



# **Confidentiality and Privilege**

## ***An overview of current state and federal laws and statutes for domestic violence victim advocates***

The educational materials that follow are supported by funding from the Washington State Department of Social and Health Services, Children's Administration, Division of Program and Policy. The points of view presented here are those of the author and do not necessarily represent the official position or policies of the Washington State Department of Social and Health Services.

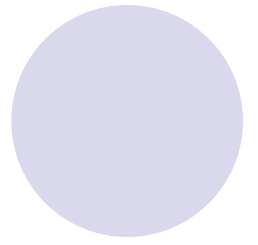
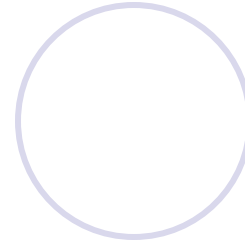
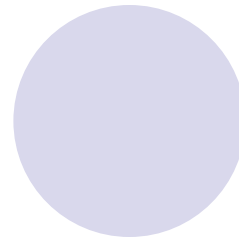
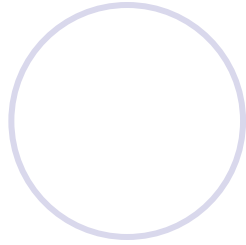
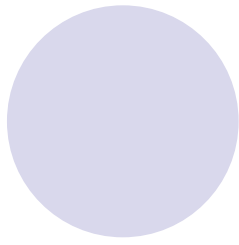
# How to Use this Presentation

- Read and study all the slides.
- Once you have read the presentation, take a quiz to test your knowledge and to complete Lesson 1 of this course.



# Presentation Outline

- Introduction: Confidentiality overview
- Privileged communication
- Handling subpoenas
- Confidentiality requirements for DV advocates and agencies
- Federal confidentiality laws
- Release of information and informed consent
- Summary and further resources



# **INTRODUCTION**

# Role of Confidentiality in Battered Women's Movement

- Historically, confidentiality and secrecy were cornerstone principles of the battered women's movement.
- Keeping survivors' information confidential helps decrease danger in their lives and maintains their autonomy.
- Integrating a deeply rooted understanding of confidentiality into your day-to-day work is critical to victims, other advocates, your agency, and the broader anti-violence movement.

# Importance of Confidentiality in Advocacy

## Definition of Advocacy-Based Counseling:

“the client is involved with an advocate counselor ... with *the primary focus on safety planning, empowerment and education of the client through reinforcing the client's autonomy and self-determination.*”

(WAC 388-61A-0025)

Honoring confidential disclosures is critical to reinforcing survivors' autonomy and self-determination.



# Legal Protections

- Federal and state laws and regulations protect domestic violence victim advocates and domestic violence victim service agencies from requests by other agencies and individuals seeking information about the victims they serve.
- DV advocates are on firm legal ground in asserting and defending a victim's right to confidentiality.

# A Note About Terminology

- State law: Revised Code of Washington (RCW)
  - Must be voted on by state legislature
  - Subject to change and compromise to get passed into law
- State statute: Washington Administrative Code (WAC)
  - Regulations for state agencies and their contractors to follow
  - Not passed by legislature, but have the force of law



# **PRIVILEGED COMMUNICATION**

# Definition of Privileged Communications

- **“Those statements made by certain persons within protected relationships such as husband-wife, attorney-client, priest-penitent and the like which the law protects from forced disclosure on the witness stand.”**  
(from *Black’s Law Dictionary*)



# Privileged Communications

- Our system of law recognizes specific relationships in which the communication between two parties is protected.
- In these relationships, it is assumed the communication is intended to be confidential.
- Until 2006, Washington state law did not recognize a DV victim talking to an advocate in confidence as one of these protected relationships.

# Privileged Communications

This is the language in state law that was added to protect legal privilege of DV victim and advocate conversations:

- RCW 5.60.060(8): A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.
  - Went into effect June 7, 2006.
  - Sexual assault victim/advocate relationship already covered in state law.

# Privileged Communications – DV Advocate Definition

## RCW 5.60.060(8)(a):

- For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

# Privileged Communications – DV Advocate Definition

- Important to note who is covered as an advocate under this definition.
- Includes anyone working (paid or volunteer) for a non-profit, community-based DV program. Can be a stand-alone agency or part of a larger organization.
- Does not include DV advocates working for a law enforcement agency, prosecutor's office or CPS.

