DO COMMUNITY-BASED ADVOCATES, BARRING OTHER PROFESSIONAL OR STATUTORY RULES, HAVE AN ENFORCEABLE OBLIGATION TO AVOID CONFLICTS OF INTEREST? DO COMMUNITY-BASED PROGRAMS HAVE A SIMILAR OBLIGATION?

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For many years, advocates and their programs have found themselves in complicated situations, where two people who appear to have opposing interests seek their assistance.

Amy Advocate works at the local community-based DV program and staffs a protection order assistance office at the local courthouse. In this capacity, she meets with individuals who come to the courthouse seeking assistance in obtaining protection orders. This assistance includes the provision of information about the legal process and general assistance with completion of any petitions/forms. In addition, when requested, Amy will attend the hearings. One afternoon, Amy assists John Doe with his application for a protection order against his girlfriend. At the hearing two weeks later, Amy is in the courtroom with Jane Smith, who she learns is the girlfriend (and respondent) of John Doe. John Doe’s attorney seeks to have Amy Advocate removed from the courtroom, claiming that she has a conflict of interest in this matter with her initial assistance to John Doe.

Andrew Advocate works at the offices of the community-based DV program, providing general advocacy and safety planning assistance to those seeking services. He also provides on-call assistance when law enforcement respond to domestic violence calls. Andrew Advocate responds to the scene of a domestic violence incident and arrest to meet with Bert Roe, whose partner has just been arrested. Andrew Advocate helps Bert assess his current needs, including a short-term safety plan, and also provides Bert with information about the various services available through the DV program. A few days later, a person named Ernie Oliver seeks advocacy help and meets with another advocate; Andrew recognizes Ernie Oliver as the recently-arrested partner of Bert Roe.

Adele Advocate works at the local community-based DV program with a primary role of assisting survivors who have children and leads the children’s support group. Adele Advocate has been working for several weeks with Nina Smith and her daughter Patsy after they had been referred to Child Protective Services due to the recent arrest of Joan’s husband. During a support group meeting facilitated by Adele Advocate, Patsy reveals that her mother, as well as her father, has physically abused her in the past.

Traditionally, the response has been to claim that the individual advocates, as well as their agencies, have a “conflict of interest” that prohibits continuing assistance to at least one of the
identified parties. The question remains, however, absent some kind of professional licensing or statutory requirement, whether advocates individually, and their agencies, have an obligation to avoid situations which present seemingly competing interests. That is, are advocates and domestic violence programs required to identify and prevent “conflicts of interest?”

The concept of “conflict of interest” is most readily identified with the ethical obligations of attorneys, as governed by the code of professional conduct existing in each state, as well as ethics requirements for certain licensed professionals such as therapists and social workers. According to the Restatement of the Law Governing Lawyers, a conflict of interest exists “if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.” The key is whether the lawyer’s exercise of independent professional judgment – on behalf of a client - is likely to be unduly influenced by other interests.

Because a lawyer does more than guide a client and actually makes decisions on the client’s behalf, the conflict issue can loom large in the attorney-client relationship. A client now facing her lawyer as an adversary will likely feel a sense of betrayal and uncertainty about the legal advice provided to her – was it really in her best legal interests or someone else’s? Thus, lawyers are legally bound by the various ethics rules to protect certain duties to clients, including former, current and/or prospective. Such duties result in a significant need to attend to confidentiality and screening for conflicts, in order to fulfill their overall duty to zealously represent their clients.

In contrast, the role of domestic violence advocates is to listen without judgment to the survivors seeking help. In partnership with survivors, advocates provide information about resources and options available and supports the decisions made by survivors. Advocates are not the ultimate deciders of the legal impact of a particular action or fact, they should not be making assessments and decisions on what steps a survivor should or should not take. In fact, advocates are expressly prohibited in many jurisdictions, whether by statute or enforcement actions, from practicing law – they are not allowed to do what lawyers do.

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2 Most states follow the ABA’s Model Rules of Professional Conduct. ABA Model Rules of Professional Conduct, Rules 1.7 – 1.9. To clarify, this paper addresses only the concept of conflict of interest for community-based advocates who are not attorneys or other licensed social work or therapy practitioners.


4 The Restatement (Third) of the Law Governing Lawyers §15, cmt. C (Am. Law Inst. 2000) (while not mandatory, such restatements are viewed across jurisdictions as persuasive authority).

