



PRIVACY & CONFIDENTIALITY FOR SURVIVORS OF SEXUAL VIOLENCE

The “right to privacy,” as guaranteed by the U.S. Constitution, means the fundamental right to avoid disclosing personal matters and to independently make certain kinds of decisions. Sex offenders commit the ultimate invasion of privacy by attacking and destroying victims’ control over their own bodies, and generating a need for help that cannot be provided without further disclosure of private information.

Many survivors are reluctant to seek assistance because they fear the consequences of disclosing such private information. Unfortunately, victims are often subjected to public shame and ridicule, are sometimes punished or prosecuted for concurrent conduct (such as under-age drinking or use of illegal drugs), and frequently experience increased danger of subsequent violence. Furthermore, offenders frequently continue to harass victims by demanding access to their records throughout criminal proceedings.

Fortunately, numerous federal and state laws have been developed to protect privacy rights, as discussed below. However, most victims are not familiar with these laws or how they can be used to protect privacy. Furthermore, no systems have been developed to ensure representation of victims’ interests in criminal proceedings (where victims serve as witnesses and are generally NOT directly represented by counsel). This does not mean that victims’ interests cannot be protected, but that proactive steps must be taken to do so.

Professionals can help by expanding their understanding of laws related to privacy, employing practices that increase protection of privacy and reduce negative consequences, providing victims with information and assistance regarding protection of privacy, and taking legal action when necessary to fulfill professional duties of maintaining confidentiality.

Confidentiality: Rights to Privacy in Personal Matters



CONSTITUTIONAL PROTECTION

Though constitutional rights have historically been cited to protect defendants, certain fundamental rights protected by the U.S. Constitution are equally important to victims. Citing the 4th Amendment’s protection from unreasonable searches and seizures and 14th Amendment’s due process protections, the U.S. Supreme Court has long recognized a “right to privacy in personal matters,” including the right to avoid disclosure of personal matters. See, e.g., *Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

Practical applications of this right include: remaining silent, choosing what type of medical treatment to have (with or without forensic evidence collection), and/or preventing release of confidential records for criminal proceedings.



VICTIM SERVICE PROVIDERS’ RECORDS ARE CONFIDENTIAL

KRS 211.608 states that “all client records, requests for services, and reports ... of a rape crisis center are confidential and shall not be disclosed by any person except as provided by law.” Furthermore, Rape Crisis Centers are required to maintain strict confidentiality by state and federal regulations, as well as by contract obligations. Similar provisions require confidentiality of records for domestic violence programs and children’s advocacy centers. For information see KRS 620.050 and 922 KAR 5:040.

Please note, however, that records held by victim service providers are frequently subpoenaed. Though the service providers must respond to the subpoena, they are not always required to release records. Service providers should contact an attorney to discuss options, including filing a “motion to quash” the subpoena.



Confidentiality: Privacy in Health Care Settings



HIPAA AND OTHER LAWS PROTECT VICTIMS

Commitment to protection of privacy in health care settings has been greatly expanded in recent years. This is due in large part to the Privacy Regulations of the federal Health Insurance Portability and Accountability Act (HIPAA). See 45 C.F.R. Part 160 & 164. In addition to setting new standards for providers, HIPAA has also pushed health care providers to work more diligently to comply with state laws regarding privacy. Highlights of both are outlined below.

Pursuant to HIPAA, health related information must not be used or disclosed without authorization, except for purposes of treatment, payment, and health care operations, or as authorized by a specific exception. When determining how much to disclose, the standard is the "minimum necessary to accomplish the intended purpose."

HIPAA specifically allows compliance with state abuse reporting laws. Kentucky law requires reporting of abuse of children and vulnerable adults, including spouses. However, Kentucky law does not require reporting of all

criminal acts. Therefore, patient authorization is required before reporting sexual violence committed by someone other than a parent, guardian, spouse, caretaker, or other person exercising powers of care, custody, or control.

The treatment protocol for sexual assault medical examinations, set forth in 502 KAR 12:010, specifically requires medical personnel to contact a rape crisis center advocate as part of the "Pre-Forensic Examination Procedure." Therefore, contacting a rape crisis center advocate is a permitted disclosure for treatment purposes under HIPAA.

Before a patient's records are released pursuant to subpoena, a health care provider must ensure that reasonable efforts are made to inform the patient and provide an opportunity to object. For information see 45 CFR 164.512. Furthermore, health care facilities should release only the "minimum necessary" information, not the patient's entire record.

