¹⁰¹ *Dorris v. Detroit Osteopathic Hosp.*, 460 Mich. 26, 594 N.W.2d 455, 461 (1999).

Chapter 8. Domestic Violence/Sexual Assault Victim Counselor Privilege

A. Applicable Statute

Communications between a domestic violence victim and a sexual assault or domestic violence counselor are protected under the domestic violence/sexual assault counselor privilege statute:¹⁰² [A] confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim.

The privilege expressly excludes information that must be disclosed under the Child Protection Law.¹⁰³

B. Definitions

The statute provides the following definitions:

“Confidential communication” means information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim.¹⁰⁴

Domestic violence, is defined as the occurrence of any of the following acts by a person that is not an act of self-defense:

- Causing or attempting to cause physical or mental harm to a family or household member.
- Placing a family or household member in fear of physical or mental harm.
- Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
- Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.¹⁰⁵

Sexual assault or domestic violence crisis counselor means a person who is employed at or who volunteers service, a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling or other assistance to victims of sexual assault or domestic violence

¹⁰² Mich. Comp. Laws § 600.2157a(2).

¹⁰³ Mich. Comp. Laws § 722.631.

¹⁰⁴ Mich. Comp. Laws § 600.2157a(1)(a).

¹⁰⁵ Mich. Comp. Laws § 600.2157a(1)(b).

and their families.¹⁰⁶

Sexual assault or domestic violence crisis center means an office, institution, agency or center that assists victims of sexual assault or domestic violence and their families through crisis intervention and counseling.¹⁰⁷

Victim means a person who was or who alleges to have been the subject of a sexual assault or domestic violence.¹⁰⁸

Although the domestic violence counselor confidentiality statute appears broad, its limits should be noted. The privilege only prevents evidence from being entered into evidence during a state-court trial but does little to prevent such information from being released in other contexts, including federal court. To begin with, an opinion by the Michigan Attorney General,¹⁰⁹ clarifies that the statute does not prohibit other non-evidentiary uses of such communications, so a domestic violence counselor is not prohibited under this statute from disclosing an alleged victim's whereabouts to law enforcement authorities—but federal regulations will likely prohibit that disclosure. Further, the courts have reduced the statute to a “semi-absolute” privilege.

C. Seminal Michigan Supreme Court Cases: *Stanaway* & *Caruso*

In the consolidated cases of *People v. Stanaway* and *People v. Caruso*,¹¹⁰ the Michigan Supreme Court defined when records of a psychologist, sexual assault counselor, social worker, or juvenile diversion officer can be discoverable by a defendant in a criminal trial, and whether non-disclosure violates the defendant's constitutional rights.¹¹¹ In *Stanaway*, the defendant was charged with three counts of third-degree criminal sexual conduct for allegedly having sexual intercourse with the then fourteen-year-old complainant on three separate occasions during the summer of 1988.¹¹² The complainant confided to a counselor about the abuse, and consistent with mandatory disclosure requirements, the counselor reported the alleged abuse to the police.¹¹³ The defense requested the counselor's records, arguing that they could contain information such as inconsistent statements or information that might lead to exculpatory evidence, but admitted he had no good faith belief that this would be true.¹¹⁴

¹⁰⁶ Mich. Comp. Laws § 600.2157a(1)(d).

¹⁰⁷ Mich. Comp. Laws § 600.2157a(1)(e).

¹⁰⁸ Mich. Comp. Laws § 600.2157a(1)(f).

¹⁰⁹ OAG, 1997, No 6953 (September 16, 1997).

¹¹⁰ *People v. Stanaway*, 446 Mich. 643 (1994).

¹¹¹ Specifically, whether the non-disclosure violated the defendant's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution or Michigan's Constitution 1963, art. 1, Sections 17 and 20.

¹¹² *Stanaway*, 446 Mich 650-51.

¹¹³ *Id.* at 651.

¹¹⁴ *Id.*

After the trial court denied the motion, the jury convicted the defendant on all three charges.¹¹⁵ In his appeal, the defendant challenged the denial of discovery of the records.¹¹⁶ The court of appeals agreed, and ordered an in camera review (i.e., private review by the judge in her chambers) of the requested documents.¹¹⁷ The Michigan Supreme Court granted leave to appeal.¹¹⁸

The defendant in *Caruso* was charged with second-degree criminal sexual conduct when his eight-year-old niece wrote a note to her mother's live-in boyfriend in which she claimed that the defendant had "rubbed her private parts" with his hand.¹¹⁹ Like *Stanaway*, the defense asked for the complainant's counseling records in preparation for trial.¹²⁰ However, instead of a claim that there might be evidence of a relevant nature contained in the records, the defendant in *Caruso* gave specific reasons for that belief.¹²¹ The defendant asserted a strong belief in previous sexual abuse by her biological father and evidence that the child had previously written a note to the defendant that was of a sexual nature.¹²² The trial court granted the defendant's motion and ordered an in camera review.¹²³ The prosecutor appealed; however, the court of appeals affirmed the order for the in camera review of the record.¹²⁴ The Michigan Supreme Court consolidated *Stanaway* with *Caruso* and granted leave to appeal.¹²⁵

The Michigan Supreme Court created a three-step process to balance due process for the defendant with the claimant's privilege. First, the defendant must make a showing of good faith belief, grounded on some demonstrable fact, that the privileged records are likely to contain material information necessary to the defense.¹²⁶ Second, the court should request a waiver of the privilege to allow the judge to review the material in camera, and the claimant can be prevented from testifying if s/he chooses not to waive the privilege.¹²⁷ Third, the court should review the material in chambers and provide it to the defendant only if it reveals information that is essential to the defense.¹²⁸

The court reasoned this approach "strikes a delicate balance between the defendant's federal and state constitutional rights to discover exculpatory evidence shielded by privilege and the

¹¹⁵ *Id.* at 653.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 654.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 677.

¹²⁷ *Id.* Courts have found that minors are unable to consent to a release of these records. See *Bowman v. Raplje*, No. 2:12-CV-13347 (E.D. Mich. July 31, 2014).

¹²⁸ *Id.*

legislature's interest in protecting the confidentiality of the therapeutic setting."¹²⁹ The court reasoned that the legislature clearly intended that privilege statutes help to create trust and to foster the client-counselor relationship; therefore, sexual assault counselors require and are given the same type of confidentiality afforded to psychologists, psychiatrists, or social workers.¹³⁰ The court also found that it was clear that the legislature intended to preclude defendants from having any access to counseling records for use as evidence in a criminal or civil trial.¹³¹ Thus, the court is sensitive to the detrimental effect that any disclosure, even in camera, has on the person who seeks the help of a counselor.¹³² The court noted the "chilling effect" that occurs when a person speaking to a counselor is told that what they say may be disclosed in court.¹³³

The court made clear that the defendant may not "fish" for information in the claimant's records for information that may be used to generally attack the claimant's credibility or reliability.¹³⁴ Nor is the defendant's general "need to know" enough to warrant an in camera review; the requirement of materiality is defined as meaning "exculpatory evidence capable of raising a reasonable doubt about the defendant's guilt."¹³⁵ Therefore, a defendant must have a specific request for information that is either favorable or material to their defense.¹³⁶

D. Michigan Court Rule 6.201(C)(2)

The decision in *Stanaway* and *Caruso* has been codified by Michigan Court Rule 6.201(C)(2) to allow for the discovery of privileged information in criminal cases. The rule states:

If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.

If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such

¹²⁹ *Id.* at 678.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 659.

¹³³ *Id.*

¹³⁴ *Id.* at 681. This principle has been expressly extended to a defendant's blanket allegations that a claimant has made prior false allegations. *People v. Halchishak*, No. 192201 (Mich. App. May 30, 1997).

Id.

¹³⁵ *Id.*

¹³⁶ *Id.*

evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress, or strike the privilege holder's testimony.

The Rule further requires records that are reviewed in camera remain sealed for an appeal, and that the records given to the defendant remain "in exclusive custody of counsel."

E. Courts' Definition of "Material" Evidence

United States v. Agurs,¹³⁷ has defined "material" evidence to be that which contains information that would probably change the outcome of a trial. The Michigan Supreme Court, in *People v. Fink*,¹³⁸ noted the United States Supreme Court's definition of "material" in *Agurs* had been further defined in *Kyles v. Whitley*¹³⁹ to ask the question of "whether in the absence of the [collective] disputed evidence, the defendant received a fair trial, i.e., a trial resulting in a verdict worthy of confidence."¹⁴⁰ In *Fink*, the defendant had been convicted by jury of sexually assaulting a thirteen-year-old-resident of a home for children with severe behavioral problems.¹⁴¹ The main witnesses for the prosecution were the alleged victim, another resident of the home who allegedly saw the abuse, and a social worker.¹⁴² At his trial, the defendant unsuccessfully attempted to subpoena the boys' records from the home as well as records from another agency.¹⁴³ The trial court had held that the files were privileged under social worker-client privilege and quashed the subpoena.¹⁴⁴ The defendant appealed, and the court of appeals remanded the case to the trial court for an in camera review.¹⁴⁵ The court stated that it would be looking for evidence of motive to harm the defendant, previous false accusations made against staff members by either of the two boys, evidence of a psychological condition related to the credibility of the two boys or their account of the events, a history of collusion between the two boys on false accusations against anyone, and the inability of either boy to understand the difference between truth and falsehood.¹⁴⁶

After the in camera review, the court turned over to the defendant several documents which included reports from two teachers regarding the boy who allegedly witnessed the sexual misconduct and a social worker report about the alleged victim, even though the court admitted that although helpful, the documents would not have changed the outcome of the

¹³⁷ 427 U.S. 97 (1976).

¹³⁸ 456 Mich. 449 (1998).

¹³⁹ 514 U.S. 419 (1995).

¹⁴⁰ *Id.* at 33.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 32.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 32–33.

trial.¹⁴⁷ The teachers' evaluations indicated that the older boy, the witness, was a liar and a thief who denied responsibilities for his actions even when faced with them.¹⁴⁸ The alleged victim had at times when in foster homes said he would report adults to various authorities for various forms of abuse if he was not "granted his every wish."¹⁴⁹ Based on the disclosure, the defendant located and obtained the testimony of the authors of the documents and made a motion requesting a new trial.¹⁵⁰ The trial court denied the motion because neither the disclosed records, nor the teacher's testimony provided evidence of the type that was originally sought by the court when it conducted the in camera review.¹⁵¹

The Michigan Supreme Court in affirming the trial court's decision to deny the new trial, reasoned that no information was presented by the documents.¹⁵² The jury had already been aware of the boys' propensity to lie, the general reputation of sexual promiscuity of the alleged victim, and the boys' troubled background by admissions of the alleged victim during his testimony.¹⁵³ Because the new information was only "helpful" and not "material" to the original decision of the jury, the defendant was not entitled to a new trial.¹⁵⁴

Similarly, in *People v. Davis-Christian*, the Michigan Court of Appeals held that counseling records were not sufficiently material to warrant in camera review because other sources of evidence would help the defendant make the same arguments that he used to justify his request for the counseling records. The court explained that, "As long as defendant is able to make a sound argument in his defense without having access to complainant's privileged counseling records, any information in those records would not be material to his defense."¹⁵⁵

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ 316 Mich. App. 204, 213, 891 N.W.2d 250, 254 (2016).

Chapter 9. Social Worker/Family Counselor/Licensed Professional Counselor

A. Social Worker: Applicable Statute

The social worker confidentiality statute protects communications between a social worker and a client by stating that a licensed social worker or an employee of an organization that employs a licensed social worker “is not required to disclose a communication or a portion of a communication made by a client to the individual or advice given in the course of professional employment.”¹⁵⁶ The Michigan Court of Appeals has observed that confidentiality was recognized for social workers’ clients because, “social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals.”¹⁵⁷

B. Social Worker: Scope of the Privilege

The statute states that all communications between a social worker and their client “shall not be disclosed” except (a) where it is required for supervisory purposes; or (2) the client or a person authorized to act on the client’s behalf waives the privilege.¹⁵⁸ Other important limitations also apply. For instance, a social worker must report suspected child abuse and any credible threat of physical violence against a reasonably identifiable third party. In addition, the *Stanaway* rule applies to social workers, thereby allowing an in camera review when a criminal defendant can establish a reasonable probability that privileged records of a social worker are likely to contain material information necessary to the defense.¹⁵⁹ If such evidence is found, it will be provided to the defendant.

C. Social Worker: Abrogation of the Privilege

The social worker’s statutory duty of confidentiality is also abrogated by the mandatory reporting requirement of the Child Protection Law.¹⁶⁰ In *People v. Mineau*,¹⁶¹ the defendant sought counseling for having inappropriate sexual contact with his stepdaughter. The counseling agency reported the abuse pursuant to the Child Protection Law, and the defendant

¹⁵⁶ Mich. Comp. Laws § 333.18513.

¹⁵⁷ *People v. Carrier*, 309 Mich. App. 92, 473; 867 N.W.2d 463 (2015) (quoting *United States v. Jaffe*, 518 U.S. 1, 15-17 (1996)).

¹⁵⁸ Mich. Comp. Laws § 330.1946. This duty to warn extends to all “mental health professionals” which includes individuals trained and experienced in the area of mental illness or developmental disabilities and has been interpreted to include limited license social workers. *People v. Carrier*, 309 Mich. App. 92; 867 N.W.2d 463 (2015).

¹⁵⁹ *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557 (1994).

¹⁶⁰ Mich. Comp. Laws § 722.623(1)(a).

¹⁶¹ 194 Mich. App. 244; 486 N.W.2d 72 (1992).

was arrested shortly thereafter.¹⁶² The defendant attempted to have the case dismissed by arguing that the mandatory reporting requirement is unfair when a person is arrested and charged after voluntarily seeking help.¹⁶³ Although the court agreed that the agency should have informed the defendant of its duty to report child abuse, the court of appeals said the case should continue.¹⁶⁴

D. Family Counselor: Applicable Statute

The family counseling services privileged communications statute¹⁶⁵ provides:

[A] communication between a counselor in the family counseling service and a person who is counseled is confidential. The secrecy of the communication shall be preserved inviolate as a privileged communication which privilege cannot be waived. The communication shall not be admitted in evidence in any proceedings. The same protection shall be given to communications between spouses and counselors to whom they have been referred by the court or the court's family counseling service.

The privilege does not apply if an adult member of a family, who was referred to counseling by the court, signs an agreement indicating the purpose of the referral.¹⁶⁶ And the privilege does not apply to evaluations and recommendations of families who were referred to counseling by the court.¹⁶⁷

E. Licensed Professional Counselor: Applicable Statute

The licensed professional counselor privilege statute¹⁶⁸ states:

[T]he confidential relations and communications between a licensed professional counselor or a limited licensed counselor and a client of the licensed professional counselor or a limited licensed counselor are privileged communications, and nothing in this part requires any privileged communication to be disclosed, except as otherwise provided by law. Confidential information may be disclosed only upon consent of the client.

Thus far, courts have applied the same legal principles applicable to other privileged

¹⁶² *Id.* at 73.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Mich. Comp. Laws § 551.339(1).

¹⁶⁶ Mich. Comp. Laws § 551.339(2).

¹⁶⁷ See *Snyder v. Thomas*, No. 214557 (Mich. App. June 18, 1999) (noting that the privilege did not protect communications between a private, licensed counselor and a client who was referred for parenting counseling by the court).