5 Id.

Advocates who are social workers or other licensed therapists may also confront potential issues regarding conflict of interest when working with survivors. With these advocates, the question centers around their ability to “exercise their professional discretion and unbiased judgment” when working with two individuals who have competing interests. In such situations, a conflict of interest occurs when services to one client are or may be compromised because of decisions in relation to another client. In this situation, the presence of a conflict may hinge more on the type of assistance provided to each survivor and the subsequent detail of information learned and relied upon from each person. Assisting an individual with the scrivener efforts of completing an application for a protection order may likely involve less detailed information than that learned through individual advocacy and safety planning appointments or long-term participation in a support group.

Across the country, however, domestic violence programs have adopted a broadly-applied “rule” that conflicts of interest must be avoided. Unlike lawyers or licensed therapists, advocates have no professional requirement to prevent conflicts of interest. Over the last few decades, as advocacy work became more involved in the legal system, advocates and programs became subsumed under attorney expectations, specifically regarding the avoidance of conflicts. It is the conflation of advocacy with attorney and licensed therapist ethical obligations that has resulted in ongoing challenges about screening, methods of deciding if someone is really a “victim” and thus eligible for services, and the turning away of survivors needing help, often with no other resource available.

We propose that a more effective way to view this issue of conflict of interest is to determine “conflict” as falling along a continuum of safety as illustrated by the following chart: the more an advocate knows of an individual survivor’s life and the more embedded a survivor becomes in the services available at a DV program, the more likely it is that an advocate will be less likely to exercise that impartial and professional discretion. Additionally, as a survivor becomes more involved in program services — moving from protection order assistance to support groups or shelter — issues of safety become the greater concern when dealing with another person. It is those safety issues — and the program’s need to do nothing that endangers survivors - that necessitate effective screening and recordkeeping practices by advocates.

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7 Supra, n. 2, p. 1.
8 Id.
9 Again, this assessment focuses solely on advocates who have no other licensing or ethics requirements (non-attorneys, non-social workers) and, thus, its proposals would not apply to a domestic violence program’s legal assistance work that involves actual attorney representation of survivor clients.
10 Determining Conflicts of Interest and Eligibility of Services: Is there a Role for Criminal History Checks? Unpublished BWJP policy memo.
11 This dilemma is especially prevalent in rural areas across the country, where the domestic violence program is the only resource available within one, two or even eight or more hours. Conversations with Jill Davies, Esq., Hartford Legal Aid, CT and Mary Ingham, Executive Director, Crisis Intervention Service, IA (notes on file with BWJP).
Accepting this idea that “conflict of interest” is inapplicable, or at least less applicable, to domestic violence programs and their advocates does not negate a program’s need to actively protect and maintain confidentiality for survivors seeking assistance, as well as addressing any “appearance” of impropriety. Rather, programs and their advocates can take many steps to ensure their obligations to confidentiality are upheld, and that survivors continue to view their services as safe, credible and available.

It is vital that programs develop a policy that makes very clear to individuals seeking services what the scope and/or limits of confidentiality are, so that individuals can make informed decisions on what/how they wish to disclose personal and highly sensitive information in the course of the relationship. As a basic guideline, programs and program advocates/staff should remember that:

- Privilege belongs to the battered victim because it is his/her information;
- The victim chooses what information to share with the advocate/program; and
- The victim chooses what information not to share with the advocate/program.  

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A **confidential communication** is a statement made under circumstances demonstrating that the battered woman intends her words to be heard only by the person she is addressing.

A **privileged communication** is a statement made by a certain person within a recognized, protected relationship, which the law protects from forced disclosure. Such privileges can be created by statute, regulation, case law, ethical rules or other ruling of a court.

A confidential communication may be privileged, depending on the relationship between the parties and the circumstances in which the statement is made.

**Evidentiary privileges** are legal rules governing the disclosure or admissibility of evidence in a judicial proceeding.\(^{13}\)

Through effective recordkeeping and other policies to address the security of information, programs and advocates can actively demonstrate a commitment to protecting confidentiality for all who seek assistance, rather than turning away survivors due to a false requirement to avoid a conflict.

Below are suggested practices for programs to implement in an effort to be available to all survivors while maintaining safety and confidentiality.