# DV Privilege and SA Privilege

- Definition is the same, but who is covered as an advocate is broader for sexual assault
- SA advocate definition: “employee or volunteer from rape crisis center, victim assistance unit, program, or association that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault”

# What Does Having Privileged Communication Actually Do?

- Having legal privilege prevents advocates from being ordered to testify in court about conversations they had with a survivor.
- Also makes it more difficult for agency files about program participants to be disclosed as part of a court case.



# Key Points About Privileged Communication

ONLY the survivor has the ability and the right to voluntarily waive legal privilege and allow information to be disclosed outside your agency.

It is her information, not yours.

# Key Points About Privileged Communication

- In order for communication to be privileged, it must occur between a DV survivor and advocate only, with no one else present.
- However, privilege is maintained among advocates at the same agency, so discussing a case with co-workers does not break it.
  - This should only be done to receive specific assistance with a case. Keep in mind the survivor's privacy, and do not routinely share everything you know about a program participant with other advocates.

# Key Points About Privileged Communication

## Situations that invalidate legal privilege:

- **Support group** – All participants should respect confidentiality of discussion, but the extra level of legal privilege cannot be sustained with multiple people in a conversation.
- **Relatives or friends of the survivor** – If they are in the room while a survivor talks with an advocate, that conversation cannot be protected under privilege (though it is still considered confidential information held by your agency).

# Interpreters and Privileged Communication

- Having an interpreter present when an advocate and survivor are holding a private conversation does not automatically break privilege.
- The interpreter's role must be solely to facilitate communication. That person cannot be someone known to the victim who is also in the room to support her (like a relative).



# Interpreters and Privileged Communication

- The best way to be clear about the use of interpreters is for your agency to contract with professional interpreters who sign confidentiality agreements when working with program participants.
- Ideally, interpreters are paid for their work, but could also be volunteers who understand their role and have signed a confidentiality agreement.



# Key Points About Privileged Communication

- Sharing information later with others outside a legally protected relationship may break the privilege.
- For example, if a survivor shares her story with a neighbor that she first told a DV advocate, then she is waiving her future right to keep that information from being used in a court case (because now another person outside the protected relationship knows about it).

# Privileged Communication and Confidentiality

- Just because a communication may not be privileged, that does not mean it isn't confidential.
- Even if a circumstance occurs that breaks legal privilege, as an advocate you are still obligated to follow other confidentiality laws in handling a survivor's information.
- So if you know a survivor has told other people some of her own personal information, you still cannot disclose it yourself.

# Privileged Communication and Confidentiality

- Always follow your agency's confidentiality policies fully in every circumstance.
- Having privilege is just the “icing on the cake” above and beyond your other practices.



# Exceptions to Keeping Privilege

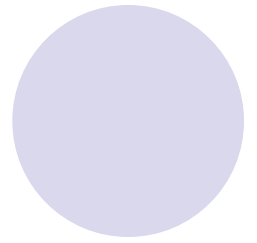
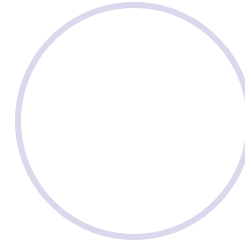
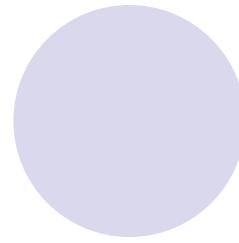
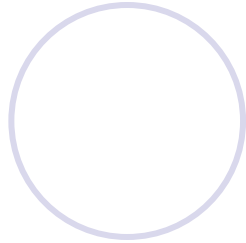
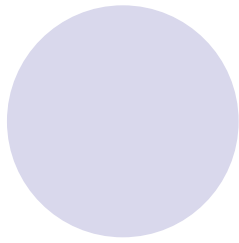
## Circumstances when a DV advocate must disclose confidential communication:

- With survivor's written permission on a release of information
- "Duty to warn" situation – an imminent risk of serious physical injury or death of the victim or another person
- Mandated report of child abuse or neglect "or to disclose relevant records relating to a child as required by RCW 26.44.030(12)"  
[see RCW 5.60.060(8)(b)]
- If required by a court order



# “Relevant records relating to a child”

Your agency is not required to turn over all files if there is a CPS investigation about a survivor’s child. You have legal standing to not turn over records about an adult survivor, as well as withhold information that is not relevant for the child abuse case.



