

**ALAMEDA COUNTY FAMILY JUSTICE CENTER
CONFIDENTIAL COMMUNICATION
and
THE DOMESTIC VIOLENCE and SEXUAL ASSAULT SURVIVOR
POLICY and PROTOCOL**

I, _____, understand that the highest priority of the Alameda County
(name and position)

Family Justice Center (ACFJC) is the safety of the Client will be protected and will not knowingly be compromised by any personnel, professional, staff, volunteer or on-site person.

I. It is the highest priorities of the ACFJC that communications between the client and identified personnel will be protected and held confidential. Further, client information will be closely guarded, held confidential and protected by all means legally available to the ACFJC. To that end, within the Central Intake System, the client information shall be designated by assigned number and any specific information that links the client to that particular number will be maintained separately and stored remotely with limited access to specific individuals.

II. Each professional, personnel, and volunteers providing services for FJC clients, whether or not those services are provided on-site or off-site at the FJC shall sign and date the Written Acknowledgement of the "ACFJC Confidential Communications and the Domestic Violence and Sexual Assault Survivor Policy and Protocol." Said signed Acknowledgement will be retained at the ACFJC by the Executive Director and will stand as evidence that the signer has received training on the policy and protocol, understands the guiding principle of the ACFJC with respect to client safety and confidentiality, agrees to abide by said policy and protocol and assures commitment to adherence of the policy and protocol, as well as the guiding principle.

III. Each agency will be provided a locking file cabinet at the ACFJC. Any client records shall be retained in a locked filing cabinet for security purposes. It is the responsibility of the agency, or person providing the service and retaining any written record to lock said records in the locked filing cabinet when the person holding the records is not present for a significant period of time, such as in the evening when the ACFJC is closed.

IV. If any agency retains client information electronically, the electronic mode of retention (computer) shall be password protected, including 'windows log on password protection' and the 'windows screen saver password protect', with appropriate firewalls in place. The agency shall designate individual access pursuant to the agency policy. Any electronic mode of retention shall be turned off when the person holding the electronic records is not present for a significant period of time.

V. At the ACFJC, an explanation of the confidential communication protections shall be explained to all clients at the initial intake of the client to the ACFJC. Any consent by the client for disclosure of information, and/or authorization to release certain information shall be the product of informed consent. Thereafter, an explanation of the law will be reiterated to the victim/survivor when appropriate.

VI. The “victim” of the domestic violence, sexual assault, stalking (where legally applicable) or elder abuse shall be the holder of the privilege. Waiver of any privilege shall be in writing and only after full consent as stated above.

VII. At the ACFJC, clients can receive counseling and/or services from various professionals. Each professional will be responsible for ensuring that they are in compliance with the professional mandates that authorize them to hold protected communications.

VIII. All professionals shall take all steps to ensure that no protected communication shall be heard by or disclosed to a third party unless:

- the presence of the third party is in the interest of the client in consultation;
- those to whom disclosures are reasonably necessary for the transmission of the information
- an accomplishment of the purposes for which the professional is consulted.
- informed consent is given in writing by the client
- ordered to do so by a Court of Law

To the end, no person with legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim shall discuss client matters in public spaces, including hallways or open offices and/or conference rooms at the ACFJC.

IX. Necessary disclosure to any third party must be done in such a manner as to ensure no one other than the intended recipient has access to the information. Modes of communication of such information shall be done in person, telephonically or other equivalent medium producing no written copy, traditional fax to a controlled fax recipient. It is strongly urged that no confidential communication be disclosed or transferred electronically, such as through electronic mail, attachment to electronic mail or other mode unless appropriate safeguards are in place and appropriate encryption is created for such communications.

X. Each agency having legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim shall provide and maintain a separate fax line and machine. Said fax machine shall be located in such a manner so that only the sender shall control the fax and only the intended recipient shall receive the fax.

XI. Each agency having legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim shall submit a copy of the written policy to the Executive Director at the ACFJC ensuring compliance with the ACFJC Policy and Protocol with regard to client safety and confidential communications.