¹⁶⁸ Mich. Comp. Laws § 333.18117.

communications.¹⁶⁹

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¹⁶⁹ *Simmons v. Frigo*, No. 216541, 2000 WL 33421452 at *3 (Mich. Ct. App. May 5, 2000) (applying the privilege where plaintiffs requested hospitals to name unknown patients in discovery and applying general privilege principles in the context of the counselor privilege); *People v. Clark*, No. 289283 at *3 (Mich. Ct. App. May 25, 2010) (declining to exclude testimony where defendant had already disclosed the information to the court, and so the privilege had been waived).

Chapter 10. Psychologist or Psychiatrist

A. Applicable Statute

The psychologist confidentiality statute states:

A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services.¹⁷⁰

With certain exceptions, the Mental Health Code¹⁷¹ shields communications made to a government or government-contracted psychiatrist or psychologist from disclosure in “civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings . . .”

The psychologist–patient privilege may be voluntarily waived by the patient.¹⁷² The statute provides, “Information may be disclosed with the consent of the individual consulting the psychologist, or if the individual consulting the psychologist is a minor, with the consent of the minor's guardian . . .”¹⁷³ The waivers for duty to warn and mandatory reporting of child abuse also apply to the psychologist–patient privilege.¹⁷⁴

B. Scope of Privilege

The physician privilege bars disclosure of “any information” acquired in the course of the professional relationship, whereas the psychiatrist privilege applies only to the patient's communications.¹⁷⁵ Nonetheless, Michigan courts have applied the psychologist–patient privilege broadly and observed that the Legislature “unequivocally intended” that a licensed psychologist not be compelled to disclose.¹⁷⁶ The Michigan Court of Appeals has held that the privilege even operated to preclude the Attorney General from subpoenaing records when investigating a psychologist for allegedly inappropriate billing practices.¹⁷⁷ Accordingly, unless one of several specific exceptions or limitations applies, the privilege will likely preclude disclosure.¹⁷⁸

¹⁷⁰ Mich. Comp. Laws § 333.18237.

¹⁷¹ See Mich. Comp. Laws § 330.1750(1); Mich. Comp. Laws § 330.1700(h).

¹⁷² *Drouillard v. Metropolitan Life Ins. Co.*, 107 Mich.App. 608, 617, 310 N.W.2d 15 (1981).

¹⁷³ Mich. Comp. Laws § 333.18237.

¹⁷⁴ *Id.*

¹⁷⁵ *Baker v. Oakwood Hosp. Corp.*, 239 Mich. App. 461, 469, 608 N.W.2d 823, 827 (2000).

¹⁷⁶ *In re Petition of Attorney Gen. for Investigative Subpoenas*, 282 Mich. App. 585, 596, 766 N.W.2d 675, 675 (2009).

¹⁷⁷ *Id.* at 597.

¹⁷⁸ *Id.* at 596.

C. Limitation of the Privilege

An in camera review is appropriate to determine whether information contained in psychiatric files is privileged or not.¹⁷⁹ The same standards for review outlined in *People v. Stanaway* apply to psychiatric records.¹⁸⁰ Thus, a request by a defendant for a victim's counseling records merely to look for evidence that may help their case is not sufficient to grant an in camera review of the confidential records.¹⁸¹

The Michigan Court of Appeals has precluded the use of psychologist records in a criminal sexual conduct case even where the Defendant was able to obtain records by issuing an improper subpoena and retrieving them from a victim's psychologist voluntarily.¹⁸² The court held that the records remained privileged and approved sanctions against the attorney who issued the subpoena because the attorney should have been aware that the records were privileged, which the court held to be a "clear violation" of the court rule and the *Stanaway* precedent.¹⁸³ The defendant should have requested in camera review and articulated a material reason why the reports would be helpful.¹⁸⁴

Notably, the Michigan Court of Appeals has determined that a private psychiatrist may not disclose privileged information about a patient to a court-appointed psychiatrist, and such actions may give rise to malpractice or a lawsuit for unauthorized disclosure of privileged communications.¹⁸⁵

A person also waives the privilege when they put their own mental health at issue. For example, in *People v. Sullivan*,¹⁸⁶ the defendant stabbed his wife and children and also stabbed himself. At the hospital, he was seen by two psychiatrists.¹⁸⁷ The defendant later asserted the insanity defense, but sought to prevent the prosecution from admitting the testimony of the psychiatrists who spoke with him on the night of the stabbings.¹⁸⁸ The court allowed the psychiatrists to testify because the defendant made his mental state the central issue at trial and had voluntarily released the records for an analysis of his fitness to stand trial, waiving his right to rely on the privilege.¹⁸⁹

When a prisoner seeks parole, he places his mental health in issue and gives implicit consent

¹⁷⁹ *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557 (1994).

¹⁸⁰ *Id.*

¹⁸¹ *People v. Fink*, 456 Mich. 449, 455, 574 N.W.2d 28 (1998).

¹⁸² *People v. Ring*, No. 298074, (Mich. Ct. App. Sept. 15, 2011).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Saur v. Probes*, 190 Mich. App. 636; 476 N.W.2d 496 (1991); *Stratton v. Krywko*, No. 248669 (Mich. Ct. App. Jan. 6, 2005).

¹⁸⁶ *People v. Sullivan*, 231 Mich. App. 510, 586 N.W.2d 578 (1998).

¹⁸⁷ *Id.* at 579.

¹⁸⁸ *Id.* at 580.

¹⁸⁹ *Id.* at 581–82.

that such information may be furnished to the parole board.¹⁹⁰ Prisoner's records for psychological or psychiatric treatment are not protected when the records are sought by a prosecutor for preparation of an appeal of a parole board's decision to grant parole.¹⁹¹ Because the records were already disclosed to a third party (the parole board), and were meant to be disclosed to a third party, the privilege disappears.¹⁹²

The psychologist–patient privilege is considered waived when a patient signs an agreement which specifically provides that the patient will submit to psychological assessments and approves the release of the reports to the court.¹⁹³

D. Exceptions to the Psychiatrist–Patient Privilege

However, psychiatrist–patient privileged communications must be disclosed upon request in certain circumstances.¹⁹⁴ For instance, where the patient's physical or mental condition is introduced as an element of a claim or defense in a civil or administrative proceeding (e.g., a personal injury lawsuit).¹⁹⁵ Alternatively, the privilege is waived if the patient sues the provider for malpractice.¹⁹⁶ In addition, if the patient was informed that a communication could be used in a guardianship or competency proceeding, then the privilege is waived for that proceeding.¹⁹⁷ Finally, in a court-ordered mental health assessment, so long as the patient was informed that the communications during that assessment would not be privileged, the privilege is waived for that proceeding only.¹⁹⁸ The fact that the patient has been examined or treated or received a diagnosis may also be disclosed for the purposes of a proceeding determining insurance coverage.¹⁹⁹

The Mental Health Code disclosure statute covers services provided by government or government-contracted mental health service providers and requires that “[i]nformation in the record of a [mental health care] recipient, and other information acquired in the course of providing mental health services to a recipient, shall be kept confidential and shall not be open to public inspection.”²⁰⁰ If someone receives confidential mental health information, then they may only use the information for the specific purpose for which confidentiality has been

¹⁹⁰ *Oakland County Prosecutor v. Department of Corrections*, 222 Mich. App. 654, 564 N.W.2d 922 (1997).

¹⁹¹ *Id.* at 924–25.

¹⁹² *Id.*

¹⁹³ *In re Zelzack*, 180 Mich. App. 117, 446 N.W.2d 588 (1989).

¹⁹⁴ Mich. Comp. Laws § 330.1750(2).

¹⁹⁵ Mich. Comp. Laws § 330.1750(2)(a).

¹⁹⁶ Mich. Comp. Laws § 330.1750(2)(d).

¹⁹⁷ Mich. Comp. Laws § 330.1750(2)(b), (c).

¹⁹⁸ Mich. Comp. Laws § 330.1750(2)(e), (f) (where the assessment is for the purpose of determining whether a patient is competent to stand trial, the privilege is waived only with regard to whether or not the individual is competent and not for any other purpose).

¹⁹⁹ Mich. Comp. Laws § 330.1750(3).

²⁰⁰ Mich. Comp. Laws § 330.1748(1).

released.²⁰¹ Any additional information, including the identity of the patient cannot be disclosed unless it is connected to the purpose of the approved disclosure.²⁰² That said, the patient may receive their own information, so long as the patient is an adult who has not been assigned a guardian or adjudicated incompetent.²⁰³ A patient may also consent to disclosure of their own record.²⁰⁴ Patient information may be disclosed pursuant to a subpoena of a court.²⁰⁵

Specifically, government or government-contracted mental health providers may disclose confidential information in the following circumstances:

- In response to a valid subpoena;
- To a prosecuting attorney when the patient has asserted the insanity defense in a criminal case;
- To the patient's attorney with consent from the patient;
- To comply with another provision of law (such as mandatory reporting or duty to warn);
- Within the state government in specific instances if necessary to discharge a constitutional duty; and
- Where a patient has died, to the spouse or appropriate decedent so they may apply for benefits.²⁰⁶

If you are working with a client who would like records related to government or government-contracted mental health services, or if your client experiences a third-party request for such files, it is helpful to be aware of these requirements and exceptions. Specifically, if a client becomes aware that an abuser or other third party has sought to discover these records, it is best to seek the assistance of an attorney to determine whether the records may be protected from discovery.

E. Duty to Warn Third Parties

A duty to warn third parties and, thus, to disclose privileged communications is statutorily required if the patient communicates to their treating mental health practitioner a threat of physical violence against a reasonably identifiable third person, and the patient has the apparent intent and ability to carry out that threat in the foreseeable future.²⁰⁷

²⁰¹ Mich. Comp. Laws § 330.1748(3).

²⁰² Mich. Comp. Laws § 330.1748(2).

²⁰³ Mich. Comp. Laws § 330.1748(4).

²⁰⁴ Mich. Comp. Laws § 330.1748(6)(b) (adding that the agency may object in writing to providing the patient with their file if, in its judgment, "the disclosure would be detrimental to the recipient or others").

²⁰⁵ Mich. Comp. Laws § 330.1748(5)(the agency has adopted an interpretation of this language that indicates lawyer-signed subpoenas are insufficient for mental health records in this context because they are not "of the court"—nevertheless, a subpoena for such information should never be ignored and programs should consult with legal counsel when a subpoena is received).

²⁰⁶ Mich. Comp. Laws § 330.1748(5). A parent who has legal and physical custody of a patient or a patient's guardian may also consent to release. *Id.*

²⁰⁷ Mich. Comp. Laws § 330.1946.

The courts have underscored that the duty to warn was intended to limit the liability of mental health professionals and only extends to an individual identified in the threat.²⁰⁸ For example, in *Jenks v. Brown*,²⁰⁹ the patient told her psychiatrist that she intended to kidnap her child from her ex-husband, and the court determined that the ex-husband was not protected by the duty to warn because there was no threat against him. Similarly, in *Swan v. Wedgwood Christian Youth and Family Services*, a man killed by a youth while the youth was on an approved home visit from a group home was not protected by the duty to warn because the youth had not made a threat against the man.²¹⁰

Regardless, mental health professionals still owe a common-law duty of reasonable care to other patients that may require them to warn other patients about potential dangers posed by certain patients to protect them from harm by a third party.²¹¹ For example, in *Dawe v. Bar-Levav Associates*, a patient sued her psychiatrist office after another patient committed a mass shooting during a group therapy session.²¹² There, the Michigan Court of Appeals compared mental health professionals to airlines or hotels that owe a basic duty to protect their customers from third parties because of the control they have over the situation.²¹³ The Michigan Supreme Court expressly held that the statutory duty to warn, M.C.L. § 330.1946, did not do away with the more general duty to keep an environment safe from known hazards.²¹⁴

After a threat, a mental health professional may fulfill the statutory duty to warn by hospitalizing the patient or initiating proceedings to hospitalize the patient, making a reasonable attempt to communicate the threat to the third person and communicating the threat to the local police department or county sheriff for the area where the third person resides, for the area where the patient resides, or to the state police.²¹⁵ If the third person is a minor or is not legally competent, then the mental health professional should communicate the threat “to the department of social services in the county where the minor resides and to the third person's custodial parent, noncustodial parent, or legal guardian, whoever is appropriate in the best interests of the third person.”²¹⁶

Once a mental health professional has discharged the duty to warn, the privilege is waived with regard to all of the statements connected to the threat.²¹⁷ In *People v. Carrier*, an individual called a crisis hotline and spoke with a limited-license social worker, stating that he was very upset about an ex-girlfriend and that he could see her “down the scope of his gun,” adding that

²⁰⁸ See, e.g., *Swan v. Wedgwood Christian Youth and Family Services*, 230 Mich. App. 190, 583 N.W.2d 719, 722 (1998).

²⁰⁹ 219 Mich. App. 415, 557 N.W.2d 114 (1996).

²¹⁰ *Swan*, 230 Mich. App. 190.

²¹¹ *Dawe v. Bar-Levav & Assoc. (On Remand)*, 289 Mich. App. 380, 391, 808 N.W.2d 240, 247 (2010).

²¹² *Id.* at 24–44.

²¹³ *Id.* at 247–48.

²¹⁴ *Id.*

²¹⁵ *Id.*; *Dawe v. Dr. Reuven Bar-Levav & Assocs., P.C.*, 485 Mich. 20, 27, 780 N.W.2d 272, 276 (2010).

²¹⁶ Mich. Comp. Laws S 330.1946(2)(c).

²¹⁷ *People v Carrier*, 309 Mich. App. 92, 473; 867 N.W.2d 463 (2015).

he knew where the social worker was and that he was going to come there and shoot the social worker as well as the social worker's wife and children.²¹⁸ The social worker called 911 and reported the threats to the police.²¹⁹ The Michigan Court of Appeals ruled that once the duty to warn became mandatory, the privilege enjoyed by the defendant was effectively and permanently waived and the statements could be used against him in a criminal trial.²²⁰

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²¹⁸ *Id.* at 98.

²¹⁹ *Id.*

²²⁰ *Id.* at 119–20.

Chapter 11. Marital Privilege

A. Privileges Arising from a Marital Relationship

This section addresses the two privileges that arise from a marital relationship under M.C.L. § 600.2162:

- M.C.L. § 600.2162(1)–(2) establish spousal privileges that limit the circumstances under which one spouse may “be examined as a witness” for or against the other spouse. This privilege is only applicable when the witness spouse and the nonwitness spouse are married at the time of the examination.
- M.C.L. § 600.2162(4)–(7) establish confidential communication privileges limiting the circumstances under which an individual may “be examined” as to communications that occurred between the individual and their spouse during their marriage. This privilege applies whether the testimony is sought during or after the marriage, as long as the communication occurred during the marriage.

The language “be examined” in the statute connotes a narrow testimonial privilege, i.e., a privilege against being questioned as a sworn witness. The introduction of a spouse’s statement through other means is not precluded.

These statutory privileges use gendered language to set forth what people and communications should be privileged. Michigan courts have not yet had occasion to examine whether same-sex couples are protected by these privileges, but it can be speculated the Supreme Court’s decision in *Obergefell v. Hodges*,²²¹ in which the Court held that same-sex couples have the same right as opposite-sex couples to enjoy intimate association and the fundamental right of marriage, would be interpreted to protect these privileges for same-sex couples. Commenters have observed that these privileges are “part of the package of benefits triggered by marital status. Put differently, state-granted marriage licenses provide the gateway to these benefits . . .”²²² This is particularly so because the reasoning behind these privileges is to protect the marital relationship.