**SUBPOENAS**



# Subpoenas

- A subpoena is a court order either for an individual to testify or for an agency to produce records related to a court case.
- State law on privileged communication prevents DV advocates from having to testify in court about conversations with a survivor, and gives stronger protection for agencies to resist turning over client records. [see RCW 5.60.060(8)]



# Subpoenas

- Even though state law is now stronger, your agency may still continue to be served with subpoenas.
- If a subpoena comes to your agency, know your office protocol and follow it. There should be a specific person (usually the director) who must receive all subpoenas and respond to them.



# Subpoenas

- Sometimes a subpoena can be “quashed” (meaning it is invalidated and does not have to be followed), but in other cases some legal response must be made.
- It is helpful for your agency to have a lawyer who understands DV confidentiality laws and can assist with this process.

# Court Orders – Existing Law

- If any of the agency's records have to be turned over in a court proceeding, there is an existing process in state law for how the records will be handled.
- It's called "*in camera* review," which means having a judge look at the records privately to see if they are indeed relevant to the court case before any information is shared more publicly as part of court documents.

# Court Orders – Existing Law

- RCW 70.123.075: Client records maintained by DV programs shall not be subject to discovery in any judicial proceeding unless:
  - (c) The court reviews the DV program's records in camera to determine whether they are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records, taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records; and
  - (d) The court enters an order stating whether the records or any part of the records are discoverable and setting forth the basis for the court's findings.



# **CONFIDENTIALITY REQUIREMENTS**

# Confidentiality Requirements for DSHS-funded Programs

- State law and statute both say: DV programs shall not disclose information to any outside party without the informed consent of the program participant.
  - RCW 70.123.076(1) and WAC 388-61A-0146
- An agency could suffer legal penalties and financial consequences for practices that do not meet this requirement.

# Confidentiality Requirements for DSHS-funded Programs

- WAC 388-61A-0025 specifies the items included in “confidential information” that DV programs must not disclose about program participants: “name, address, telephone number, social security number, date of birth, nine-digit ZIP code, and other personally identifying information, physical appearance of, and case file or history of, any victim of domestic violence who seeks or has received services...”

# If the DV Program Must Share Survivor Information

Under state law, DV agencies must try to contact a survivor whose personal information has to be turned over to a court, even if they are no longer a current program participant (see RCW on next page).

- Also specified in WAC 388-61A-0147(e).

# If the DV Program Must Share Survivor Information

RCW 70.123.076(3): If disclosure of a recipient's information is required by statute or court order, the domestic violence program shall make reasonable attempts to provide notice to the recipient affected by the disclosure of information. If personally identifying information is or will be disclosed, the domestic violence program shall take steps necessary to protect the privacy and safety of the persons affected by the disclosure of the information.



# **Confidentiality Requirements Can *Help* You**

These requirements are not just rules to worry about breaking, they can help you in your advocacy.

- Provide an explanation to external parties (like DSHS or law enforcement) that may demand client information from your agency.
- Useful for your work with collaboration partners – help them understand your work and how seriously your agency takes protecting survivors' personal information.



# Data for Funders

- Funders are entitled to financial details regarding how their money is used.
- The need to track a DV program's use of funding must be balanced against the interests of survivors in maintaining their confidentiality, and therefore, safety.
- State law provides guidance for how information about program services can be legally provided to funders without identifying any program participants.

# Sharing Statistical Data with Funders and Government Agencies

- RCW 70.123.076(4): To comply with tribal, federal, state, or territorial reporting, evaluation, or data collection requirements, domestic violence programs ***may share data in the aggregate that does not contain personally identifying information*** and that: (a) Pertains to services to their clients; or (b) is demographic information.

# Notice of Confidentiality Rights

- DV programs are required by state statute to provide a written notice of program participants' rights to confidentiality at intake. (WAC 388-61A-0149)
- The notice of rights must be explained to the program participant at their initial intake, and also when/if the participant is considering whether to sign a release of information.