Individuals and health care providers may intervene in legal proceedings to limit the use of medical records in which they have interests. For information see KRS 422.315 (granting standing for limited purposes).

Confidentiality: Privacy in Public Records



OPEN RECORDS LAWS EXCEPTIONS

Pursuant to Kentucky's Open Records Law "all public records shall be open for inspection by any person" because "free and open examination of public records is in the public interest." For information see KRS 61.870-.884. However, this requirement does not apply to "public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." For information see KRS 61.878(1)(a).

◇ Public agencies, including law enforcement organizations, may redact (or edit out) identifying information in sex crimes cases. See *In re: Courier-Journal/City of Louisville Division of Police*, 02-ORD-36 (holding that police may deny access to personally identifiable information relating to victims of sex offenses that appeared in police incident reports; and acknowledging the singularly traumatic consequences of crimes of sexual violence).

- ◇ The purpose of Open Records Law is to allow the public to monitor how government agencies fulfill their duties. Therefore, access may be denied to records regarding the details of a sex crime or the condition of the victim in the aftermath, where those records are not related to how the public agency carries out its duties. See *In re: Courier-Journal/Crime Victims Compensation Board*, 03-ORD-153 (holding that the Crime Victims' Compensation Board may refuse to disclose detailed information from certain police reports, sexual assault examination reports, and medical records related to a victim's post-assault suicide attempt; and acknowledging that "information is no less private simply because that information is available someplace.")
- ◇ Questions regarding Open Records Laws can be directed to the Office of the Attorney General, Civil Law Division at (502) 696-5614 or <http://ag/ky.gov/civil/openrecords.htm>.



Confidentiality: Rules of Evidence in Legal Proceedings

Rules of evidence govern what can be admitted (or considered by the decision maker) during legal proceedings. Rules of evidence that can be called upon to help victims include, but are not limited to: "privileges," which can be claimed to prevent testimony based on "confidential communications," and the "rape shield rule," which prohibits testimony about a victim's sexual history in some cases.

PRIVILEGES COMMONLY CLAIMED BY VICTIMS

The privileges most frequently claimed by victims of sexual violence are the Counselor-Client Privilege (KRE 506) and the Psychotherapist-Patient Privilege (KRE 507). Though there are differences between these privileges, they are discussed together below in the interest of space.

- ◇ The basic rule is that "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of counseling the client..." KRE 506(b).
- ◇ These privileges protect confidential communications with sexual assault counselors, victim advocates (except those employed by Commonwealth's or county attorneys), certified professional counselors, certified marriage and family therapists, certified school counselors, psychologists, licensed clinical social workers, doctors treating mental conditions, registered nurses practicing psychiatric or mental health nursing, and others.
- ◇ These privileges do not provide absolute protection for confidential communications. For example, the "exceptions" to Counselor-Client Privilege (KRE 506) allow for admission of evidence that is "relevant" (i.e., tends to prove or disprove an alleged fact), where there is no other way to obtain the information, and where omitting the evidence would lead to greater injustice than undermining confidentially protected relationships. A judge may review evidence *in camera* (i.e., in private) to determine whether an exception applies.
For information see KRS 506(d).
- ◇ This privilege can be claimed by the client, the client's guardian, or the counselor/mental health care provider in the absence of the client, but only on behalf of the client. Professionals have legal duties to claim privileges on behalf of clients, unless the client authorizes release of the records sought or until a court specifically orders that the privilege does not apply.
For information see KRS, e.g., 908 KAR 2:070§3(3).
- ◇ Professionals in possession of victims' records should consult attorneys about legal actions to protect victims' privacy, including filing motions to quash subpoenas and requesting *in camera* reviews to determine relevancy.

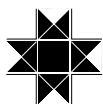
COURTS DETERMINE WHEN PRIVILEGES APPLY

When legal action is taken to assert privileges, defendants frequently argue that access to information about victims must be allowed in order to prevent violation of constitutionally protected fair trial rights.

Fortunately, the Kentucky Supreme Court has established guidelines to help bolster the protection of victims' privacy while ensuring defendants' access to information that is truly relevant. In *Commonwealth v. Barroso, Ky.*, 122 S.W.3d 554, 563 (2003), the Court discussed the problem of "fishing expeditions" into victims' records, concluded that more restrictive standards are needed, and overruled numerous parts of *Commonwealth v. Eldred, Ky.*, 906 S.W.2d 696 (1994).