XII. No client will be publicly acknowledged without his or her express permission.

XIII. All questions regarding confidentiality will be directed by the person having legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim to the supervisor in compliance with their agency policy.

By signing this document, I acknowledge the policy and protocols regarding victim safety and protection of confidential communications set forth at and by the ACFJC. I do hereby agree to abide by

said policy and protocol. I understand that a knowing and voluntary violation of the confidentiality policy can jeopardize my working relationship at the ACFJC.

Signature of Employee

Date

Signature of Supervisor

Date

Signature of Executive Director of ACFJC

Date

DISCUSSION

The Alameda County Family Justice Center (ACFJC) will provide services to victims of domestic violence, sexual assault, elder family abuse and to children who witness or experience domestic violence. In California, domestic violence and sexual assault victims have the right to have certain protections of confidentiality under the law, including certain communications. They also have the honor of confidentiality where there is not necessarily applicable law, including identity confidentiality as a client and/or recipient of services at the ACFJC, should they so choose.

At what point and under what circumstances does the Domestic Violence and/or Sexual Assault Survivor, irrespective of age, have protected communication?

To answer the query, one must look at several issues: to whom the communication was made, under what circumstance the communication was made, what is the communication that was made. The pivotal question, therefore, is under what circumstances are the communications of the domestic violence and/or sexual assault victim protected. And, who holds the privilege of the confidential communication?

POLICY POINT: At the ACFJC, an explanation of the confidential communication protections shall be explained to all clients at the initial intake of the client to the ACFJC. Any consent by the client for disclosure of information, and/or authorization to release certain information shall be the product of informed consent. Thereafter, an explanation of the law will be reiterated to the victim/survivor when appropriate.

HOLDER OF THE PRIVILEGE

The domestic violence/sexual assault victim, or the guardian of the victim who is a minor, holds the privilege of confidential communication. Under some circumstances, a minor may be the holder of the privilege. As holder of the privilege, the victim can refuse to disclose and can prevent the professional from disclosing the protected communication absent a mandate by a Court. Likewise, the holder of the privilege can waive that privilege enabling the professional to share or report information to third parties.

POLICY POINT: The “victim” of the domestic violence, sexual assault, stalking (where legally applicable) or elder abuse shall be the holder of the privilege. Waiver of any privilege shall be in writing and only after full consent as stated above.

THE PROFESSIONALS

At the ACFJC, it is most likely that **protected communications** will occur between the domestic violence and/or sexual assault survivor and few of the professionals recognized under California law. Those professionals include attorneys, law clerks, law students, therapists and counselors, domestic violence and/or sexual assault counselors, victim-witness advocates, clergy and medical.

POLICY POINT: At the ACFJC, clients can receive counseling and/or services from various professionals. Each professional will be responsible for ensuring that they are in compliance with the professional mandates that authorize them to hold protected communications.

THE LAW

The Evidence Code controls the types and methods of evidence that are admissible in Court. These laws also protect the communication between domestic violence, and sexual assault survivors and professionals.

Each Evidence Code section having to do with confidential communications define who falls within the definition of the “profession” for purposes of engaging in communications that are protected (see below for full text of statutes). However, where the Criminal Justice professionals are involved, the rules are significantly different and are discussed below. By way of example, a Civil Attorney, or Family Law Attorney will be covered under Evidence Code Sect. 954 et seq. However, a Deputy District Attorney, who is also an attorney, is not covered under the same Evidence Code Section. While the Civil or Family Law Attorney must keep communications confidential, the Deputy District Attorney is required by law to disclose to the defense any statements made by the victim of the crime and is always bound to disclose exculpatory evidence that is material.