# Notice of Confidentiality Rights

WAC 388-61A-0149 describes the information that must be provided on the notice of rights:

- The client's right to privacy and confidentiality of the information shared with the DV program.
- What the exceptions are to maintaining confidentiality (mandated reporting of child abuse or neglect, duty to warn of imminent harm, written release from client).

# Notice of Confidentiality Rights

WAC 388-61A-0149 (continued):

- Client does not give up their right to have their personal information protected even if they sign a release allowing some information to be shared with others.
- Client has the right to withdraw a written release at any time.
- DV program will not require any client to sign a release of information in order to receive agency services.



# Model Notice of Rights

- WSCADV has created a model notice of program participant rights to confidentiality that includes all the elements outlined in WAC 388-61A-0149.
- The following two slides show the model form.
- You can download the form on our website at [www.wscadv.org](http://www.wscadv.org) under Resources (look for Model Forms in the “Advocacy” topic).

## Notice of Your Right to Confidentiality

Safety is a priority of our program. To respect your privacy and help support your safety and right to make your own decisions, we will make every effort to keep what you tell us confidential. Confidential information includes:

- any written or spoken communication between a person seeking/receiving services and any program staff, volunteer, or board member;
- any records or written information identifying a person to whom services are provided; and
- any information about services provided to an individual.

We will not disclose anything about you without your permission, unless a legal exception exists. Legally, we are obligated to release confidential information if we are required by a court order. We are required by law to contact Child Protective Services if we suspect your child has been abused or neglected. We are also required by law to contact law enforcement when there is potential suicidal behavior or threat of harm to others that is likely to result in a clear, imminent risk of serious physical injury or death to you or another person.

It is your choice to decide what information you share about yourself and you may change your mind and withdraw the release at any time. You do not have to give permission or sign a release of information in order to receive services. It is completely your decision.



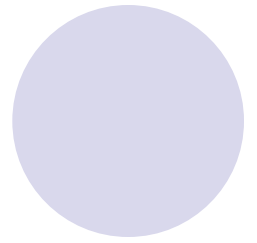
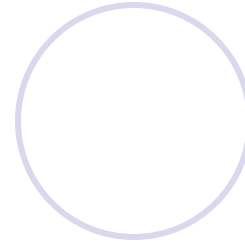
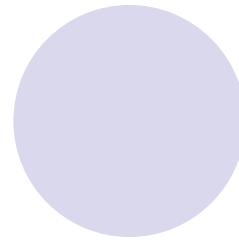
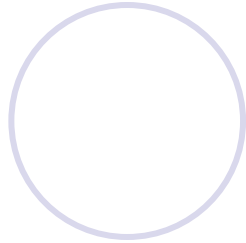
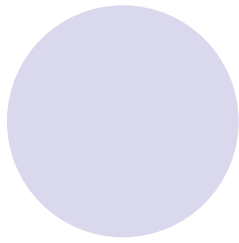
It is your choice to decide what information you share about yourself and you may change your mind and withdraw the release at any time. You do not have to give permission or sign a release of information in order to receive services. It is completely your decision.

You may find it helpful for us to share specific and limited information with other agencies and programs. You can choose to give permission so that we can release this information about you. If you decide that we can share your information, this will be done by signing a Release of Confidential Information form. However, we will still protect your privacy and confidentiality to the best of our ability. Please note that if you sign a release of information you do not give up your right to have the released information protected under other laws or rules.

I understand the information provided on this form.

\_\_\_\_\_  
Participant Signature

\_\_\_\_\_  
Date



**FEDERAL  
CONFIDENTIALITY LAWS –  
VAWA 2005**

# Federal Law – VAWA 2005

- If your program receives federal grant money, you must also follow confidentiality provisions in the Violence Against Women Act (reauthorized by Congress in 2005).
- These are similar to WA state laws and statutes protecting survivors' information.

# Federal Law – VAWA 2005

- Like “confidential information” about program participants spelled out in WAC 388-61A-0025, VAWA describes similar items considered “personally identifying information” that programs must not disclose without a written release from the survivor.
- Sections of VAWA stating these restrictions on disclosure of confidential information are on the next three slides.



