ETHICAL LEGAL ADVOCACY:

ISSUES FOR DOMESTIC VIOLENCE ADVOCATES
ATTORNEY- CLIENT PRIVILEGE
Attorney- client privilege

- ABA Model Rule 1.6
- Any information transmitted between a lawyer and a client in the course of that relationship is privileged
- No third persons can be present other than those who are necessary for the transmission of the information or to carry out the tasks of the representation
People who do not destroy privilege

- Interpreters
- Paralegals
- Legal advocates (part of a legal office or a legal team)
- Legal support staff
People who do destroy privilege

- Family members
- Support people
- Friends
- Advocates who are there as support, but not on the legal team or part of a legal office
- Law enforcement
- People who overhear the conversation because it is being held in a public location
Considerations for mandated reporting

• The attorney client privilege can prevent attorneys from being mandated reporters
  – This means advocates who are working at the direction of an attorney (part of a legal team or a legal office) are also not mandated reporters
  – Advocates operating under the domestic violence victim-counselor privilege are bound by their duties regarding reporting

• Some states have specific exceptions
Attorney-client privilege specifically affirmed in state statute

- Alabama
- Arizona
- Arkansas
- Delaware
- District of Columbia
- Florida
- Idaho
- Kentucky
- Maryland
- Michigan
- Missouri
- Nevada
- New Hampshire
- North Carolina
- North Dakota
- Ohio
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- West Virginia
- Wyoming
DOMESTIC VIOLENCE VICTIM-COUNSELOR PRIVILEGE
Who is a “domestic violence counselor”

• Usually defined as someone working for an organization focused primarily on aiding and supporting domestic violence victims and whose communication with DV victims is conducted under the assumption of confidentiality.

• Many states, if not a majority, have a requisite amount of training required. This varies from as little as 3 hours (FL) to 40 hours (CA, NJ, NM) and it varies substantially in between. Some states require the supervision of another, more experienced counselor.
DV Victim- Counselor Privilege

• Many states have laws that protect the confidentiality of communications between the victim and their dv counselor.

• The purpose is to allow clients to speak freely about their situation with domestic violence counselors.
Yellow= no privilege
What is a “confidential communication”

• Usually defined as communication, written, verbal, or otherwise, between the counselor and victim in the course of their relationship where the victim expects confidentiality and the only other persons privy to such information are there to facilitate meeting the victim’s needs (i.e. translators, administrative assistants, etc.).

• Exceptions to this rule vary widely.
What is a “confidential communication”

- Any discussion regarding a client’s situation, including the facts and circumstances of all incidences of domestic violence
- Information about the client
- Information about the client’s children
- Information about the batterer
Common exceptions to confidentiality

- Child abuse is far and away the most common exception to the rule.
- Handful of states who don’t at least mention disclosure as related to child abuse. This is usually determined by another statute mandating that certain persons report any incidences or suspected incidences of child abuse.
Common exceptions to confidentiality

• Other exceptions that come up, but not as often:
  – Victim intends to commit a crime or inflict harm
  – Knowledge that the victim has perjured him/herself
  – Knowledge of exculpatory information in a criminal proceeding
  – The victim is deceased
Who holds the privilege

- Client holds the privilege
- Client can refuse to disclose
- Client can keep the counselor from disclosing

- Nearly all states allow a victim or their guardian to waive the privilege, though some require written consent.
Compelling Disclosure

- Some states allow for a process to compel disclosure
- CA- Court may compel in certain circumstances even if the client does not want that to happen
- VA- If disclosure is compelled, the service provider must make attempts to notice victim and take necessary steps to protect privacy and safety of victim
- Until then, the counselor must keep the communication confidential unless expressly given permission by the client
  - Must have signed release
Victim Witness/District Attorney
Victim Advocates- Considerations

• Victim Advocates that work in places other than DV agencies may not be covered by this privilege
• Do not assume they are working under the same laws of privilege and confidentiality!!
Privilege - Considerations

• When an advocate is working with an attorney for the purpose of furthering a client’s case, attorney client privilege applies.

• If an advocate is not working at the direction of an attorney on a case, the domestic violence victim advocate privilege applies.
Privilege Scenario

1. Why does Laura say that Karla’s presence in the interview will violate attorney-client privilege?

2. What are the differences, generally, between attorney-client privilege and domestic violence counselor privilege?

3. Why is the interpreter allowed to be part of the interview when Karla isn’t?

4. How else could Karla have supported Susanna during her interview with Laura?
LEGAL ADVICE VS.
LEGAL INFORMATION
Unauthorized Practice of Law

• Model Rule of Professional Conduct 5.5
  – A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

• California Business and Professions Code prohibits a layperson from 1) practicing law or 2) holding him/herself out as someone who is entitled to practice law.
What is “practicing law?”

• Providing legal advice- includes explaining the law and applying it to a client’s situation
• Completing court forms based on interviewing the client
• Providing opinions on a client’s legal issues
• Predicting the outcome of a case
• Representing the client in court
• Coaching a client on giving answers they believe to be legally advantageous
What is not “practicing law?”

• Providing legal information, for example, “two of the Penal Code sections that address domestic violence are 243 and 273.5.”

• Providing court forms to a client

• Filling in forms at a client’s direction

• Providing manuals or guides to a client on how to complete court documents, without personalized advice

• Providing emotional support to a client at a court hearing
Legal Advice vs. Legal Information Scenario

• What did Alex say that was legal advice?
• What did Alex say that was legal information?
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