

What Advocates Need To Know About Mandatory Reporting of Elder Abuse

Note: This fact sheet was adapted from a longer article by Jessica Mindlin, Esq., and Bonnie Brandl, MSW, entitled, “*Respecting Elders, Protecting Elders: Untangling the Mystery of What Sexual Assault Advocates Need to Know About the Mandatory Reporting of Elder Abuse*” published in **Reshape** (Spring 2011; no. 27).

Guiding Principles

Sexual assault and domestic violence advocates typically are—and should be—reluctant to breach victim privacy and confidentiality. Victims share with advocates some of the most painful and violating experiences of their lives. Often, these disclosures are forthcoming only because the advocate has established a relationship based on trust and the victim’s self-interest. For many survivors, the promise that such details will be kept confidential is a prerequisite for their disclosure of abuse. Breaching that promise can re-victimize a survivor and can also threaten or compromise victim safety.

Violating confidentiality is also inconsistent with the precepts on which our work rests: that we are a movement committed to survivor empowerment and self-determination. It also undermines community confidence in a provider if victims believe their privacy will not be respected, potentially inhibiting other victims from seeking services.

The federal Violence Against Women Act (VAWA) reflects this commitment to victim privacy. VAWA specifically prohibits victim service provider grantees from releasing a victim’s confidential or personally identifying information without a victim’s written consent, unless the release is mandated by your state, tribal or territorial statute, or a court.¹ The starting place for your analysis, therefore, is to know your confidentiality and mandatory reporting obligations under the relevant state, tribal or territorial law(s).



A. Federal Confidentiality Obligations for VAWA-Funded Victim Service Providers

Many sexual assault, domestic violence, and dual agencies receive direct or indirect funding through the Violence Against Women Act (VAWA). In 2005, VAWA was amended to include additional privacy protections for victims (see 42 U.S.C. § 13925). This next section summarizes VAWA's confidentiality requirements for victim service providers.

What Are VAWA's Confidentiality Requirements?

Under federal law, confidentiality is a grant condition for every state, tribe, or territory receiving VAWA funding. All victim service provider grantees and sub-grantees who receive funding from the Violence Against Women Act (VAWA)ⁱⁱ must comply with VAWA's confidentiality obligations. Grantees are required to protect the confidentiality and privacy of those receiving services, and may not disclose personally identifying informationⁱⁱⁱ or confidential information, or reveal individual client information unless at least one of the following criteria is met:

- 1) The victim executes a written, narrowly tailored, and reasonably time-limited consent form (also called a release of information), executed with the victim's *informed consent*;
- 2) The victim service provider is required to release the information by statutory mandate (such as an elder abuse mandatory reporting law); or
- 3) The information must be released pursuant to a court mandate.^{iv}

In this context, the term "informed consent" means that, before signing the release, the victim understands what information will be released, why and to whom it is being released, what will happen to the information once it is disclosed, the benefits and burdens of releasing the requested information, and how to withdraw consent once it has been granted. Victims must also have the mental capacity to give informed consent. Other federal funding laws, such as the Victims of Crime Act (VOCA) and the Family Violence Prevention Services Act (FVPSA) also impose confidentiality requirements on grantees. Review your federal, state and funder obligations to ensure you are compliant.

B. State or Tribal Mandatory Reporting Laws

VAWA's confidentiality requirements permit VAWA-funded victim service providers to comply with their mandatory reporting obligations. To determine whether mandatory reporting laws apply in any individual case, start by reading the applicable statute(s) and cases, paying special attention to the relevant definitions. The primary considerations include: (1) who is a mandatory reporter; (2) about whom must abuse be reported; (3) what constitutes elder abuse; (4) what information must be reported; and (5) what exceptions, if any, apply to the duty to report. Each of these questions is addressed below. (See Information Sheet # 6 for a flow chart of the issues discussed below.)

1. Are You A Mandatory Reporter Of Elder Abuse?*

Although the answer to this question may seem obvious, sorting out whether you are mandated to report may be more complicated or nuanced than appears at first blush.

- Do you live in a state where everyone is a mandatory reporter?
- Does the statute list the specific professionals who are mandated reporters?
 - If yes, how is the professional group defined? For example, if all "school employees" are mandatory reporters, is a licensed substitute teacher who works as an advocate mandated to report?
- Do your mandatory reporting laws apply 24 hours a day/7 days a week, or only when you learn about the abuse while working in your professional capacity? *E.g.*, Must you report abuse if you are a listed professional but learn about the abuse as a volunteer or neighbor?
- If you are licensed in more than one jurisdiction, be sure to address the impact of multi-state licensing and cross-border services. Are you exempt from reporting in one state but obliged to report the abuse in another?
- Are you obligated to report as a matter of law or as a condition of employment?
Sometimes, employers' internal policies will require employees to report abuse. This is not the same as a legal obligation to report and therefore does not fall within VAWA's "court or statutory mandate" exception to the confidentiality requirements.