B. Spousal Privilege

The holder of the spousal privilege depends on the nature of the proceeding. In a civil action or administrative proceeding, the non-witness spouse holds the privilege. This is because the statute states, “a husband shall not be examined as a witness for or against his wife without her consent, or a wife for or against her husband without his consent.”²²³

In a criminal prosecution, the witness spouse holds the privilege. This is because the statute states that “a husband shall not be examined as a witness for or against his wife without his

²²¹ 135 S. Ct. 2584, 2604–05 (2015).

²²² Susan Frelich Appleton, *Obergefell's Liberties: All in the Family*, 77 Ohio St. L.J. 919, 979 (2016).

²²³ Mich. Comp. Laws § 600.2162(1) (emphasis added).

consent or a wife for or against her husband without her consent.”²²⁴ If the testifying spouse consents to give testimony, the other spouse has no grounds to object.²²⁵

The spousal privilege may only be invoked when the witness spouse and the nonwitness spouse are legally married at the time of trial. The spousal privilege precludes any examination of the other spouse, regardless of whether the events at issue occurred before or during the marriage.

C. Exceptions to the Privilege

The statute does not apply in several situations that may be of particular importance in cases involving allegations of sexual assault or domestic violence:

- Actions for divorce, separate maintenance, or annulment.²²⁶
- Prosecutions for crimes committed against the children of either or both spouses, or crimes committed against individuals younger than age 18.²²⁷
- Actions growing “out of a personal wrong or injury done by one [spouse] to the other or [growing] out of the refusal or neglect to furnish the spouse or children with suitable support.”²²⁸
- In cases of desertion or abandonment.²²⁹
- In prosecutions for bigamy.²³⁰
- In certain property disputes between the spouses.²³¹

The exception for actions growing out of a personal wrong or injury done by one spouse to the other has been interpreted to mean that a spouse may be compelled to testify against the other. In *People v. Szabo*,²³² the defendant was charged with felonious assault and felony-firearm arising from criminal actions he allegedly committed against his wife, but the wife wrote an affidavit stating that she wanted to assert her privilege. The Michigan Court of Appeals held that the defendant's wife was not vested with a spousal privilege (on account of the exception); thus, her consent to testify was not required and she could be compelled to testify against defendant.²³³ This means that even where a witness-victim of domestic violence or sexual assault decides they do not want to testify against their spouse, the prosecutor may potentially compel them to do so; however, this practice is not common.

²²⁴ Mich. Comp. Laws § 600.2162(2).

²²⁵ *People v. Moorer*, 262 Mich. App. 64, 76, 683 N.W.2d 736, 744 (2004) (holding counsel not ineffective for not objecting to voluntary testimony; any objection would have been futile because the spouse consented to give testimony and defendant lacked standing to claim privilege).

²²⁶ Mich. Comp. Laws § 600.2162(3)(a).

²²⁷ Mich. Comp. Laws § 600.2162(3)(b).

²²⁸ Mich. Comp. Laws § 600.2162(3)(c).

²²⁹ Mich. Comp. Laws § 600.2162(3)(d).

²³⁰ Mich. Comp. Laws § 600.2162(3)(e).

²³¹ Mich. Comp. Laws § 600.2162(3)(f).

²³² 303 Mich. App. 737, 749, 846 N.W.2d 412, 419 (2014).

²³³ *Id.*

The spousal privilege exception for “cases of prosecution for a crime committed against the children of either or both” has been held to include all children, including adult children.²³⁴ The appeals court reasoned that one spouse committing a crime against the other spouse’s child would extinguish the purpose of marital privilege, protection of marital harmony.²³⁵

D. Marital Communication Privilege

The marital communication privilege,²³⁶ prevents both spouses from testifying about any private conversations that occurred between the couple during the course of the marriage—even if the marriage has since ended. The statute provides that without the consent of the other “[a] married person or a person that has been married previously shall not be examined as to any communication made between that person and his or her spouse or former spouse during the marriage.” The communication privilege is subject to the same exceptions as the spousal privilege. The viability of the marriage at the time of the communication is made is irrelevant. It matters only whether the couple remained legally married at the time of the statement.²³⁷ The privilege does not protect confidential communications that inadvertently end up in the hands of a third party and only prevents a spouse from “being questioned as a sworn witness about the described communications.”²³⁸

E. Scope of Privilege

Michigan courts have interpreted the statutory language “any communication made . . . during the marriage” to mean “confidential communications between spouses.”²³⁹ Accordingly, the communication must be one that was intended to be confidential. The nature and circumstances of the communication determine whether a communication is confidential, but the nature and status of the marital relationship will not be considered. For instance, where one spouse is acting as a business agent for the other, the nature of the communication is not inherently confidential.²⁴⁰ Where a communication is not made to convey an “admission or confession or an act of which [the spouse] might not be cognizant,” it is not considered confidential. For instance, where a defendant shot his wife and baby and then said “I am finished with you; I am going outside and going to kill your mother now . . . ,” the Court of

²³⁴ See *People v. Simpson*, 132 Mich. App. 259, 347 N.W.2d 215 (1984) (vacated on other grounds). The defendant was convicted of assaulting his daughter who was 19 or 20 years old at the time of the offense. The defendant had argued that the exception to spousal privilege should not apply unless the child is a minor. The court disagreed.

²³⁵ *Id.*

²³⁶ Mich. Comp. Laws § 600.2162(4)-(7).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *People v. Vermeulen*, 432 Mich. 32, 438 N.W.2d 36, 37 (1989).

²⁴⁰ *People v. Hamacher*, 432 Mich. 157, 166, 438 N.W.2d 43 (1989), relying upon McCormick, *Evidence* (3d ed.), § 80, p. 193.

Appeals found that the communication was not made in confidence.²⁴¹ The appellate court later clarified that some threats can still be considered confidential communications, for example, where a husband told his wife that if she left him he would kill another person—that threat was considered confidential because it was intended to be private.²⁴²

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²⁴¹ *People v. Zabijak*, 285 Mich. 164, 182, 280 N.W. 149 (1938).

²⁴² *People v. Vermeulen*, 432 Mich. 32, 40, 438 N.W.2d 36, 39 (1989).

Chapter 12. Attorney–Client Privilege

A. Purpose and Scope of the Privilege

The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law.²⁴³ Its purpose is to encourage full and frank communication between attorneys and their clients and recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.²⁴⁴

The scope of the privilege is narrow and covers only confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice.²⁴⁵ The attorney–client privilege attaches to direct communication between a client and his attorney, as well as communications made through their respective agents.²⁴⁶ Where an attorney's client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication.²⁴⁷ Communications can be written or spoken, but documents that pre-existed the relationship do not become privileged just because they are given to an attorney.²⁴⁸ The content of a conversation is protected by the attorney–client privilege—whether the conversation is held in a private or public place—so long as it is confidential in nature and made to seek legal advice.²⁴⁹

B. Waiver

Although either the attorney or the client can assert the privilege, only the client may waive the privilege.²⁵⁰ Any action to waive the attorney–client privilege must be intentional and voluntary; thus, it cannot arise by accident.²⁵¹ The Michigan Supreme Court has refused to accept the theory that once confidential information has been published, the privilege of objecting to its repetition has been waived; and it has held that consent can be withdrawn.²⁵²

C. Work-Product Rule

²⁴³ *Leibel v. Gen. Motors Corp.*, 250 Mich. App. 229, 236, 646 N.W.2d 179, 183 (2002) (citing 8 J Wigmore, Evidence § 2290 (McNaughton rev 1961); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *See id.*

²⁴⁹ *City of Ann Arbor v. McCleary*, 228 Mich. App. 674, 579 N.W.2d 460, 464 (1998).

²⁵⁰ *Augustine v. Allstate Ins. Co.*, 292 Mich. App. 408, 420, 807 N.W.2d 77, 85

²⁵¹ *Sterling v. Keidan*, 162 Mich. App. 88, 412 N.W.2d 255 (1987) (concerning the inadvertent disclosure of a privileged letter to another person).

²⁵² *Id.*

An attorney's materials that are prepared for trial or anticipated litigation are protected by the work product rule and generally cannot be discovered in the course of litigation.²⁵³ However, the rule allows discovery of attorney work product if the other party can show that it has a "substantial need" for the information and cannot obtain it "without undue hardship" by any other means.²⁵⁴ In the rare circumstances where a court orders discovery of work product, the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."²⁵⁵

The case of *Hickman v. Taylor*²⁵⁶ set forth the parameters of the work-product doctrine. There, the U.S. Supreme Court considered a case that involved the sinking of a tugboat. An attorney interviewed several survivors of the incident, and the opposing party sought to obtain his notes from the interviews.²⁵⁷ The Court said that the opposing party could contact the witnesses themselves and did not need to obtain the other attorney's notes.²⁵⁸ The Court reasoned that:

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.

The work-product privilege applies in criminal proceedings to the work product of a prosecutor.²⁵⁹ Notes by the prosecutor in preparing a prosecution are also exempt from the

²⁵³ *Hickman v. Taylor*, 329 U.S. at 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *Leibel v. Gen. Motors Corp.*, 250 Mich. App. 229, 248, 646 N.W.2d 179, 189 (2002).

²⁵⁴ Mich. Crt. R. 2.302(B)(3)(a).

²⁵⁵ *Id.*

²⁵⁶ 329 U.S. at 495

²⁵⁷ *Id.* at 509.

²⁵⁸ *Id.*

²⁵⁹ *People v. Gilmore*, 222 Mich. App. 442, 564 N.W. 2d 158 (1997). In *Gilmore*, the defendant was charged with felonious assault upon a park ranger. *Id.* at 160. The defendant requested that the ranger also be charged with assault and malicious destruction of property in connection with the incident. See *Id.* When the prosecutor opted to prosecute only the defendant, he filed a motion to compel the discovery of the prosecutor's "disposition record," which set forth the reasons why the prosecutor denied the defendant's request. See *Id.* The prosecutor refused to turn either the "disposition record" or

initial disclosures that are generally done in criminal discovery.²⁶⁰ This is because a prosecutor preparing for a criminal case must perform the same assembling, preparing, and planning that a civil attorney must do.²⁶¹

The Michigan Court of Appeals has held that a prosecutor's entire work product is privileged from disclosure under the Freedom of Information Act (FOIA), M.C.L. § 15.231 et seq., despite public interest or private need.²⁶² The attorney-client privilege is also an enumerated exemption from FOIA.²⁶³ The courts have applied these rules to prevent family of crime victims from discovering the prosecutor's documents relating to the victims' cases.²⁶⁴

Michigan law is unclear as to the status of work product by a victim-witness assistant in a prosecutor's office.²⁶⁵ Any verbatim witness statements that are given and approved by the witness are generally discoverable.²⁶⁶ However, it is less clear whether additional notes or mental impressions would be protected by work-product privilege, although such victim-witness assistants are arguably representatives of the prosecutors and therefore should have such notes protected.²⁶⁷ Federal privacy standards under the VOCA do not pertain to information gathered for purposes of the prosecution, even if provided to a victim specialist in a prosecutor's office who is receiving VOCA funding.²⁶⁸

Relatedly, reports by probation officers are privileged from discovery. However, statements of crime victims regarding the impact of a crime that are submitted to a probation officer may be reviewed by the court in camera and any inconsistent statements necessary for cross-examination may be shared with defense counsel.²⁶⁹ The presentence report will also be

any documents that indicated the reason for denial of defendant's request for prosecution claiming that they were privileged as attorney work product. *See Id.*

²⁶⁰ *People v. Holtzman*, 234 Mich. App. 166, 593 N.W.2d 617, 619 (1999) (noting also that the notes are not a

²⁶¹ *See Gilmore*, 222 Mich. App. at 442.

²⁶² *Messenger v. Ingham County Prosecutor*, 232 Mich. App. 633, 591 N.W.2d 393 (1998). This was a highly publicized case in which the plaintiff removed his prematurely born son from artificial life support causing the child to die. *Id.* at 395. The defendant prosecuted the plaintiff for manslaughter; however, he was found not guilty. *Id.* The plaintiff requested his entire criminal case file under the Freedom of Information Act, and the defendant complied in part refusing only to disclose those documents that came under various statutory exemptions. *Id.*

²⁶³ Mich. Comp. Laws § 15.243(g).

²⁶⁴ *E.g., King v. Oakland Cty. Prosecutor*, No. 314779, (Mich. Ct. App. July 31, 2014).

²⁶⁵ *Holtzman*, 234 Mich. App. at 178-179.

²⁶⁶ *Id.*

²⁶⁷ See *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (the "work-product privilege" applies to an investigator hired by the defendant because, as a practical matter, "attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial").

²⁶⁸ 34 U.S.C. § 12291(b)(2)(D)(i)(II).

²⁶⁹ *People v. Rohn*, 98 Mich. App. 593, 599-600 (1980) (*overruled on other grounds by People v. Perry*, 460 Mich. 55 (1999) concluding that such statements must be provided to protect the defendant's right to confront witnesses against him).

provided to the defense attorney.²⁷⁰ The victim must be notified that the PSIR (or presentence investigation report in juvenile designated cases) and their impact statement in the report will be made available to the defendant or juvenile and defense counsel unless the court exempts it from disclosure.²⁷¹

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²⁷⁰ Mich. Crt. R. 6.425(B) *See also* Mich. Crt. R. 6.610(F)(1)(b).

²⁷¹ Mich. Comp. Laws § 780.763(1)(e); Mich. Comp. Laws § 780.791(2)(c); Mich. Comp. Laws § 780.823(1)(e).

Chapter 13. Physician–Patient Privilege

A. Applicable Statutes

Both federal and state laws ensure the security and privacy of health information. At the federal level, the Health Insurance Portability and Accountability Act (“HIPAA”)²⁷² ushered in a “strong federal policy in favor of protecting the privacy of patient medical records.”²⁷³ HIPAA requires that covered entities, which include health insurance plans and health care providers that transmit health information electronically, maintain confidentiality.²⁷⁴ Specifically, HIPAA prevents disclosure of “protected health information,” which means individually identifiable health information, but has several exceptions.²⁷⁵ HIPAA specifically allows disclosure to a government authority or social services agency if required by law or if the individual patient agrees to the disclosure.²⁷⁶

Under Michigan Law, The physician–patient privilege statute²⁷⁷ states:

Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.²⁷⁸

Physician’s assistants are also covered under the physician–patient privilege.²⁷⁹

B. Scope of Privilege

HIPAA assumes that health information must be shared between entities and governs only the circumstances under which it will be shared. HIPAA, therefore, permits a physician to disclose protected health information to comply with a court order, subpoena, discovery request, or other lawful process.²⁸⁰ However, a physician may also disclose protected health information in response to a subpoena, discovery request, or other lawful process only if (1) the patient has been given notice of the request for information; or (2) the physician receives “satisfactory assurance” from the party seeking the information that reasonable efforts have been made to

²⁷² 42 U.S.C. § 1320d et seq.