# Federal Law - VAWA

VAWA 2005 (Public Law 109-162, Section 3):  
Nondisclosure of Confidential or Private  
Information

- (A) IN GENERAL.—In order to ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families, grantees and sub-grantees under this title **shall protect the confidentiality and privacy of persons receiving services.**

# Federal Law - VAWA

- (B) NONDISCLOSURE .— grantees and subgrantees shall not:
  - (i) disclose any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees' and subgrantees' programs; or
  - (ii) reveal **individual client information without the informed, written, reasonably time-limited consent of the person** ... about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program....

# VAWA – Definition of “Personally Identifying Information”

- (i) PERSONALLY IDENTIFYING INFORMATION OR PERSONAL INFORMATION.—
- individually identifying information for or about an individual including information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking, including—
- (I) a first and last name;
- (II) a home or other physical address;
- (III) contact information (including a postal, e-mail or Internet protocol address, or telephone or facsimile number);
- (IV) a social security number; and
- (V) any other information, including date of birth, racial or ethnic background, or religious affiliation, that, in combination with any other non-personally identifying information would serve to identify any individual.

# VAWA – Permitted Information Sharing


- Like RCW 70.123.076(4) and WAC 388-61A-0147(4), VAWA also provides guidance for DV programs on data that they are allowed to share for funding purposes (see next slide).
- This statistical data cannot contain any of the prohibited elements of “personally identifying information.”

# VAWA – Permitted Information Sharing

- (D) INFORMATION SHARING.—Grantees and subgrantees may share
  - (i) **non-personally identifying data in the aggregate regarding services to their clients and non-personally identifying demographic information** in order to comply with Federal, State, tribal, or territorial reporting, evaluation, or data collection requirements;
  - (ii) court-generated information and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes; and
  - (iii) law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.



# **RELEASE OF CONFIDENTIAL INFORMATION**



# Release of Confidential Information

- State law mandates that one of the only ways advocates can release any information about a program participant to a third party is when the participant has given express written permission.
- This is done using a standardized form called a “Release of Information” (ROI), also called a “waiver of confidentiality” in the WAC.



# Release of Information

RCW 70.123.076(2)(a) and WAC 388-61A-0148 describe what a release of information must contain to be valid:

- Made voluntarily
- Written (no verbal releases), signed by survivor
- Pertain only to the survivor or her children
- Include an end date or it will expire in 90 days



# Release of Information

## Elements of an ROI (continued):

- Clearly describe the scope of information to be released
- Inform client that consent to share the information can be withdrawn at any time

Also, a DV agency cannot require that a client sign a release of information in order to receive services (WAC 388-61A-0149).



# Release of Information

## What Is Being Shared?

- RCW 70.123.076(2)(b): The domestic violence program's disclosure of information shall be ***only to the extent authorized by the recipient***. The domestic violence program, if requested, shall provide a copy of the disclosed information to the recipient.



# Release of Information

- A release of information should be specific about purpose, person or agency to receive the information, and amount of time the waiver is valid.
- A “blanket waiver” should never be used.
- Once a release is signed and the information is shared, the participant cannot make that information confidential again.
- However, a participant can withdraw her permission at any time to stop the advocate from sharing the information further.



# Release of Information

- WSCADV has created a model release of information that includes all the elements outlined in RCW 70.123.076(2)(a) and WAC 388-61A-0148.
- The next two slides show the model ROI.
- You can download the form at [www.wscadv.org](http://www.wscadv.org) under Resources (look for Model Forms in the “Advocacy” topic).

# Release of Confidential Information

We will not release any information about you without your permission, unless a legal exception exists, as explained on the Notice of Your Right to Confidentiality form. You do not have to give permission or sign a release of confidential information in order to receive services. It is completely your decision. You can withdraw your permission (in writing or orally) at any time. If you sign a release of information, you do not give up your right to have any of this information protected under other laws or rules.

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I, \_\_\_\_\_, authorize this program to release the following information:  
(Printed name of Program Participant)

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to: \_\_\_\_\_ and/or \_\_\_\_\_  
(Name of agency) (Name of staff person)

I understand that I can revoke my permission to release confidential information at any time. This release of information is good until \_\_\_\_\_.  
(Expiration Date)

*\*\*\* If no date is entered, the release will automatically expire in 90 days. \*\*\**

I understand this consent form does not release medical, HIV/AIDS related information, or Alcohol/Drug related information unless I have specifically stated so above.