2. Is the Victim An Older Adult and About Whom Abuse Must Be Reported?

The age at which an individual is “older” or otherwise covered by a mandatory reporting law due to age is determined by each individual jurisdiction.

- The age threshold may range from 55 – 70, depending on state, territorial or tribal law.
- In some states, there is no specifically designated age at all. Such statutes mandate reporting when a “vulnerable,” “dependent,” or “at-risk” adult may be being abused. An adult may be deemed vulnerable for any one of a number of reasons, including age, physical or cognitive disability, or other circumstance. Statutes (and case law) set out the criteria to determine who is a “vulnerable,” “dependent,” or “at-risk” adult. Whether a reporting obligation exists may also depend on who is committing the abuse (*e.g.*, a caretaker or other person responsible for the victim’s care). Criteria vary from jurisdiction to jurisdiction.

3. What Is “Abuse”?

Definitions of what constitutes “elder abuse” vary between jurisdictions. Be familiar with your statutes and cases and confirm that what the victim experienced falls within the relevant legal definition of “abuse,” “neglect,” or “exploitation.”

4. What Must Be Reported?

Determine what information must be reported.

- Does the statute require that the reporter provide only the victim’s name, address, and telephone number?
- Must additional information be disclosed, such as the basis for the report, the name, location, and contact information for the alleged offender, or the names of the victim’s family members and care providers?

Even if it’s awkward or controversial to withhold information from APS, without victim consent advocates must limit their disclosure to the information required by the mandatory reporting law. Advocates may not release information that exceeds the scope of what’s

required or authorized. Even if APS asks for additional information to help them triage the case, these details may not be released unless the older victim has signed a written, time-limited release of information for this specific purpose. Advocates must comply with the law and only provide information that is mandated by statute or authorized by the older victim (or the victim's legal guardian, as applicable). Disclosing information that is not legally required to be reported, without victim consent, violates a victim's right to privacy. It will likely also contravene the advocate's federal and state confidentiality obligations.

5. What Reporting Exemptions Apply?

Information may be exempt from disclosure even though it appears to meet all the mandatory reporting criteria. One of the most likely exemptions is if the victim's information is protected by a legal privilege such as attorney-client, clergy-penitent, or victim-(community-based) advocate.

If your communications with a victim are privileged, determine the scope of the privilege and what conditions must be met both for the privilege to apply and for it remain in effect.

- Does the privilege extend only to disclosures the victim makes in the context of the privileged relationship, or may two professionals, each of whom has a privileged relationship with the victim, communicate and keep the privilege intact? For example, may the victim's lawyer and medical provider discuss the case without compromising the doctor-patient and attorney-client privileges?
- Does the privilege encompass the use of an interpreter or translator?
- Does a waiver of the privilege have to be intentional or can it be inadvertent?

Remember that, because the privilege belongs to the victim, and not the provider, it is the victim and not the provider who may waive it. For a flow chart to help you analyze your reporting obligations, see *Part 6: Elder Abuse Mandatory Reporting Flow Chart*. For a discussion of how mandatory reporting laws may benefit and/or harm older victims, see *Part 2: Mandatory Reporting of Elder Abuse: Exploring the Benefits and Harms*.

Disclaimer: The general information presented here is intended for educational purposes only. It does not constitute and is not a substitute for independent legal advice and should not be relied upon for that purpose. If you need legal advice you should consult with your own attorney.

ⁱ VAWA defines the term “victim services provider.” See 42 U.S.C. § 13925(a)(36). If a release is required, the victim service provider must take steps to protect the safety of the victim and others affected by the release. See 42 U.S.C. § 13925 (b)(2)(C).

ⁱⁱ 42 U.S.C. § 13925 (b)(2).

ⁱⁱⁱ “Personally identifying information” is “information that is likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking, including *a victim’s* first and last name; a home or other physical address; contact information (including a postal address, e-mail address, telephone or fax number); social security number, and *any* other information, including date of birth, racial or ethnic background, or religious affiliation, that, in combination with any of the above information, would serve to identify any individual.” 42 U.S.C. § 13925 (a) (18).

^{iv} If a court mandates that the victim’s private information be released, the victim service provider should take steps to ensure that a court order was properly issued.

^v You will also want to know which, if any, of your colleagues are mandatory reporters. This information may impact what information will be shared within – and between – provider organizations.

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