²⁷³ *Thomas v. 1156729 Ontario Inc.*, 979 F. Supp. 2d 780, 782 (E.D. Mich. 2013) (internal quotation omitted). Under HIPAA, the health care provider is the o

²⁷⁴ 42 U.S.C. § 1320d et seq

²⁷⁵ 42 U.S.C. § 1320d et seq

²⁷⁶ 45 C.F.R. § 164.512(c).

²⁷⁷ Mich. Comp. Laws § 600.2157.

²⁷⁸ Mich. Comp. Laws § 600.2157.

²⁷⁹ Mich. Comp. Laws § 333.17078

²⁸⁰ *Thomas*, 979 F. Supp. 2d at 783–84.

secure a qualified protective order.²⁸¹

The purpose of Michigan's physician–patient privilege is to protect the doctor–patient relationship and to ensure that communications between them are confidential.²⁸² The idea is that patients will be more likely to completely disclose all symptoms and conditions if the patient knows everything that is told to the doctor is protected.²⁸³ The privilege bars disclosure even when the disclosure is from a third party who obtained protected information from a doctor.²⁸⁴ The privilege belongs to the patient and may be waived only by the patient.²⁸⁵

The court of appeals has extended the privilege to cover medical records, even if the patient's name is not attached to the record or disclosed.²⁸⁶ The privilege continues after the patient's death unless it is waived by someone authorized to do so, such as their personal representative.²⁸⁷ Michigan courts have held that defense counsel may conduct ex parte interviews with a plaintiff's treating physician under state discovery rules after the plaintiff has waived the physician–patient privilege, either by failing to assert it timely or by filing a lawsuit and alleging personal injuries; however, HIPAA limits the extent to which this is allowable.²⁸⁸

C. Waiver of Privilege

A patient may consent to disclosure under HIPAA by giving oral consent or merely by not objecting to disclosure.²⁸⁹ A patient may also intentionally and voluntarily waive the physician–client privilege.²⁹⁰ With regard to discovery, a patient must assert the privilege in a first response to any discovery request asking for information that is covered by the privilege—otherwise, the privilege is deemed waived.²⁹¹

A waiver is effective only in the action in which it is given.²⁹² The fact that a person may have waived their privilege with regard to one matter or defendant does not necessarily mean that

²⁸¹ *Id.*

²⁸² *Baker v. Oakwood Hospital*, 239 Mich. App. 461, 608 N.W.2d 823, 828 (2000) (citing *Herald Co. v. Ann Arbor Public Schools*, 224 Mich. App. 266, 568 N.W.2d 411, 416 (1997)).

²⁸³ *Id.*

²⁸⁴ *Meier v. Awaad*, 299 Mich. App. 655, 832 N.W.2d 251 (2013).

²⁸⁵ See *Baker v. Oakwood Hospital*, 239 Mich. App. 461, 608 N.W.2d 823, 830 (2000) (stating, “[T]he statute broadly and clearly forbids physicians from disclosing ‘any information’ acquired under the requisite circumstances.”).

²⁸⁶ *Scott v. Henry Ford Hosp.*, 199 Mich. App. 241, 243, 501 N.W.2d 259, 260 (1993).

²⁸⁷ *Id.*

²⁸⁸ *Thomas v. 1156729 Ontario Inc.*, 979 F. Supp. 2d 780, 782 (E.D. Mich. 2013).

²⁸⁹ 42 U.S.C. § 1320d et seq.

²⁹⁰ *Meier v. Awaad*, 299 Mich. App. 655, 666, 832 N.W.2d 251, 258 (2013).

²⁹¹ MICH. CRT. R. § 2.314(B) (also stating that a party waives the right to present evidence regarding the party's physical or mental state if asserting the privilege to preclude discovery).

²⁹² *Domako v. Rowe*, 438 Mich. 347, 475 N.W.2d 30 (1991).

they have waived their privilege with regard to other parties.²⁹³ However, there must be a reasonable basis for a person to revoke a waiver of the physician–patient privilege in one situation, but not another.²⁹⁴ Similarly, all privileges are independent of each other, and so waiving the psychologist–patient privilege does not mean that the physician–patient privilege is waived. The parties in *Navarre v. Navarre*²⁹⁵ were engaged in a custody dispute, and the husband wanted the wife’s treating physician to testify about her mental and physical condition.²⁹⁶ The court found that Child Custody Act did not overcome the protections of the physician–patient privilege and the wife’s medical communications should remain privileged.²⁹⁷

Usually, a privilege will only be considered waived if the person acted knowingly, but justice may require that a person be treated as if they have waived their privilege when they act in some way inconsistent with the assertion of such a right.²⁹⁸ For instance, if a person signs a general disclosure agreement with regard to medical information they may not be allowed to later assert that such information should remain privileged.²⁹⁹

D. Exceptions to the Privilege

There are various instances in which a physician may be required to break confidentiality in order to comply with the law. For example, a physician is required to report known or suspected child abuse and neglect, as well as abuse of vulnerable adults, to protective services.³⁰⁰

E. Sexual Assault Evidence Kits

The collection of sexual assault evidence statute³⁰¹ discusses the parameters around evidence-gathering equipment and procedures known as “rape kits.” It requires a treating hospital staff member who is told by a patient that the patient has been the victim of criminal sexual conduct—including penetration as well as any touching of genitals, buttock, or breast, above or underneath clothing³⁰²—within the past 120 hours to let the patient know that a sexual assault evidence kit is available at no charge and not to be billed out to insurance.³⁰³ In a previous version, this statute stated that administration of a rape kit would not be considered a medical procedure, which clearly indicated that the physician–patient privilege did not apply.³⁰⁴ In 2015,

²⁹³ *Id.*

²⁹⁴ *Landelius v. Sackellares*, 453 Mich. 470, 556 N.W.2d 472 (1996).

²⁹⁵ 191 Mich. App. 395, 479 N.W.2d 357 (1991).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Landelius v. Sackellares*, 453 Mich. 470, 556 N.W.2d 472 (1996).

²⁹⁹ See, e.g., *Id.*

³⁰⁰ See Mich. Comp. Laws § 722.623.

³⁰¹ Mich. Comp. Laws § 750.520a;

³⁰² Mich. Comp. Laws § 750.520a

³⁰³ Mich. Comp. Laws § 333.21527

³⁰⁴ Leslie A. Hagen, Kim Morden Rattet, *Communications and Violence Against Women: Michigan Law on*

this law was amended to take away that specific language, which would suggest that the privilege is now considered a medical procedure subject to the physician–patient privilege.³⁰⁵ Nevertheless, the new version of the statute defines a “sexual assault evidence kit” as “a standardized set of equipment and written procedures approved by the department of state police that have been designed to be administered to an individual principally for the purpose of gathering evidence of sexual conduct, which evidence is of the type offered in court by the forensic science division of the department of state police for prosecuting a case of criminal sexual conduct.”³⁰⁶ It is unclear whether the courts will interpret this to mean that defendants may access any statement made during collection of the evidence kit.

F. Injury by Deadly Weapon

A hospital, pharmacy, physician, or surgeon is required to report the identity of any person injured by means of a knife, gun, other deadly weapon, or by “means of violence” immediately to the police. The report must include the name and residence of the person, if known, their whereabouts, and the cause, character, and extent of the injuries and may state the identification of the perpetrator, if known.³⁰⁷ Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor.³⁰⁸ Notably, this statute does not apply to physicians or their staff who are not working with patients in a hospital or pharmacy context.³⁰⁹ This statute has not been applied so as to require the mandatory reporting of sexual assault of an adult.

G. Medical Records/ Documents

Under Michigan’s Medical Records Access Act, a patient or their authorized representative has the right to examine or obtain the patient’s medical record.³¹⁰ The provider may set restrictions but must verify that the individual requesting the records is the individual to whom they apply and must also generally provide them within 30 days of making a request.³¹¹ Certain fees will apply.³¹²

H. Confidentiality of HIV Records

Privilege, Confidentiality, and Mandatory Reporting, 17 T.M. Cooley L. Rev. 183, 244 (2000) (commenting that a defendant may gain access to anything disclosed to health professionals in the course of the collection of evidence through the court or prosecutor’s office).

³⁰⁵ P.A. 320 of 214; Mich. Comp. Laws § 333.21527.

³⁰⁶ Mich. Comp. Laws § 333.21527(2).

³⁰⁷ Mich. Comp. Laws § 750.411(1).

³⁰⁸ Mich. Comp. Laws § 750.411(3).

³⁰⁹ Mich. Comp. Laws § 750.411(1).

³¹⁰ Mich. Comp. Laws § 333.26265(1).

³¹¹ Mich. Comp. Laws § 333.26265.

³¹² Mich. Comp. Laws § 333.26269.

"All reports, records, and data pertaining to testing, care, treatment, reporting, research, and information pertaining to partner notification . . . associated with the serious communicable diseases or infections of HIV infection and [AIDS] are confidential."³¹³ The release of reports, records, data, and information is only permitted in limited circumstances, such as under a court order for such information.³¹⁴

The test results of HIV infection or AIDS and the fact that such a test was ordered, is information that is subject to the physician–patient privilege. The disclosure of information pertaining to HIV infection or acquired immunodeficiency syndrome in response to a court order and subpoena is subject to restrictions.³¹⁵

The sensitive nature of this information is clearly understood by the court, and a court petitioned for an order to disclose the information must determine whether the information may be obtained another way, or that the public interest and need for the disclosure outweigh the potential for injury to the patient. The court order compelling disclosure must limit the disclosure to only those people whose need for the information is the basis of the order. Disclosure also includes those parts of the patient's record that are determined by the court to be essential to fulfilling the objective of the order.

Information pertaining to a person who is HIV infected or has AIDS may be disclosed to a local health department or other health care provider for the purposes of protecting the health of the individual, preventing further transmission of HIV, and to diagnose and care for a patient. There is an affirmative duty placed upon physicians or local health officers to disclose information pertaining to an individual who is HIV infected or has AIDS to an individual who is known by the physician or health officer to be a contact of the individual who is HIV infected or has been diagnosed with AIDS. The affirmative duty is discharged by referring the individual to the appropriate local health department for assistance with partner notification. The physician or health officer shall include as part of the referral the name and, if available, address and telephone number of each individual known by the physician or local health officer to be a contact of the individual who is HIV infected or has been diagnosed as having AIDS.

HIV information may be disclosed to an employee or pupils of a school district if deemed to be necessary to prevent a reasonably foreseeable risk of transmission of HIV to other students in a school district.³¹⁶ However, the information that is disclosed to the employee remains confidential. The information is privileged only if it is received from public health officials. The statute cannot be extended to cover information pertaining to students received by school

³¹³ Mich. Comp. Laws § 333.5131.

³¹⁴ Mich. Comp. Laws § 333.5131. *See People v. Odom*, 276 Mich. App. 407, 420, 740 N.W.2d 557, 565 (2007) (holding that a prison employee who was exposed to body fluids of a prisoner when the prisoner spat in his face may request that the prisoner be tested for HIV infection or HBV (hepatitis B virus) infection, or both and receive the results of those tests).

³¹⁵ Mich. Comp. Laws § 333.5131(3).

³¹⁶ ee 1989-90 OAG 251, 252 (Oct. 20, 1989).

employees from the student, their parents, or other third persons.

An individual may expressly authorize that their diagnosis of HIV or AIDS be disclosed in writing if the authorization is specific to HIV infection or AIDS. If the individual is a minor or incapacitated, the written authorization may be executed by the parent or legal guardian of the individual. The information may be disclosed if it is part of a report required under the child protection law. A director or holder of the license of a child placing agency may have HIV or AIDS information about an individual disclosed to them.

I. Records of the Hospital

A hospital has a duty to keep and maintain records regarding treatment given to patients at the hospital. Those records, reports, and other information collected or used by administrative committees in conducting peer review sessions are confidential. The records may only be used for the purpose of peer review sessions, are not public records, and are not subject to court subpoena.³¹⁷

The Michigan Supreme Court has held that any investigative reports relative to incident reports, any statements made by any person with respect to an incident, and any notes, memoranda, records, and reports related to an incident are also covered by privilege if the reports are maintained in furtherance of the hospital's quality assurance and peer review function.³¹⁸ Thus hospitals may not release reports about incidents which occur within a hospital or treatment facility which are used for internal review and discussion. The reports must remain confidential to allow for effective functioning of staff meetings, and ensure that improvements as to care and treatment of patients can be achieved.

³¹⁷ See Mich. Comp. Laws § 333.20175 and Mich. Comp. Laws § 333.21515.

³¹⁸ See *Dorris v. Detroit Osteopathic Hosp. Corp.*, 460 Mich. 26, 594 N.W.2d 455, 462 (1999). The Michigan Supreme Court combined and reviewed this case with *Gregory v. Heritage Hospital*. The plaintiff in *Gregory* wanted investigative reports surrounding a physical altercation between another patient and her roommate in which the plaintiff was seriously injured. *See Id.*

Chapter 14. Children

A. Mandatory Reporters

Michigan's Child Protection Law requires certain professionals to report their suspicions of child abuse or neglect to Children's Protective Services ("CPS") at the Department of Health and Human Services ("DHHS").³¹⁹ These people are mandated reporters because they are believed to have established relationships with children based on their profession. Michigan courts have upheld the Child Protection Law as constitutional in spite of arguments that its requirements were not sufficiently clear to allow reporters to understand their responsibility.³²⁰ At this point, it is well-settled law that the Child Protection Law is constitutional.

Specifically, the Child Protection Law imposes reporting requirements on the following professionals:

physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker, registered social service technician, social service technician, a person employed in a professional capacity in any office of the friend of the court, school administrator, school counselor or teacher, law enforcement officer, member of the clergy,³²¹ or regulated child care provider.³²²

Additionally, "any employees of an organization or entity that, as a result of federal funding statutes, regulations, or contracts, would be prohibited from reporting in the absence of a state mandate or court order" are also required to make a report.³²³ DHHS highlights "domestic violence providers" as an example of individuals who must report under this category.³²⁴

³¹⁹ Mich. Comp. Laws § 722.623. All persons are permitted to report suspicions of child abuse or neglect. Mich. Comp. Laws § 722.624.

³²⁰ See, e.g., *People v. Cavaiani*, 172 Mich. App. 706, 432 N.W.2d 409 (1988).

³²¹ However, the Michigan Court of Appeals has held that communication by church member to her pastor that her husband was abusing her children and seeking pastor's advice and guidance on how to proceed fell within exception to mandatory disclosure for privileged communications made to a member of the clergy in his professional character in a confession or "similarly confidential communication," and, thus, pastor was not required to make a report of the alleged abuse under the reporting statute; church member went to pastor for pastoral guidance and advice, and though she did not make a confession to the pastor, she had a similar expectation that her communication with pastor would be kept private. *People v. Prominski*, 302 Mich. App. 327, 839 N.W.2d 32 (2013).

³²² Mich. Comp. Laws § 722.623(1)(a).

³²³ Mich. Comp. Laws § 722.623(1)(c).

³²⁴ *Mandated Reporters Are Required by Law to Report*, MDHHS, http://www.michigan.gov/mdhhs/0,5885,7-339-73971_7119_50648_7193_7812-157836--,00.html (2018).