\_\_\_\_\_  
Participant Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Staff Signature

\_\_\_\_\_  
Date

**FOR REVOCATION OF CONSENT ONLY**

---

Release revoked on this date:	_____
Signature of Participant:	_____
Signature of Staff:	_____



# Release of Information

## Informed Consent:

- It is the advocate's responsibility to ensure that program participants fully understand what they are giving up and what the potential consequences may be for giving permission to release privileged information.



# Release of Information

Remember.....

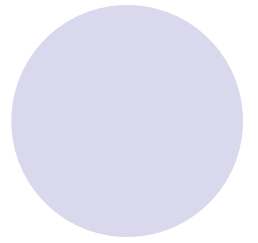
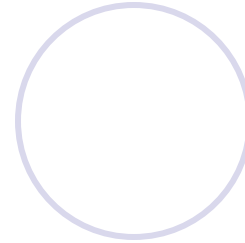
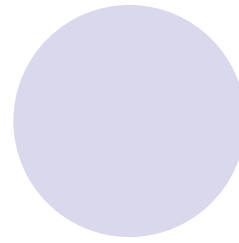
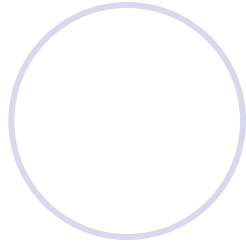
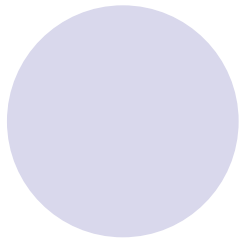
The information being released belongs to the survivor. She is the only person who gets to decide what to do with it.



# Release of Information

## Questions to consider before asking a program participant to sign an ROI:

- Why do I want the survivor to sign this release?
- Do the goals of the individual or agency who is asking for the information line up with what the survivor thinks is in her own best interest?
- What are the benefits to the survivor if the information is shared?
- What are the risks to the survivor if the information is shared?



# **SUMMARY AND RESOURCES**



## **In Summary...**

- Once you are familiar with the background and laws on confidentiality and privileged communication for DV advocates, you can communicate about the topic more clearly and with greater confidence.



## In Summary...

- There's a difference between being silent and keeping confidentiality.
- As an advocate, you can and should share stories about survivors' experiences with domestic violence – in a collective way, not with specific enough detail to identify any individual person.
- Keep speaking out to support survivors and bring an end to abuse, while at the same time honoring the confidentiality that is critical to our work.

# Summary of Relevant State and Federal Laws



- RCW 5.60.060: Communications between advocate and victim are privileged
- RCW 70.123.076: DV programs shall not release confidential information without client's written authorization
- VAWA 2005: Nondisclosure of victims' personally identifying information



# Summary of Relevant State Statutes

- WAC 388-61A-0146: What information DV programs must keep confidential
- WAC 388-61A-0147: What information can be disclosed
- WAC 388-61A-0148: What information needs to be included in a written waiver of confidentiality
- WAC 388-61A-0149: What information must be provided to clients about their right to confidentiality

# Where to Find Laws & Statutes

- Follow the links below to read the full text of any of the laws or regulations mentioned in this presentation.

(Note: Click the right-hand mouse button on the link and choose “open in new window” or you will leave the presentation to go to the link page.)

- [RCW \(state laws\)](http://apps.leg.wa.gov/rcw/) at <http://apps.leg.wa.gov/rcw/>
- [WAC \(state regulations\)](http://apps.leg.wa.gov/wac/) at <http://apps.leg.wa.gov/wac/>
- [VAWA \(federal law\)](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ162.109.pdf) at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ162.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ162.109.pdf)



# WSCADV Resources

Read additional materials about confidentiality and privileged communication on our website:  
[www.wscadv.org/resourcesPublications.cfm](http://www.wscadv.org/resourcesPublications.cfm)

- Model protocols – *Confidentiality When Working with Battered Women and Record-Keeping When Working with Battered Women*
- “A Fresh Look at Confidentiality” – article with overview on state privilege and confidentiality statutes



# The End!

- You've completed this portion of the distance learning course. Now it's time to see how much you can remember.
- Click the link below to test yourself on what you just learned. This will also tell us that you have completed this section so we can record your credit. (Not to worry – we're not grading the quiz, it's for your own information.)
- [Take the quiz](#)