Principal themes from *Barroso* include the following:

- ◇ While Constitutional rights generally prevail over statutory rights, the defendant bears the burden of establishing that Constitutional rights will be violated if the statutory privilege is not overridden.
- ◇ Constitutional due process rights are not implicated where records regarding a witness are not in the possession of a prosecuting attorney.
- ◇ The defendant's right to compulsory process to gather information about a witness prevails only where records contain evidence regarding the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony.
- ◇ *In camera* review of a witness's privileged records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence, i.e., evidence favorable to the accused and material to guilt or punishment (which may include evidence that can be used to "impeach" or attack the credibility of a witness).
- ◇ A witness's credibility is not in question merely because s/he is receiving or has received mental health services.
- ◇ Defendant's constitutional rights can be fully protected by an *in camera* inspection with only the trial judge present.



WAIVER OF PRIVILEGE - IMPACT OF RELEASING RECORDS

- ◇ If a person voluntarily discloses or consents to disclosure of any significant part of the privilege matter, the privilege may be “waived,” i.e., the person may no longer be able to claim the privilege. For information see KRE 509.
- ◇ There is no waiver if a witness makes a disclosure without having the opportunity to claim a privilege or is erroneously compelled to disclose privileged communications (as in Barroso). For information see KRE 510.
- ◇ There is no waiver if the disclosure itself is privileged, i.e., made to another with whom the client has privilege (such as the client’s attorney).
- ◇ It is important to note that prosecuting attorneys represent the Commonwealth, not individual victims. Therefore, there is no attorney-client relationship between a prosecuting attorney and victim. Thus, releasing records to a prosecuting attorney can result in waiver of privilege.
- ◇ Furthermore, upon request by the defendant, the prosecutor must "permit the defendant to inspect and copy or photograph any relevant results or reports of physical or mental examinations . . . that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth." RCr 7.24(1).

RAPE SHIELD LAW (KRE 412) MAY BLOCK EVIDENCE REGARDING VICTIMS’ PAST

In order to prevent the shift of focus from the defendant to the victim, the Kentucky Rules of Evidence specifically address the admissibility of evidence regarding the victim’s character and behavior. Pursuant to KRE 412, commonly referred to as the Rape Shield Law, evidence is generally inadmissible if it is offered to prove that the victim engaged in other sexual behavior or to prove the victim’s sexual predisposition.

Take note, however, KRE 412 includes numerous exceptions, and these exceptions are sometimes subject to broad interpretation. Nonetheless, the Rape Shield Law provides an additional layer of protection for many victims of sexual violence. Furthermore, it has recently been expanded so that it is now applicable in civil, as well as criminal, cases.

Acting to Protect Victims’ Privacy

The need for action to protect victims’ privacy rights cannot be overstated. Such actions are critical to reducing additional trauma suffered by victims who report sex crimes and to increasing others willingness to do so.

- ◇ Professionals should institute policies designed to maximize protection of victims’ privacy rights, such as: protocols for responding to requests for information (including subpoenas and open records requests), parameters for participating in multi-disciplinary responses, and disclosures necessary to ensure informed consent before victims authorize releases of information.
- ◇ On a case-by-case basis, preliminary attention to victims’ privacy rights can be extremely important. Victims should be informed about privacy rights and how to protect them. These steps might include simply refusing to provide information or refusing until allowed an opportunity to make an informed decision.
- ◇ In some situations, attorneys can be very helpful. Attorneys sometimes represent victims in preliminary matters, such as communications with prosecutors and

defense attorneys about victims’ rights. Attorneys can also provide direct representation in some legal proceedings where privacy rights are implicated. For example, KRS 422.315 specifically grants standing to intervene when medical records are at issue.

- ◇ When a child’s rights are at issue, Kentucky law provides that a guardian ad litem (i.e., GAL or specially trained attorney) or specially trained advocate should be appointed to ensure that the child’s legal interests are adequately protected. For information see KRS 26A.140(1).

KASAP is committed to working with professionals to develop strategies and resources for protecting victims’ privacy. For information or assistance, contact the KASAP at (502) 226-2704, toll-free 1-866-375-2727, or visit <http://www.kasap.org>