The following employees of DHHS also have a legal mandate to report suspected child abuse or neglect: eligibility specialists, family independence manager or specialists, social services specialists, social work specialists, social work specialist managers, and welfare services specialists.³²⁵

The Child Protection Law creates liability both for failing to report and for knowingly making a false report.³²⁶ A mandatory reporter who does not report may be sued for the damages that are proximately caused by the failure.³²⁷ Failure to report is also a misdemeanor that may be punished by up to 93 days in jail or a fine of up to \$500.³²⁸ Intentionally making a false report, on the other hand, can result in the same criminal liability as the activity that was falsely reported or a misdemeanor, depending upon the activity falsely reported.³²⁹

A person making a report or assisting in any other requirement is presumed to have acted in good faith.³³⁰ Individuals who make such reports are shielded from liability for having made the report.³³¹ For example, the Michigan Court of Appeals ruled that physicians' statements to police that a patient had potentially given birth to viable fetus and that she and her partner may have disposed of a live baby at risk were within ambit of suspected child neglect under the Child Protection Law, and so the physicians were immune from claims of defamation, intentional infliction of emotional distress, invasion of privacy, and invasion of privacy-false light.³³²

B. When a Report is Mandatory

A report becomes mandatory when one of the above-mentioned individuals has "reasonable cause to suspect child abuse or child neglect . . .".³³³ There is no statutory definition of what it means to find "reasonable cause to suspect child abuse or neglect." The Michigan Court of Appeals has stated that "the words 'reasonable cause to suspect' speak for themselves . . .".³³⁴

³²⁵ 722.623(1)(b).

³²⁶ Mich. Comp. Laws § 722.633.

³²⁷ Mich. Comp. Laws § 722.633(1). However, a government employee may be entitled to immunity from civil action if their failure to report was not grossly negligent and the proximate cause of the child's injury. See *Garza v. Lansing Sch. Dist.*, No. 1:15-CV-1128, 2016 WL 3397535, at *3 (W.D. Mich. June 21, 2016); *Jones*, 300 Mich. App. at 78, 832 N.W.2d at 433 (holding that the abuser—and not the individual who failed to report—was the proximate cause of a child's injuries); see also *Campbell v. Dundee Cnty. Sch.*, No. 12-CV-12327, 2015 WL 4040743, at *12 (E.D. Mich. July 1, 2015) ("Where a child is abused by a third party, the third party is the proximate cause, and the governmental employee will not be held liable").

³²⁸ Mich. Comp. Laws § 722.633(2).

³²⁹ Mich. Comp. Laws § 722.633(5).

³³⁰ Mich. Comp. Laws § 722.625.

³³¹ *Sanders v. Stanley*, 794 F. Supp. 2d 755 (E.D. Mich. 2011).

³³² *Id.*

³³³ Mich. Comp. Laws § 722.623(1).

³³⁴ *Cavaiani*, 172 Mich. App. at 715.

Courts have made clear that it is not the legal duty or even the option of the reporting person to investigate the possibility of abuse.³³⁵ Courts have also observed that “even if a reporting person believes that there was no child abuse, [they] must still report the possibility and allow the state to investigate, because the state has different interests.”³³⁶ This is because, according to the courts, “public policy is better served by investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred.”³³⁷

The State Court Administrative Office recommends that “those individuals designated as mandated reporters report child abuse or neglect when their rational observations, professional training, experience, or any other factor causes them to suspect child abuse or neglect has occurred.”³³⁸ Nonetheless, it can be challenging to know whether a suspicion is reasonable. Few concrete examples exist to guide mandated reporters. DHHS has specifically instructed that several specific situations standing alone do not indicate neglect or abuse: head lice, decisions not to immunize or provide psychotropic medication, refusal to consent to therapy, and a child who is a truant or runaway.³³⁹ The Michigan Court of Appeals has found that a reasonable suspicion should have prompted a report when, for example, a child’s aunt repeatedly called a foster-care worker to complain that the child was not being given sufficient nutrition.³⁴⁰ A court also found that a psychologist reasonably suspected abuse when his nine-year-old patient told him that her father had fondled her breasts.³⁴¹

The Child Protection Law defines a child as a person who is under the age of 18.³⁴² The Child Protection Law does not impose a duty to report disclosed abuse of a child who is now an adult unless the disclosure creates a reason to suspect harm or threatened harm to someone who is currently a child.³⁴³

The term “child abuse” is limited to “harm or threatened harm to a child’s health or welfare

³³⁵ *Id.*

³³⁶ *McNeil ex rel. McNeil v. Metinko*, No. 194595 (Mich. Ct. App. Mar. 13, 1998).

³³⁷ *Cavaiani*, 172 Mich.App at 713.

³³⁸ *What Mandated Reporters Need to Know about Reporting Child Abuse & Neglect*, THE PUNDIT, STATE COURT ADMIN. OFFICE, June 30, 2016.

³³⁹ *Mandated Reporters’ Resource Guide*, Mich. Dep’t Hum. Servs., DHHS Pub 112 (Rev. 2-13) (2013) available at http://www.michigan.gov/documents/dhs/Pub-112_179456_7.pdf.

³⁴⁰ *Williams v. Coleman*, 194 Mich.App. 606, 488 N.W.2d 464 (1992) (abrogated on other grounds).

³⁴¹ *Cavaiani*, 172 Mich. App. 706, 714, 432 N.W.2d 409, 413 (1988). The Michigan Court of Appeals has observed that its prior decisions stand for the proposition that “a child’s statement to a health care professional that abuse occurred automatically triggers the duty to report” *Westwood v. Basham*, No. 195603 (Mich. Ct. App. May 22, 1998).

³⁴² Mich. Comp. Laws § 722.622(f).

³⁴³ See 1997-98 OAG 15, 16 (Mar. 19, 1997). However, the duty to report may be triggered under two exceptions to the general rule: (1) if the mandated reporter knows that the reported abuser is now responsible for another child’s welfare, or (2) if the reporting adult is now caring for a child’s welfare, and it appears that the child being cared for is in danger of being abused. *Id.* (analyzing in the context of recipients of mental health services).

that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment.”³⁴⁴ Child abuse occurs when such a harm is committed by “a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy.”³⁴⁵ Child neglect is a “harm or threatened harm” that is caused by (i) “Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care”; or (ii) “Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.”³⁴⁶ A person is “responsible for the child's health or welfare” if they are “a parent, legal guardian, person 18 years of age or older who resides for any length of time in the same home in which the child resides,” a close friend of the family,³⁴⁷ or a licensed child or adult foster care provider.³⁴⁸

Reporters are not required to report activity when the suspected perpetrator is not a parent or one of the other individuals specified by the statute.³⁴⁹ In other words, the imposition of a duty to report suspected child abuse is based, not on the occurrence of such abuse, but on the type of relationship the alleged perpetrator has with the minor child.³⁵⁰ For example, the Child Protection law has been held not to apply to abuse that was allegedly perpetrated by an emergency medical technician because that technician did not have one of the specific types of relationships with the child.³⁵¹

There are certain circumstances under which the statute explicitly requires a report. For example, the pregnancy of a child less than 12 years of age or the presence of a sexually transmitted infection in a child who is over one month of age but less than 12 years of age is reasonable cause to suspect child abuse or child neglect has occurred.³⁵² In addition, a person required to report suspected child abuse who knows, or because of the child's symptoms has reasonable cause to suspect, that a newborn infant has any amount of alcohol, a controlled substance, or a metabolite of a controlled substance in their body must make a report of suspected child abuse.³⁵³

³⁴⁴ Mich. Comp. Laws § 722.622(g).

³⁴⁵ Mich. Comp. Laws § 722.622(g).

³⁴⁶ Mich. Comp. Laws § 722.622(k).

³⁴⁷ The statute references a “nonparent adult” who has “substantial and regular contact with the child”; “a close personal relationship with the child's parent or with a person responsible for the child's health or welfare”; and is “not the child's parent or a person otherwise related to the child” Mich. Comp. Laws § 722.622(v). This may be construed to include a non-live-in girlfriend or boyfriend.

³⁴⁸ Mich. Comp. Laws § 722.622(x).

³⁴⁹ *People v. Beardsley*, 263 Mich. App. 408, 416, 688 N.W.2d 304, 308 (2004).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² Mich. Comp. Laws § 722.626(8).

³⁵³ Mich. Comp. Laws § 722.623a.

C. The Report

A mandatory reporter who reasonably suspects child abuse or neglect must make an “immediate report to centralized intake by telephone, or, if available, through the online reporting system, of the suspected child abuse or child neglect. Within 72 hours after making an oral report by telephone to centralized intake, the reporting person shall file a written report . . .”³⁵⁴ Very little detail is required in the report. The written report must include the name of the child and a description of the abuse or neglect; if possible, the names and addresses of the child’s parents, guardian, the persons with whom the child resides, and the child’s age.³⁵⁵ The report must contain other information available to the reporting person which might establish the cause of the abuse or neglect, and the manner in which the abuse or neglect occurred.³⁵⁶

D. Confidentiality and Child Protection Reports

The Child Protection Law expressly overcomes all privileges except the attorney-client privilege and the pastor-church member privilege.³⁵⁷ Any other privilege does not constitute an excuse for failure to report and will not constitute a reason for excluding evidence from a child protective proceeding that results from a report.³⁵⁸ Accordingly, it is possible that a report could culminate in the reporter being subpoenaed to give testimony regarding the report. Regardless, professional and statutory duties of confidentiality require that, once a report is made, additional communications regarding the details or underlying circumstances of an event may not be shared unless in compliance with those duties.

“The identity of a reporting person is confidential subject to disclosure only with the consent of that person or by judicial process.”³⁵⁹ This protection does not extend to individuals who did not make the report, but collaborated in some way. The alleged perpetrator may infer from the information in the report who made the complaint and confront mandated reporters, however, CPS will not disclose the identity of a reporting person.³⁶⁰ The department is required to maintain a state-wide registry of reports made under the Child Protection Law.³⁶¹ A person listed on the registry may seek administrative review of that decision.³⁶² If an investigation does not find support by a preponderance of the evidence to support a report, or if a court dismisses

³⁵⁴ Mich. Comp. Laws § 722.623(1)(a). Notification of a supervisor is not sufficient to relieve the mandatory reporter of their duty to report. *Id.*

³⁵⁵ Mich. Comp. Laws § 722.623(2).

³⁵⁶ *Id.*

³⁵⁷ Mich. Comp. Laws § 722.631.

³⁵⁸ *Id.*; *People v. Prominski*, 302 Mich. App. 327, 331, 839 N.W.2d 32, 34 (2013) (holding that statement was privileged when church member asked pastor for advice on what to do about husband’s sexual abuse of children even though pastor was mandatory reporter).

³⁵⁹ Mich. Comp. Laws § 722.625.

³⁶⁰ *Mandated Reporters’ Resource Guide*, Mich. Dep’t Hum. Servs., DHHS Pub 112 (Rev. 2-13) (2013), available at http://www.michigan.gov/documents/dhs/Pub-112_179456_7.pdf.

³⁶¹ Mich. Comp. Laws § 722.627.

³⁶² Mich. Comp. Laws § 722.627(5)–(6).

a petition regarding a report, then the individual accused of abuse or neglect will have their name expunged from the registry.³⁶³ Entries in the registry are carefully guarded and may only be disclosed under several limited circumstances set forth by the statute.³⁶⁴

E. Teacher–Student Privilege

Michigan statutorily protects the confidentiality of a student’s records or confidential communications made to school teachers and employees; the statute provides:

No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students’ behavior or who has records in their custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of their parent or legal guardian.³⁶⁵

The Michigan Court of Appeals has observed “the plain language of [the statute] makes clear that it does not apply when a school official discloses information outside of court proceedings.”³⁶⁶ It must be clear that the communication is intended to be confidential; therefore, a student’s communication is not considered confidential when made in the presence of third parties who are not involved in the educational system, such as a friend.³⁶⁷

Federal law also protects the privacy of academic records, which goes beyond merely preventing them from being shared in court.³⁶⁸ Schools are generally prohibited from disclosing personally identifiable information about your child without a parent or guardian’s written consent or a valid court order.³⁶⁹

F. Protection of Records by Personal Protection Orders

Generally, a noncustodial parent cannot be denied access to their child’s records or information

³⁶³ Mich. Comp. Laws § 722.627(7).

³⁶⁴ Mich. Comp. Laws § 722.627(2)(a)–(w).

³⁶⁵ Mich. Comp. Laws § 600.2165.

³⁶⁶ *Cassise v. Walled Lake Consol. Sch.*, No. 257299 (Mich. Ct. App. Feb. 23, 2006).

³⁶⁷ See *People v. Pitts*, 216 Mich. App. 229, 235, 548 N.W.2d 688, 692 (1996) (communication was not confidential because the defendant made the statements in the presence of the assistant principal, a teacher, the complainant and the complainant’s friend).

³⁶⁸ 20 U.S.C. § 1232g.

³⁶⁹ *See id.*

unless they are prohibited from having access to the records or information by a protective order.³⁷⁰ Records or information includes, but is not limited to, medical, dental, and school records, day care provider records, and notification of meetings regarding the child's education.³⁷¹ A school is prohibited from releasing information protected by a PPO to a parent who is subject to a personal protection order.³⁷²

G. Parent-Child Privilege

The Michigan Court of Appeals, like the courts of most states around the country, has declined to adopt a parent-child testimonial privilege. The court in *People v. Dixon*³⁷³ stated that any recognition of new privileges are best determined by the legislature.³⁷⁴ The court reasoned that the "exclusion of relevant evidence by the creation of a privilege is warranted only if the resulting public good transcends the normally predominant principle of using all rational means for ascertaining the truth."³⁷⁵ The court stated that the interests of obtaining all relevant evidence of the crimes outweighed the "generalizations favoring the preservation of the American family through barring the testimony of a parent or child."³⁷⁶

³⁷⁰ Mich. Comp. Laws § 722.30.

³⁷¹ *Id.*

³⁷² Mich. Comp. Laws § 380.1137a,

³⁷³ 161 Mich. App. 388, 411 N.W.2d 760 (1987). A majority of states have rejected the adoption of parent-child privilege. *See Id.* at 762. It is recognized in the federal district court of Nevada, some state courts in New York, and has statutorily been enacted in Idaho and Minnesota. *See Id. See also* 81 Am. Jur. 2d Witnesses § 491 (stating "generally, there is no parent-child privilege").

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 763.

Chapter 15. Vulnerable Adults

A. Mandatory Reporters

Reporting requirements³⁷⁷ pertaining to vulnerable adults largely mirror those for abused and neglected children.³⁷⁸ The applicable statute makes professionals in the following roles mandatory reporters:

- A person who is employed, licensed, registered, or certified to provide health care, educational, social welfare, mental health, or human services;
- An employee of an agency licensed to provide health care, educational, social welfare, mental health,³⁷⁹ or other human services;
- A law enforcement officer;
- An employee of the office of the county medical examiner.

These professionals must make a report if they have “reasonable cause to believe that an adult has been abused, neglected, or exploited . . .”³⁸⁰ Those who report under the vulnerable adults statute are shielded from liability for claims such as defamation based on their report.³⁸¹ Any legally recognized privileged communication, except the attorney-client privilege, is abrogated and will not excuse the reporting requirement.³⁸²

B. Definitions

An adult is considered “vulnerable” if they are in “a condition . . . which [makes them] unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age.”³⁸³

The statute goes on to explain the conditions that would warrant a report. It defines neglect as “harm to an adult’s health or welfare caused by the inability of the adult to respond to a harmful situation or by the conduct of a person who assumes responsibility for a significant aspect of the adult’s health or welfare. Neglect includes the failure to provide adequate food, clothing, shelter, or medical care.”³⁸⁴ In turn, “Abuse” is defined as “harm or threatened harm

³⁷⁷ Mich. Comp. Laws § 400.11a.