Each section defines under what circumstances, to whom and what communications are protected. Likewise, each section also sets forth circumstances that might result in a penetration of the protection albeit under very limited and closely scrutinized circumstances. For instance:

- an **attorney** who is bound not to disclose a communication between herself and her client may be required to do so if the communication would enable or aid in the commission of a crime or fraud. Other circumstances are clearly set forth in Evidence Code Section 956-961;
- the **psychotherapist** is required by law to hold communications between herself and her client confidential, unless there is a mandatory duty to report child abuse as set forth under the law in Penal Code Sections 11161 et seq;
- a **domestic violence or sexual assault counselor** is empowered to hold communications confidential, unless ordered to do so by a Court or with the consent of the survivor.
- While they may be providing similar and often times identical services provided by a domestic violence or sexual assault counselor, a **victim-witness advocate**, who is part of the prosecution team, has the duty to disclose to the prosecution, statements made by the survivor and particularly any statements made that could be exculpatory to the defendant.

Although this Policy Paper will focus on the statement of law that governs communications between the sexual assault counselor and the victim, the domestic violence counselor and the victim as well as the victim-witness advocate and the victim, a brief articulation of the law regarding other professionals who have the obligation to hold communications confidential is in order.

The civil or family law attorney and their subordinates including law clerks and paralegals, are bound by the same professional rules as the attorney. Further, any representative of the attorney, such as an investigator, is bound to hold the communications confidential. The Evidence Code defines each of the

subordinates of a psychotherapist and clearly, all are bound by the same rules as the psychotherapist with respect to holding communications confidential and under what circumstances a communication must be disclosed.

There will be limited medical services provided on-site. The Evidence Code protects communications between the health care provider, including a Physician Assistance, with limited circumstances under which the law requires disclosure. At the ACFJC, many of the medical examinations performed on-site will be forensic examinations consented to by the victim and authorized by law enforcement. The requisite forms to be completed become part of the police report. Including in the exam are statements of the victim/survivor are memorialized. As such, those statements are not protected as confidential communications.

SEXUAL ASSAULT & DOMESTIC VIOLENCE COUNSELORS & THE “VICTIM”

As stated above, the Evidence Code specifically protects communications between the Sexual Assault (SA) or Domestic Violence (DV) Counselor and the “victim.” In that the rules are essentially identical, reference set forth below will pertain to both disciplines, which often involve the same professionals. Evidence Code Sections 1035 et seq., and 1037 et seq., articulate the rule regarding confidential communication between the SA/DV victim and the Domestic Violence Counselor.

To be applicable, the “victim” means a person who consults a sexual assault counselor for the purpose of securing advice or assistance concerning a mental, physical or emotional condition caused by a sexual assault. EC 1035.

The definition of the qualifying “Sexual Assault Victim Counselor” includes those persons who engage in any office, hospital, institution or center that qualifies as a Rape Crisis Center as defined in Penal Code Section 13837 so long as one of he or she meets the articulated requirements. Specifically, a person qualifies as a “Sexual Assault Victim Counselor” if he or she is

- working in or with a Rape Crisis Center and who is a psychotherapist;
- has a master’s degree in counseling or related field; or
- has one year of counseling experience, at least six months of which is in rape crisis counseling;
- has had 40 hours of Rape Crisis training and is supervised by one who qualifies as a counselor under the statute.

Not all communications between the sexual assault or domestic violence counselor and the victim are protected. Protected communications includes information that is transmitted between the victim and the sexual assault counselor in the course of their relationship. The information must be communicated in confidence by a means that, so far as the victim is aware, discloses the information to no third persons with limited exception. For instance, if the Survivor communicates with the sexual assault counselor AND the Police Officer or a friend is present, the communication ceases to be confidential. The types of communications that are protected include all information regarding the facts and circumstances of the sexual assault as well as all information regarding the victim’s prior or subsequent sexual conduct, and opinions regarding the victim’s prior or subsequent sexual conduct, and opinions regarding the victim’s sexual conduct or reputation in sexual matters.

POLICY POINT: All professionals shall take all steps to ensure that no protected communication shall be heard by or disclosed to a third party unless:

- **the presence of the third party is in the interest of the client in consultation;**
- **those to whom disclosures are reasonably necessary for the transmission of the information**
- **an accomplishment of the purposes for which the professional is consulted.**
- **informed consent is given in writing by the client**
- **ordered to do so by a Court of Law**

To the end, no person with legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim shall discuss client matters in public spaces, including hallways or open offices and/or conference rooms at the ACFJC.