- **Adhere to quality, but minimally required, recordkeeping practices.**

While it is necessary that programs keep client case files and program records to provide effective services, manage shelters and advocacy programs and satisfy funding agencies, it is equally critical that they do so in a manner that best protects all survivor information. Policies and practice guidelines should be adopted by domestic violence programs to establish clear record-keeping practices, set parameters for retention and destruction of client case files and program records and safeguard the confidentiality of information about individuals who seek services.\(^{14}\) Any documentation about a survivor should be the minimal amount required by funders and may depend on the type of services a survivor utilizes. For example, a woman seeking to enter temporary shelter with her children will have to provide information about health or school issues that a survivor seeking only assistance to obtain a protection order will not. This minimal recordkeeping would reduce the risk of an advocate learning detailed information about an individual who has competing interests to another survivor using services.

Moreover, domestic violence programs should maintain the limited records they do keep in secured filing cabinets, providing access only to designated staff. Program records, such as

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\(^{13}\) *Id.*

\(^{14}\) *Id.*
financial documents or personnel files, should be kept separately from case files (i.e., shelter intake files). Only designated staff should have authority to review case files and/or make notations in case files, whether those are paper or electronic versions.

- **Implement effective intake and assessment procedures to identify needs and services of survivors seeking assistance and recognize that these procedures may vary based on the setting and the types of services sought.**

It is necessary for domestic violence programs to utilize some kind of screening tool to determine the eligibility of those who seek services. This screening, however, does not permit a domestic violence program to discriminate in the provision of services on the basis of age, race, sex/gender, weight, ethnicity/color/national origin, marital status, sexual orientation, disability or religion.\(^{15}\) It has also been shown how the use of criminal background checks can be inaccurate at best, and at worst, can deny help to those victims who may need it most.\(^ {16}\)

Individuals who seek advocacy, counseling, shelter or other services from the domestic violence program should be screened to determine whether they are eligible for such services,\(^ {17}\) as well as whether providing those services will affect the safety of another survivor, such as shelter. In order to provide effective and safe advocacy, a program will necessarily gather more information about a survivor seeking help with a custody or child protective service case than a hotline caller. If an advocate is working at a courthouse providing assistance with applications for protection orders, this will likely require less information from a survivor than one seeking emergency shelter or transitional housing.

- **Importance of supervisor oversight and decision-making, often in “real time.”**

Given the need to limit access to survivors’ information, it is vital that a supervisor plays an active role in assisting advocates with intake and safety concerns and serves as the program representative who does any “program record checks” that may be needed before connecting a survivor with a particular service. For example, if a survivor seeks to join a support group, it will be necessary for a supervisor to cross-check the participants of the current support group to ensure there is no “adverse” party. This check, however, is for basic safety – not to determine if there is a “conflict of interest,” as alternative services or different support groups remain available.

- **Clearly define how survivor information will be protected in the various settings where program advocates may work.**

This assurance should spell out the type of assistance available in that location – general assistance completing a protection order application at a courthouse office, for example. Furthermore, the assurance should highlight and repeat that any information an individual shares with an advocate will be kept confidential, and will not be shared with anyone else absent

\(^{15}\) *Id.*

\(^{16}\) See supra., fn. 9.

\(^{17}\) The Northwest Network Assessment Tool is a model for intake and screening that does not rely upon inaccurate and even illegal assumptions, such as gender. See www.nwnetwork.org.
permission. If an advocate is challenged, for example by having spoken with both parties to a protection order matter at different times, there should be a standardized response clarifying that, while advocates do not have conflict of interest prohibitions, they are beholden to maintain confidentiality at all times and that this responsibility is strictly adhered to by all program staff.

- **If possible, create an ‘opt-out’ decision for individual advocates, after supervisor consultation.**

Even without a specific conflict prohibition, there are going to be those rare occasions where an advocate may find herself in a situation as outlined in the opening scenarios, where long-time work with an individual is either too uncomfortable to assist another family or household member, or where that long-time work would cause concerns about the program’s credibility. The creation of an “opt-out” provision can alleviate the individualized concerns that such situations may bring for advocates. In fact, many domestic violence programs provide for an alternative advocate if a name is recognized, even before any real information is shared (with the notice that “we have another advocate who specializes in the kind of services you may want,” to protect the confidentiality of all parties.

**Conclusion**

Certainly, all suggested practices should be customized to fit a program’s own staffing resources, the actual licensing status of staff and the other service options available in a community. Additionally, successful program responses require ongoing conversations with practitioner partners in each community, so that all partners anticipate and understand any policy and practice changes.