³⁷⁸ See *supra* Chapter 14.

³⁷⁹ Notably, mental health providers may also be required to report criminal abuse of adults who are not deemed vulnerable by the vulnerable adults reporting statute. See Mich. Comp. Laws § 330.1723.

³⁸⁰ Mich. Comp. Laws § 400.11a(1).

³⁸¹ See Mich. Comp. Laws § 400.11c; *Shipman v. Greenameyer*, No. 186917 (Mich. Ct. App. Jan. 31, 1997).

³⁸² Mich. Comp. Laws § 400.11a(2).

³⁸³ Mich. Comp. Laws § 400.11(f).

³⁸⁴ Mich. Comp. Laws § 400.11(f) (also providing that “A person shall not be considered to be abused,

to an adult's health or welfare caused by another person.”³⁸⁵ “Abuse includes, but is not limited to, non-accidental physical or mental injury, sexual abuse, or maltreatment.”³⁸⁶ The court of appeals has determined that “educational abuse or neglect” is not included in this definition.³⁸⁷ Finally, the term “exploitation” means “an action that involves the misuse of an adult's funds, property, or personal dignity by another person.”³⁸⁸

C. Application of the Statute

People in the listed professions have a duty to report suspected abuse, neglect, or exploitation of vulnerable adults.³⁸⁹ However, anyone is permitted to make a report if they suspect that a vulnerable adult is being abused, neglected, or exploited.³⁹⁰

A report made by a physician or other licensed professional pursuant to the vulnerable adult statute is not considered a violation of any legally recognized privileged communication.³⁹¹ A person who is required to but fails to make a report is civilly liable for the damages proximately caused by failure to report and is subject to a civil fine of not more than \$500.00 for each failure to report.³⁹²

Under the Mental Health Code,³⁹³ a community mental health agency who has information regarding an adult who is suspected of being abused is required to disclose the information or records in the course of an adult protective services investigation.³⁹⁴ “[T]he Mental Health Code...authorizes the disclosure of such records...when there is a compelling need for disclosure based upon a substantial probability of harm to the recipient or other persons.”³⁹⁵ Furthermore, there is a duty to report criminal abuse and suspected criminal abuse of a recipient of mental health services, no matter what the age of the recipient.³⁹⁶ However, the Mental Health Code

neglected, or in need of emergency or protective services for the sole reason that the person is receiving or relying upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, and this act shall not require any medical care or treatment in contravention of the stated or implied objection of that person.”)

³⁸⁵ Mich. Comp. Laws § 400.11(a).

³⁸⁶ Mich. Comp. Laws § 400.11(a).

³⁸⁷ Michigan Ass'n of Intermediate Special Educ. Administrators v. Dep't of Soc. Servs., 207 Mich. App. 491, 526 N.W.2d 36 (1994).

³⁸⁸ Mich. Comp. Laws § 400.11(c).

³⁸⁹ Mich. Comp. Laws § 400.11a(1).

³⁹⁰ Mich. Comp. Laws § 400.11a(3).

³⁹¹ Mich. Comp. Laws § 400.11a(2).

³⁹² Mich. Comp. Laws § 400.11e.

³⁹³ Mich. Comp. Laws § 330.1748(5)(d) (authorizing disclosure of community health information to comply with another provision of law); and Mich. Comp. Laws § 330.1748(7)(c) (authorizing disclosure when there is compelling need based upon a substantial probability of harm to the recipient or other persons).

³⁹⁴ See 1991-92 OAG 84, 85-86 (Sept. 18, 1991).

³⁹⁵ *Id.*

³⁹⁶ Mich. Comp. Laws § 330.1723.

expressly provides a statute of limitations of one year from the time the abuse became known to the enumerated “reporting person” on the duty to report.³⁹⁷ The duty to report may be satisfied if the individual who has a duty to report knows that the incident has already been reported to the appropriate law enforcement agency.³⁹⁸

D. The Report

A report made must contain the name of the adult and a description of the abuse, neglect, or exploitation. If possible, the report must also contain the adult’s age and the names and addresses of the adult’s guardian or next of kin, and of the persons with whom the adult resides, including their relationship to the adult.³⁹⁹ The report must also contain all other information available to the reporting person that may establish the cause of the abuse, neglect, or exploitation and the manner in which the abuse, neglect, or exploitation occurred or is occurring.⁴⁰⁰ The county department is responsible for creating a written statement of an oral report.⁴⁰¹

E. The Investigation

Mere suspicion that an adult is being abused, neglected, or exploited is sufficient grounds to make a report to the county department of social services.⁴⁰² An investigation to determine whether the adult suspected of being in need of protective services must begin within twenty-four hours of receiving the information.⁴⁰³ That investigation must include a review of the residence and conduct an in-person interview with the adult.⁴⁰⁴

The county department is responsible for preparing a written report of the investigation, its findings and forwarding a copy to the state department upon request.⁴⁰⁵ A copy of the report may be forwarded to the appropriate prosecuting attorney.⁴⁰⁶ The statute imposes a duty on the county department to orally report to the police any criminal activity that it believes is occurring.⁴⁰⁷

If the county department determines that an adult was or is abused, neglected, or exploited the county must make available to the adult the appropriate and least restrictive protective service

³⁹⁷ Mich. Comp. Laws § 330.1723(9)(b).

³⁹⁸ See *Id.* Mich. Comp. Laws § 330.1723(9)(a).

³⁹⁹ Mich. Comp. Laws § 400.11a(4).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² Mich. Comp. Laws § 400.11a(1).

⁴⁰³ Mich. Comp. Laws § 400.11b(1).

⁴⁰⁴ Mich. Comp. Laws § 400.11b(4).

⁴⁰⁵ Mich. Comp. Laws § 400.11b(7).

⁴⁰⁶ Mich. Comp. Laws § 400.11b(8).

⁴⁰⁷ Mich. Comp. Laws § 400.11a(5).

that is available, either directly or by purchase from other agencies.⁴⁰⁸ The department may petition for a finding of incapacity and appointment of guardian or temporary guardianship.⁴⁰⁹

F. Confidentiality

The identity of a person making a report is confidential, subject only to disclosure with the consent of that person or by judicial process.⁴¹⁰ The information and records collected by the department will be made available for further investigations and other government functions.⁴¹¹ The records may also be released under FOIA or to the vulnerable adult who is the subject of the report.⁴¹²

⁴⁰⁸ Mich. Comp. Laws § 400.11b(6).

⁴⁰⁹ *Id.*

⁴¹⁰ Mich. Comp. Laws § 400.11c(1).

⁴¹¹ Mich. Comp. Laws § 400.11c(3).

⁴¹² Mich. Comp. Laws § 400.11d.

Chapter 16. Rape-Shield Rules

A. Rape-Shield Law

Rape shield laws apply in every state and under federal law to “codify the simple truth that a victim who consented to sexual activities in the past is not more likely to have ‘consented’ to the rape being prosecuted.”⁴¹³ Although not a “privilege,” the rape shield means that certain facts about a person’s sexual history may not be used to discredit them in court. This is of special significance to sexual assault survivors, who often fear that they will be humiliated for their personal sex lives while trying to bring their attacker to justice. It is important to stress that these laws and rules act separately from statutory privileges. Even if humiliating or embarrassing information is subject to discovery, the rape shield law may prevent the information from being used as a weapon of intimidation in court.

The law known as the rape shield is actually both an evidentiary rule and a statute. The Michigan Rules of Evidence generally do not allow character evidence that is offered only to show that someone has a particular trait or tendency.⁴¹⁴ Before the rape shield, evidence of prior sexual relations was commonly allowed in regardless of this general rule because it was considered to be useful to show a pattern of behavior or conduct as opposed to character.⁴¹⁵ The rape shield added this specific prohibition: “In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity, showing the source or origin of semen, pregnancy, or disease.”⁴¹⁶

In prosecution of a criminal sexual conduct crime, the statutory rape shield law generally bars evidence of “specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct.”⁴¹⁷ However, a judge may allow such evidence if it would not be overly prejudicial, and if it has to do with prior sex acts with the defendant or if it could show the source of semen, pregnancy, or disease.⁴¹⁸ In other words, the rape shield law does not stop evidence from coming in if (1) its inflammatory nature does not outweigh its value to the case, and (2) it either has to do with a prior act with that defendant or another act that could have been the source of semen, pregnancy, or disease.⁴¹⁹ If the defendant wants to put up this type of evidence, then they must offer it to the

⁴¹³ Meg Garvin, et. al., *Exluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, NAT'L CRIME VIC. LAW INST., September (2010).

⁴¹⁴ Mich. R. Evid. 404(a).

⁴¹⁵ See, e.g., *People v. Sharpe*, 319 Mich. App. 153, 161, 899 N.W.2d 787, 792, appeal granted on other grounds, 501 Mich. 899, 901 N.W.2d 899 (2017).

⁴¹⁶ Mich. R. Evid. 404(c).

⁴¹⁷ Mich. Comp. Laws § 750.520j(1).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

judge for a review in chambers within 10 days after the arraignment.⁴²⁰ This means that a victim should know early in the process whether this is likely to come in as evidence. This approach to rape-shield exceptions has been adopted by the overwhelming majority of states.⁴²¹ A similar approach is reflected in the federal rules of evidence as well, but the federal rule also explicitly states that evidence of prior sexual behavior is admissible when the constitutional rights of the defendant would be violated by its exclusion.⁴²² In general, prosecutors may argue that evidence of prior sex acts between a defendant and victim is overly prejudicial and should be excluded anyway, but that argument is met with limited success.⁴²³

The rape shield statute serves two purposes. The first is to encourage the reporting and prosecution of criminal sexual conduct offenses by ensuring that the victim will not be subject to embarrassment or harassment based on the victim's sexual past. Second, it furthers the truth-seeking function of the trial by excluding evidence of the victims' sexual history which may distract and inflame the jury and lead to acquittals based solely on prejudice.⁴²⁴ The constitutionality of the rape shield has been upheld by the courts and there is no longer any credible argument that the rape shield generally is a violation of defendants' rights to confront witnesses against them.⁴²⁵ The rape shield evidentiary rule applies in all federal proceedings, in Michigan criminal sexual conduct criminal trials, and in hearings regarding sexual assault PPOs.⁴²⁶

B. Prior Sexual Conduct

Although general evidence regarding the chastity or virginity of a victim is generally not admissible,⁴²⁷ there are some circumstances in which evidence of the victim's prior sexual conduct must be admitted in order to protect the defendant's rights. For example, courts have held that a victim's history of making false accusations of rape may need to be admitted.⁴²⁸ All of these determinations must be made on a case-by-case basis, so the court must consider

⁴²⁰ Mich. Comp. Laws § 750.520j(2); but see *People v. McLaughlin*, 258 Mich. App. 635, 655, 672 N.W.2d 860, 873 (2003) (holding that failure to give notice does not automatically preclude admission of **873 the evidence. In this situation, the trial court must exercise its discretion, on a case-by-case basis, to determine whether the evidence should be admitted or excluded).

People v. McLaughlin, 258 Mich. App. 635, 655, 672 N.W.2d 860, 873 (2003).

⁴²¹ Garvin, *supra*, note 413.

⁴²² Fed. R. Evid. 412(a)(2)(C)

⁴²³ See generally, Garvin, *supra*, note 413.

⁴²⁴ *People v. Arenda*, 416 Mich. 1, 330 N.W.2d 8141 (1982).

⁴²⁵ *Id.*

⁴²⁶ Mich. Comp. Laws § 600.2950a(4).

⁴²⁷ *People v. Bone*, 230 Mich. App. 699, 704, 584 N.W.2d 760, 762 (1998) (holding that evidence presented by the prosecutor of a victim's virginity was unduly prejudicial); *People v. Benton*, 294 Mich. App. 191, 199, 817 N.W.2d 599, 605 (2011) (holding that a twelve-year-old boy's virginity was not legally relevant to any issue in the case).

⁴²⁸ *People v. Grissom*, 492 Mich. 296, 327, 821 N.W.2d 50, 67 (2012) (does not apply to this evidence because it does not preclude impeaching a complainant with the complainant's prior false accusation).

whether the evidence is worthwhile despite the fact that it is prejudicial and the strong public policy of the rape shield against this evidence.⁴²⁹ A determination of admissibility of such evidence does not entitle the defendant to unnecessarily harass or humiliate the complainant, nor does it entitle the defendant to a “fishing expedition.”⁴³⁰

The statute does not define “sexual conduct.” Courts have not settled the question of whether evidence of prior sexual abuse constitutes “sexual conduct” within the meaning of the rape-shield statute. The proper construction of that term is a question that has divided the Michigan Supreme Court.⁴³¹

C. Past Sexual Conduct with the Actor

When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case.⁴³² “Past sexual conduct” refers to both conduct occurring before the alleged sexual assault as well as conduct that occurs before trial; thus, the term refers to any acts prior to trial.⁴³³

A defendant may be allowed to present evidence of prior sexual acts that are similar to the charged offense. For example, the Michigan Supreme Court has held that evidence of consensual sexual conduct between the complainant and the defendant approximately one week before the alleged sexual assault was material to the issue of whether the complainant consented to the acts charged.⁴³⁴ On the other hand, where a defendant sought to introduce evidence that during their marriage they frequently engaged in digital-anal intercourse, the Michigan Supreme Court held that the proffered evidence was inadmissible because the defendant was not offering it to show his wife consented to the acts in question, but rather, he argued that the events subject to the prosecution had never happened at all.⁴³⁵ Similarly, the court has reasoned that prior consent to have sex with one person is not relevant to show consent to have sex with that person and four other defendants.⁴³⁶

Courts have considered the relevancy of having received payment for sex acts. The Court of Appeals has approved the fact that a victim had previously exchanged sex for money in order to support a defendant’s claim that he had financially induced the victim to consent; however, that evidence could not be used generally to show that they were not credible simply because

⁴²⁹ See Garvin, *supra*, note 413

⁴³⁰ See Hackett, 365 N.W.2d at 125.

⁴³¹ See *People v. Duenaz*, 498 Mich. 969, 873 N.W.2d 303 (2016) (*citing People v. Parks*, 483 Mich. 1040 (2009) (Young, J., concurring) (Markman, J., dissenting); *People v. Piscopo*, 480 Mich. 966 (2007) (Markman, J., dissenting)).

⁴³² *People v. Benton*, 294 Mich. App. 191, 817 N.W.2d 599 (2011)

⁴³³ *People v. Adair*, 452 Mich. 473, 550 N.W.2d 505, 510 (1996).

⁴³⁴ *People v. Perkins*, 424 Mich. 302, 379 N.W.2d 390, 393 (1986).

⁴³⁵ See *People v. Adair*, 452 Mich. 473, 550 N.W.2d 505 (1996).