As stated above, not all communications between the counselor and the victim are protected. As an extreme example of what is not protected communication: if during the course of the relationship, the Survivor admits the crime of homicide that is not connected to the sexual assault for which counseling is sought, the sexual assault counselor can be compelled to disclose the admission and the sexual assault counselor can disclose the communication on his or her own. The Survivor cannot prevent the sexual assault counselor from disclosing the admission. Likewise, the sexual assault counselor has no obligation to disclose the admission to the authorities, but can do so if he or she so chooses.

Further, the confidential communication is not absolute. The court can compel disclosure and override the claim of the privilege, if the Court determines that the probative value outweighs the effect on the Survivor and the treatment relationship. Essentially, the Court conducts an EC 352 analysis. When ruling on the claim of the privilege, the Court may require the counselor or the Survivor or both, to disclose the information in chambers and in camera (out of the presence of the other parties). Normally, if the counselor discloses the communication to a third person, the integrity of the privilege is broken and the privilege may no longer exist. However, if the counselor discloses the communication to the Court, in chambers and in camera, the privilege is not breached. Ultimately, if the Court rules that the privilege stands, then the counselor cannot disclose the information absent the authorization from the Survivor.

At all times, absent actual consent from the Survivor, the sexual assault victim counselor shall assert the privilege pursuant to Evidence Code Section 1036. That privilege cannot be breached by either the Prosecution or the defense and can only be executed by actual consent of the Survivor or by Court Order.

The same analysis holds in Domestic Violence cases and the confidential communications set forth in EC 1037 et seq.

To be applicable, the “victim” means a person who consults a domestic violence counselor and any information transmitted between the victim and the counselor. EC 1037.2. The definition of the qualifying “Domestic Violence Counselor” includes those persons who are employed by any

organization providing the programs specified in Section 18294 of the Welfare & Institution Code and who has received specialized training for counseling domestic violence victims and he or she meets the articulated requirements. Specifically, a person qualifies as a “Domestic Violence Counselor” if he or she is working in or with an organization as set forth above and who is

- a psychotherapist; OR,
- who has a master’s degree in counseling or a related field; OR
- has one year of counseling experience at least six months of which is in domestic violence counseling; OR
- has had 40 hours of domestic violence training and is supervised by one who qualifies as a “counselor” under the statute; OR
- works in the Victim-Witness Assistance Program and is supervised by one who qualifies as a “counselor” under the statute. EC 1037.1

As discussed above, not all communications are protected and privileged. Protected communications includes information that is transmitted between the victim and the domestic violence counselor in the course of their relationship. The information must be communicated in confidence by a means that, so far as the victim is aware, discloses the information to no third persons with limited exception. For instance, if the domestic violence victim communicates with the domestic violence counselor AND the Police Officer or a friend is present, the communication ceases to be confidential. Ordinarily, and under traditional law, disclosure of confidential communications to a third party breaches the privilege.

POLICY POINT: Necessary disclosure to any third party must be done in such a manner as to ensure no one other than the intended recipient has access to the information. Modes of communication of such information shall be done in person, telephonically or other equivalent medium producing no written copy, traditional fax to a controlled fax recipient. It is strongly urged that no confidential communication be disclosed or transferred electronically, such as through electronic mail, attachment to electronic mail or other mode unless appropriate safeguards are in place and appropriate encryption is created for such communications.

The statute allows the presence of a third party who is present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purpose for which the domestic violence counselor is consulted. This might include disclosure of information by the counselor to a shelter for the purpose of securing a safe location for the victim.

The types of communications that are protected include all information regarding the facts and circumstances of all incidents of domestic violence as well as all information regarding the children of the victim or abuser or the relationship of the victim with the abuser. As an extreme example of what is not protected communication: if during the course of the relationship, the victim admits