⁴³⁶ *People v. Williams*, 416 Mich. 25, 330 N.W.2d 823 (1982).

they had engaged in sex for money.⁴³⁷ Allegations of being employed as a sex worker must be concrete.⁴³⁸ For example, general allegations that the complainant was seen walking with persons believed to be prostitutes, or that the complainant danced at a topless club, or a belief that the complainant was seen waving to passing cars while dressed in a short skirt are not admissible.⁴³⁹ The proffered evidence may not be of the type that calls into question a complainant's sexual character because that is precisely the type of evidence the rape-shield statute was enacted to prevent.⁴⁴⁰

D. Other Conduct of the Victim

In spite of the rape shield, a victim's conduct is sometimes allowed into evidence. The rape shield does not prevent evidence of prior sex acts that may have been the source of an injury such as tears to the hymen or anal fissure.⁴⁴¹ The rape shield law also does not bar sexual statements allegedly made by a victim to a third party that are otherwise relevant to the defendant's consent defense. For example, the Michigan Supreme Court allowed testimony to come in that on the date of the alleged rape, the victim had told a friend that she had discussed birth control with her mother in anticipation of going away to college, that she believed that she was ready for sex, and that she asked her friend to "find her a guy."⁴⁴²

Relatedly, the Michigan Court of Appeals has held that a defendant is not entitled to a psychiatric examination of a victim to prove consent or simply because they have asserted that they were sexually assaulted.⁴⁴³ The court reasoned that the "introduction of a general psychological profile as to one's sexual propensities would have little bearing on the issue of consent in any particular case."⁴⁴⁴ Additionally, the defendant could not use the complainant's history of treatment for alcoholism to show that the complainant consented.⁴⁴⁵ The court could not find any connection between alcoholism and consenting to sexual activity.⁴⁴⁶

⁴³⁷ *People v. Slovinski*, 166 Mich. App. 158, 420 N.W.2d 145 (1988).

⁴³⁸ *People v. Ramirez*, No. 242381, 2004 WL 136402, at *2 (Mich. Ct. App. Jan. 27, 2004) (stating that a strong

⁴³⁹ *People v. Powell*, 201 Mich. App. 516, 506 N.W.2d 894, 895-96 (1993).

⁴⁴⁰ *Id.*

⁴⁴¹ *People v. Shaw*, 315 Mich. App. 668, 679, 892 N.W.2d 15, 24 (2016), *appeal denied*, 500 Mich. 941, 891 N.W.2d 226 (2017) (noting in a dissenting opinion that the Court of Appeals seemingly had read in a "source of injury" exception to the statute—going beyond the exceptions for source of pregnancy, disease, or semen).

⁴⁴² *People v. Ivers*, 459 Mich. 320, 587 N.W.2d 10, 14 (1998).

⁴⁴³ *People v. Davis*, 91 Mich. App. 434, 441, 283 N.W.2d 768, 771 (1979).

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

Chapter 17. Confidentiality in Michigan Court Cases

The presence of domestic violence has serious safety implications on domestic relations proceedings. Sometimes divorce and child custody/parenting time proceedings are used by assailants to gain information on the whereabouts of an abused party who is in hiding to escape violence. The following information addresses various times and ways that identifying information may be safeguarded from an abuser.⁴⁴⁷ Keeping this information secret has become increasingly crucial as courts and government offices regularly make their records searchable on the internet. Clients and advocates should seek information from their attorneys regarding which rules will apply in any particular case.

Perhaps the most crucial information to keep private is a vulnerable individual's home address. In light of this reality, it has become a general practice for domestic violence programs to have survivors in shelter use the program's public business mailing address (whether it's a P.O. Box or street address) to receive mail while they are in shelter (and sometimes for others not in shelter but in need of a place to receive mail while they are in transition). Programs engaging in this practice should be aware that some people-search websites make it possible to do a reverse address search for the program's publicly available mailing address and obtain a list of survivors who have received mail there. Accordingly, shelter programs should get a separate, confidential P.O. Box that is for shelter resident mail only, rather than using the business's public mailing address. That way there is no publicly searchable address that an abuser could use to find out if their victim has received services from the program.

A. General availability of court records

Unless a rule or court order makes a court record private, it will generally be available to the public.⁴⁴⁸ It is also a general rule that a noncustodial parent may access their child's records.⁴⁴⁹ However, there are several specific provisions of law that prevent disclosure of court records in cases involving, or related to domestic and sexual violence. It is helpful to keep in mind that court records and confidential files are not subject to requests under Michigan's Freedom of Information Act (FOIA), as the judicial branch of government is specifically exempted from that act.⁴⁵⁰

B. Sealing Court Records

⁴⁴⁷ For more detailed information on each of the legal provisions discussed in this Chapter, see Mary Lovik, et al., *Domestic Violence Benchbook*, MICH. JUDICIAL INST. (4th ed. 2017) available at <https://mjieducation.mi.gov/documents/benchbooks/21-dvbb/file>.

⁴⁴⁸ Mich. Crt. R. 3.703(B)(6); Mich. Crt. R. 6.007; Mich. Crt. R. 8.119(H)(1) (stating that the records shall be available so that "any person may inspect that record and may obtain copies").

⁴⁴⁹ Mich. Comp. Laws § 722.30.

⁴⁵⁰ Mich. Comp. Laws § 15.232(d)(v); Mich. Comp. Laws § 15.233(1).

Parties may move the court to seal any court record.⁴⁵¹ A court may seal a record if the court makes a finding of “good cause” to keep the file private and “there is no less restrictive means to adequately and effectively protect the specific interest asserted.”⁴⁵² “When considering a motion to seal court records in a civil or criminal matter [and] the motion involves an allegation of domestic violence, the court shall consider the safety of any alleged victim or potential victim of the domestic violence.”⁴⁵³ If a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals.⁴⁵⁴

Notably, any the court must give any interested party an opportunity to be heard regarding a request to seal a record.⁴⁵⁵ This may be problematic in cases involving domestic violence. Abusers may use this “opportunity” as a tool for harassing the person seeking confidentiality. Furthermore, the motion process itself may be dangerous for an abused individual. Advance notice of a hearing on a motion may itself alert the abuser to the abused individual’s whereabouts. Safety planning with an abused individual’s attorney should be carefully managed when confidentiality is paramount.

C. Use of Pseudonym to protect litigant identity

It is becoming increasingly common for courts in civil actions to consider motions by litigants seeking to proceed under a fictitious name, such as “Jane Doe.” This is commonly referred to as “Doe status” or “proceeding under pseudonym.” However, the right to proceed anonymously, which is derived from the right to privacy, is not absolute. Rather, the decision whether to permit fictitious names is “subject to a decision by the judge as to the need for the cloak of anonymity.”⁴⁵⁶

The case controlling the use of fictitious names in Michigan is *Doe v. Bodwin*.⁴⁵⁷ In *Doe*, the plaintiff sued her psychologist for malpractice, battery and criminal sexual conduct, “alleging that he had sexual intercourse with her during therapy.”⁴⁵⁸ The Michigan Court of Appeals determined that whether it is appropriate to grant a litigant anonymity by way of a fictitious name “requires a balancing of considerations calling for maintenance of a party’s privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings.”⁴⁵⁹

⁴⁵¹ Mich. Crt. R. 8.119(I).

⁴⁵² *Id.*

⁴⁵³ Mich. Comp. Laws § 600.2972(1).

⁴⁵⁴ Mich. Crt. R. 7.211(C)(9)(a)(specifying that any request to review the sealed material will be directed to the trial court).

⁴⁵⁵ Mich. Crt. R. 8.119(I)(3). Note that, under Mich. Crt. R. 2.113, the caption of a motion must contain the name, address, and telephone number of the pleading attorney, or, if the party has no attorney, the party’s name, address, and telephone number.

⁴⁵⁶ *Doe v. Bodwin*, 119 Mich. App. 264, 267, 326 N.W.2d 473, 475 (1982).

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

Among the factors to be considered in the balancing process are whether: (1) prosecution of the suit compels the plaintiff to disclose information of a private nature; (2) the plaintiff seeks to challenge governmental or private activity; and (3) the plaintiff is compelled to admit an intention to engage in illegal conduct.⁴⁶⁰ Specifically, courts have identified abortion, religion, illegitimate, or abandoned children subject to welfare proceedings, birth control, homosexuality, transsexuality, mental illness, and personal safety as the types of cases where it may be appropriate to grant a party pseudonymous status.⁴⁶¹

D. Information Relating to Personal Protection Orders (“PPOs”)

A person seeking a PPO may leave off their address from the documents filed with the court, but must provide a mailing address for the court.⁴⁶² The federal Violence Against Women Act (VAWA),⁴⁶³ prohibits a court from providing certain PPO information over the internet if it would likely reveal the identity or location of the petitioner. The Michigan Court Rules have adopted a provision prohibiting the court “from making available to the public on the internet any information regarding the registration of, filing of a petition for, or issuance of an order . . . if such publication would be likely to publicly reveal the identity or location of the party protected under the order.”⁴⁶⁴ In practice, PPOs are not searchable on any online filing or storage database for Michigan counties. The court does not have the authority to seal the order that emerges from a PPO proceeding.⁴⁶⁵

A court may also issue a PPO that restrains an individual from “[h]aving access to information in records concerning a minor child of both [the] petitioner and [the] respondent that will inform [the] respondent about the address or telephone number of [the] petitioner and [the] petitioner’s minor child or about [the] petitioner’s employment address.”⁴⁶⁶

E. Criminal Files

Some criminal file contents are kept private.⁴⁶⁷ In Michigan, crime victims have a constitutional

⁴⁶⁰ *Id.*

⁴⁶¹ *Doe v. Borromeo*, No. 305162 (Mich. Ct. App. Sept. 20, 2012).

⁴⁶² MCR 3.703(B)(6); see also Mich. Comp. Laws 600.2950(3) Mich. Comp. Laws 600.2950a(3).

⁴⁶³ 18 U.S.C. § 2261 et seq.

⁴⁶⁴ MICH. CRT. R. § 3.705(C).

⁴⁶⁵ See *Jenson v Puste*, 290 Mich App 338, 345; 801 N.W.2d 639 (2010).

⁴⁶⁶ Mich. Comp. Laws § 600.2950(1)(h). See also Mich. Comp. Laws § 380.1137a, which prohibits a “school district, local act school district, public school academy, intermediate school district, or nonpublic school” from releasing certain information protected by a PPO.

⁴⁶⁷ The provisions below apply in felony or serious misdemeanor cases. Serious misdemeanors, as

“right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.”⁴⁶⁸ To protect this right, the Crime Victim’s Rights Act (CVRA) exempts from disclosure under Michigan’s Freedom of Information Act (FOIA),⁴⁶⁹ the following information and visual representations of a crime victim: (a) home and work address and telephone number unless needed to identify the location of the crime; (b) any image of the victim; (c) for victims of child abuse, criminal sexual conduct, and some similar crimes, the victim’s name and address, that of family members, and any other information that would reveal the identity of the victim, including reference to the relationship of the victim to accused.⁴⁷⁰ This information could be released to a victim advocacy organization in order to allow the organization to provide services.⁴⁷¹ A prosecutor may motion the court and ask that witnesses not be compelled to testify about a victim’s identifying information.⁴⁷² In juvenile delinquency cases, confidential files are only open to individuals whom the court determines have a legitimate interest in wanting to see them.⁴⁷³ Confidential files include the social case file, including victim statements.⁴⁷⁴

F. Domestic Relations Action Documents

As a general rule, all domestic relations complaints in cases that have not been deemed confidential by the court must contain complete names of all parties, complete names and dates of birth of minors involved, anything relevant to what is being requested, and the residence information for parties and minors.⁴⁷⁵ Advocates and attorneys should always ask parties in domestic relations matters whether there are safety concerns with disclosing identifying information to the other party. Where domestic violence is present, some courts will allow a party living in a shelter to give a post office box (used only for private resident mail and not as the shelter’s business address) as an address; otherwise, a court order is needed to protect an address.

Beyond the initial pleadings, the Michigan Court Rules require disclosure of parties’ addresses

defined in Mich. Comp. Laws § 780.811(1)(a), include, among other crimes, a crime of assault and assault and battery under Mich. Comp. Laws § 750.81, assault and infliction of serious or aggravated injury under Mich. Comp. Laws § 750.81a, fourth-degree child abuse under Mich. Comp. Laws § 750.136b(7), internet or computer usage to make prohibited contact under Mich. Comp. Laws § 750.145d, and stalking under Mich. Comp. Laws § 750.411h.

⁴⁶⁸ Const 1963, art 1, § 24.

⁴⁶⁹ Mich. Comp. Laws § 15.231 to Mich. Comp. Laws § 15.246,

⁴⁷⁰ Mich. Comp. Laws § 780.758(3); see also Mich. Comp. Laws § 780.769(2) (rendering victim’s address maintained by sheriff or department of corrections exempt from FOIA); and Mich. Comp. Laws § 780.758(2) (instructing that this information not be contained in court files).

⁴⁷¹ Mich. Comp. Laws § 780.758(4).

⁴⁷² Mich. Comp. Laws § 780.758(1) (a court may hold an in camera hearing on such a motion).

⁴⁷³ MCR 3.925(D).

⁴⁷⁴ Mich. Crt. R. 3.903(A)(3)(b).

⁴⁷⁵ See Mich. Crt. R. 3.206.

on responsive pleadings, motion papers, and court judgments and orders awarding child or spousal support. For example, any responsive pleading must include name, address, and telephone number of the pleading attorney, or, if the party has no attorney, the party's name, address, and telephone number.⁴⁷⁶ Child support orders must also require that the FOC be informed of the name and address of current source of income, and of the health care coverage available to them, including the name and contract number of the insurer.⁴⁷⁷ Finally, a party's employer who is a source of income must promptly notify the FOC when the payer's employment is terminated or interrupted for more than 14 consecutive days, and shall provide the payer's last known address and then name and address of the payer's new employer, if known.⁴⁷⁸ There are no express exceptions to these requirements for cases in which disclosure of a party's address presents a danger to that party, but parties concerned with safety may consider a motion to keep such information confidential.

Federal databases used in the enforcement of domestic relations decisions are governed by specific confidentiality requirements designed to safeguard victims of domestic and sexual violence. The Federal Parent Locator Service ("FPLS") is a national computer matching system operated by the Federal Office of Child Support Enforcement.⁴⁷⁹ The FPLS is designed to assist states in locating noncustodial parents, putative fathers, and custodial parties for the establishment of paternity and child support obligations, as well as the enforcement and modification of orders for child support, custody and visitation. It also identifies support orders or support cases involving the same parties in different states. Individuals may not make direct requests to the FPLS for information.

To implement federal requirements, the state government has established a process for noting cases using what is called the "Family Violence Indicator" which appears as a yes "Y" or no "N" on the federal database file.⁴⁸⁰ If a case has been flagged under the Family Violence Indicator, then the federal government will be precluded from disclosing FPLS information to any person.⁴⁸¹ A case will be flagged with the Family Violence Indicator if any of the following exists: (a) a PPO or foreign PPO has been entered protecting that individual; (b) there is a court order that provides for confidentiality of the individual's address, or denies access to the individual's address; (c) the FPLS data indicates that an address is confidential; (d) an individual files a sworn statement with the FOC setting forth specific incidents or threats of domestic violence or child abuse; (e) the Friend of the Court becomes aware that a determination has been made in another state that a disclosure risk comparable to any of the above risk indicators exists for the individual; or (f) there is "reasonable evidence of domestic violence or child abuse, and the disclosure of such information (i.e. location information) could be harmful to the parent or the

⁴⁷⁶ Mich. Crt. R. 2.113(C).

⁴⁷⁷ Mich. Comp. Laws § 552.605a.

⁴⁷⁸ Mich. Comp. Laws § 552.614.

⁴⁷⁹ See generally 42 U.S.C. § 653.

⁴⁸⁰ Admin. Order 2002-03, Family Violence Indicator 4DM 135, available at <http://www.mfia.state.mi.us/olmweb/ex/4dm/135.pdf> (hereinafter AO 2002-03).

⁴⁸¹ 42 653(b)(2).

child of such parent[.]”⁴⁸²

G. Friend of the Court Records

In general, records from the Friend of the Court (“FOC”) may not be subpoenaed.⁴⁸³ If a party requests it, a court may issue an order that prevents the release of any information in the FOC file.⁴⁸⁴ However, nonconfidential⁴⁸⁵ Friend of the Court records are generally accessible to either party, a third-party custodian, guardian, conservator, guardian *ad litem* or minor’s attorney, lawyer–guardian *ad litem*, any attorney of record, a party’s personal representative, and (in some cases) certain military personnel.⁴⁸⁶ The FOC is also required to provide access to all records to governmental agencies such as Social Security, Child Protective Services, law enforcement involved in an investigation related to FOC records, state and federal auditors, and corrections or parole officers if FOC determines that access would allow those officers to enforce an order relating to custody, parenting time, or support.⁴⁸⁷ However, any person who is denied access to FOC records may bring a motion asking the judge to provide access.⁴⁸⁸

Any case involving a minor child or where spousal support is needed must contain a “verified statement” to the FOC, with detailed information such as postal, business, and residence address, social security number and date of birth of parties and children, occupation and location of employment of each party, detailed physical description of each party, driver’s license number, etc.⁴⁸⁹ The information in the verified statement is considered confidential and may not be released beyond the parties.⁴⁹⁰ Further, the address of a party and minors may be omitted from the copy of the statement that is served on the party—but the party requesting this must show good cause for doing so to the court.⁴⁹¹ Note that this does not protect information about a party’s occupation, employment address, or insurance coverage, from which an abuser can also gain access to a victim. However, parties may consider leaving sensitive information off the verified statement and explaining these omissions to the court in a sworn statement.⁴⁹²

⁴⁸² AO 2002-03.

⁴⁸³ Mich. Crt. R. 3.218(A).

⁴⁸⁴ Mich. Crt. R. 8.112(B).

⁴⁸⁵ Under Mich. Crt. R. 3.218(A)(3), the following records are confidential: (a) staff notes from investigations, mediation sessions, and settlement conferences; (b) protective service reports; (c) formal mediation records; (d) communications from minors; (e) friend of the court grievances filed by the opposing party and the responses; (f) a party’s address or any other information if release is prohibited by a court order; (g) most information over which a privilege may be claimed; and (h) information, such as a social security number, made classified by federal social security law.

⁴⁸⁶ MCR 3.218(B)(1).

⁴⁸⁷ Mich. Crt. R. 3.218(C).

⁴⁸⁸ Mich. Crt. R. 3.218(F).

⁴⁸⁹ Mich. Crt. R. 3.206(B)(1).

⁴⁹⁰ Mich. Crt. R. 3.206(B)(2).

⁴⁹¹ Mich. Crt. R. 3.206(B)(2).

⁴⁹² Mich. Crt. R. 3.206(B)(3): “If any of the information required to be in the verified statement is

H. Interstate Domestic Relations Actions

Upon separation from an abuser, relocation to a new state may allow an abused individual to find family support or economic opportunity in a safe location. In cases where the abused party has located to a new state, the court of that state may be called upon to enforce domestic relations orders entered in another state.

The Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) also imposes several important rules on domestic relations proceedings that are designed to prevent multiple courts in different states from making decisions about a particular child. Because of the UCCJEA, additional information that is required in cases involving custody of a minor includes (a) the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period; (b) information regarding other child-custody proceeding with the child and the party; and (c) name and address of each person who is or may claim custody.⁴⁹³ However, all of these disclosures are subject to any ruling by the local court regarding confidentiality.⁴⁹⁴ In other words, a local court may decide to keep all of this information private if the party can show good cause for such a request.

Where an interstate or international proceeding is brought to determine parentage or regarding child support, the Uniform Interstate Family Support Act (“UIFSA”), requires that information be sealed if a party alleges that “the health, safety, or liberty of a party or child would be jeopardized by disclosure of specific identifying information.”⁴⁹⁵

Unlike the UIFSA, the UCCJEA contains no exception to disclosure for cases in which a party might be endangered by release of information to the other party. If the party's first pleading is a complaint governed by Michigan Court Rule 3.206, the privacy provisions of that court rule would apply. If the party's first pleading is a responsive pleading, however, no Michigan court rules expressly address exceptions to disclosure.

I. Name Change Proceedings

In a proceeding for a name change, the court may order for “good cause” that no publication of the proceeding take place and that the proceeding be confidential.⁴⁹⁶ “Good cause” includes evidence that publication or availability of a record could place a person seeking a name change

omitted, the party seeking relief must explain the omission in a sworn affidavit, to be filed with the court.” An attorney should review any such statement to ensure that it is wholly consistent with any other statements regarding fear of abuse that the individual has submitted elsewhere. Otherwise this statement could be used to discredit the victim.

⁴⁹³ Mich. Crt. R. 3.206; Mich. Comp. Laws § 722.1209(1).

⁴⁹⁴ Mich. Comp. Laws § 722.1209(1).

⁴⁹⁵ Mich. Comp. Laws § 552.2312.

⁴⁹⁶ Mich. Comp. Laws § 711.3(1).

or another person in physical danger, such as evidence that these persons have been victim of stalking or an assaultive crime.⁴⁹⁷ It is a misdemeanor for a court officer, employee or agent to divulge, use, or publish, beyond the scope of his or her duties with the court, information from a record made confidential. However, disclosures under a court order are permissible.⁴⁹⁸

Major Confidentiality Rules Governing Information in Court Proceedings			
Type of proceeding	Type of Information that Can be Safeguarded	What Survivor Must Do	Rule/Statute
PPO	Residential address of petitioner	Leave off petition; provide mailing address to court	MCR 3.703(B)(6); see also MCL 600.2950(3) MCL 600.2950a(3)
Criminal Case File (information rendered exempt from FOIA)	(a) home and work address and telephone number unless needed to identify the location of the crime; (b) any image of the victim; (c) for victims of child abuse, criminal sexual conduct, and some similar crimes, the victim's name and address, that of family members, and any other information that would reveal the identity of the victim, including reference to relationship of victim to accused	n/a (double check with the prosecutor)	MCL 780.758(3)
Domestic Relations	Address information, potentially other identifying information (results vary depending upon the court)	Make a motion to the court requesting it.	2.302(C) (Protective order in discovery); MCR 8.119(l);(seal records) MCL 600.2972(1)(urging court to consider safety of parties where DV is alleged in motion

⁴⁹⁷ *Id.*

⁴⁹⁸ Mich. Comp. Laws § 711.3(3).

			to seal records)
Federal databases used for support and custody orders	Any identifying information that could put child or party in danger	Make a request to FOC to submit statement regarding family violence	42 USC 653
Name change	The entire record	Make a motion showing good cause for no record to be made.	MCL 711.3(1)
FOC	Address information Other confidential information requested for verified statement Any information in the FOC file	Submit statement to FOC showing good cause to keep it private Omit from statement and include reasons why it was omitted Make a motion to the court	MCR 3.206(B)(2) MCR 3.206(B)(3) MCR 8.112(B).

Chapter 18. Conclusion

The proper creation, maintenance, and handling of records and information obtained from and about victims of violence is a critical function of any advocacy program. Improper handling of victim information and records can cause great harm to individual victims. Release of information about the victim's residence or location can make them accessible to the perpetrator from whom they are hiding. Such accessibility can endanger both the victim and their children. Release of some kinds of information about the victim or the children can provide ammunition to an abuser seeking to punish or intimidate the victim through child custody battles or child protection complaints. Release of certain information to the abuser can complicate or harm the state's case in any criminal proceeding brought against the perpetrator, thereby placing some victims in further jeopardy.

Survivors expect confidentiality in their dealings with domestic violence and sexual assault service programs. Most victims of domestic violence or sexual assault have been threatened with further harm or even death if they reveal what their assailants have done to them. Survivors are justified in their terror of these threats. Other victims of abusive behavior may be experiencing shame or embarrassment about what has occurred. Without assurances of confidentiality, few survivors would contact domestic violence/sexual assault programs or open up to counselors.

From the foregoing, it is clear that Michigan statutes and court rules impact strongly on what information will remain confidential. It is critical that every service provider program develop its own policy on confidentiality, that the policy is routinely reviewed, and that every staff member and volunteer receive annual training on the policy.

Please contact the attorneys at MCEDSV for any questions regarding confidentiality:
www.mcedsv.org

Summary of Pertinent Confidentiality and Privilege Law

Name of Privilege or Rule	To whom does this protection belong?	What information is protected?	From what is the information protected?	Source of Law
VAWA (Violence Against Women Act)	Survivor ⁴⁹⁹	Personally identifying information or individual information collected in connection with services requested, utilized, or denied, even if it is redacted or encrypted.	Disclosure or release to any person or any entity without written, informed, and reasonably time-limited consent. Must prevent accidental disclosure.	U.S. Code (34 U.S.C. § 12291(b)(2))
VOCA (Victims of Crime Act)	Survivor	Any personally identifying information ⁵⁰⁰ or individual information collected in connection with VOCA-funded services requested, utilized, or denied, even if it is redacted or encrypted.	Disclosure or release to any person or any entity without written, informed, and reasonably time-limited consent. Must prevent accidental disclosure.	Code of Federal Regulations 28 C.F.R. § 94.115
FVPSA (Family Violence Prevention & Services Act)	Survivor	Personally identifying information or individual information collected in connection with services requested, utilized, or denied, even if it is redacted or encrypted.	Disclosure or release to any person or any entity without written, informed, and reasonably time-limited consent. Must prevent accidental disclosure.	U.S. Code 42 U.S.C. § 10401 <i>et seq.</i>
Domestic Violence or Sexual	Survivor	Any information transmitted between a	Protected only from being admissible as evidence in any civil or	State statute M.C.L. § 600.2157a

⁴⁹⁹ VAWA, VOCA, and FVPSA protections also extend to children receiving shelter services with survivor. If a minor or person with a guardian receives services without parent or guardian consent, then he/she may also sign a release without parent/guardian consent; otherwise, they must have the signature of the non-abusive parent or guardian, for example, a child who happens to be in shelter with mom. 34 U.S.C. § 12291(b)(2)(B).

⁵⁰⁰ Personally identifying information is that information “likely to disclose the location of a victim” including, but not limited to first and last name, home or other physical address, contact information, social security number, driver license number, passport number, student identification number, and date of birth, racial or ethnic background, religious affiliation, or anything else that “would serve to identify any individual.” 34 U.S.C. § 12291(a)(20).

Name of Privilege or Rule	To whom does this protection belong?	What information is protected?	From what is the information protected?	Source of Law
Assault Counselor		victim and counselor ⁵⁰¹ and any other person who needed to know it in order to help that is transmitted in connection with advice, counseling, or other assistance.	criminal court proceeding without prior written consent of the victim.	
Professional Counselor or a Limited Licensed Counselor	Survivor (person who is counseled)	Any communication between counselor and person who is counseled.	Must be “preserved inviolate” by the counselor and cannot be waived. Cannot be admitted into evidence in any proceedings except if the counseling is by referral of the court in the context of a custody or parenting time dispute.	State statute M.C.L. § 551.339
“Rape Shield”	Survivor	Any evidence of past sexual conduct, opinion or reputation evidence of sexual conduct except if judge thinks it is highly valuable to show prior sexual conduct with alleged perpetrator or source of semen, pregnancy, or disease.	Entry into evidence in court in a criminal case.	State law M.C.L. § 750.520j
FERPA (Family Educational and Privacy Rights Act)	Survivor / Parents ⁵⁰²	Educational records, which means anything pertaining directly to a student and maintained by an educational institution (not teacher's prep notes, law enforcement, nonstudent employee records, or physician / therapist records for students over	Disclosure or release without written permission except to school officials with legitimate educational interest, schools to which the student transfers, auditing or accrediting organizations, and in	U.S. Code 20 U.S.C. § 1232g

⁵⁰¹ The statute lists sexual assault or domestic violence counselor, but proposed legislation would add “human trafficking counselor.” Those who have the title of human trafficking counselor

Name of Privilege or Rule	To whom does this protection belong?	What information is protected?	From what is the information protected?	Source of Law
		18)	response to a valid subpoena, health or safety emergency, or authority pursuant to state law.	
Educator-student privilege	Student	Communications received in confidence from students or other juveniles and any records of a student's behavior.	Disclosure or testimony in state criminal or civil court unless the student or parent of minor student consents.	State statute M.C.L. § 600.2156
HIPAA (Health Insurance Portability and Accountability Act)	Patient	"Protected health information" which means individually identifiable health information transmitted or maintained by a covered entity or business associate.	Disclosure by a "covered entity" which includes health plans, clearinghouses, providers and business associates of those entities.	45 C.F.R. §§ 160, 164
Physician-patient	Patient ⁵⁰³	Any information that a licensed medical doctor or surgeon has acquired in attending a patient in a professional character that was necessary to obtain treatment.	Any disclosure. ⁵⁰⁴	State statute M.C.L. § 600.2157; 767.5a
Attorney – client confidentiality	Attorney's client	Anything the client tells an attorney in the process of seeking legal services and anything the lawyer learns while representing the client as part of the representation.	Any disclosure.	Attorney ethical rule M.R.P.C. 1.6; state statute M.C.L. § 767.5a
Attorney – client privilege	Attorney's client	Anything the client tells an attorney in the process of seeking legal services in private.	Admission into evidence in a court proceeding. Any waiver must be knowing and	Case Law, State statute M.C.L. § 767.5a

⁵⁰³ (or heirs / beneficiary in life insurance action if patient has died).

⁵⁰⁴ This can be waived if the patient brings a medical malpractice case.

Name of Privilege or Rule	To whom does this protection belong?	What information is protected?	From what is the information protected?	Source of Law
			voluntary.	
Attorney work product	Attorney's client ⁵⁰⁵	Anything prepared by an attorney or assistant / consultant in preparation for trial.	Discovery by opposing counsel unless there is no other way to obtain the information without undue hardship.	Case law, State court rule M.C.R. 2.302(B)(3) (a)
Marital Privilege	Spouse against whom the other spouse would testify	Blanket rule that does not allow the other spouse to testify except in certain proceedings, for example, divorce or criminal action for crime against child.	Testimony in court.	State statute M.C.L. § 600.2162
Clergy-penitent	Penitent and Priest/Minister	Confessions made in [priest or minister's] professional character / made in order to enable clergy to serve as clergy.	Any disclosure whatsoever, including as mandatory reporter if the only way the priest or minister knows about it is because of the confession.	M.C.L. § 600.2156; 767.5a
Crime stoppers	Any individual who knows about the confidential communication	Statements made for the purpose of reporting alleged criminal activity to a private, "crime stoppers" organization.	Any disclosure or production pursuant to subpoena. However, the prosecution or defense can ask for production and the court may order it as the court deems appropriate.	State statute M.C.L. § 600.2157b

⁵⁰⁵ Prosecutors' work product is also protected from Freedom of Information Act requests, such that the public cannot access prosecutors' notes, memoranda, etc.