

DANGER TO SELF OR OTHERS:

DYP RULE GUIDANCE

Current Rule	12.201.2.C.6
Proposed Rule	12.201.3

**Colorado Dept. of Human Services
Domestic Violence Program**

May 2012



ACKNOWLEDGEMENTS

We would like to thank the advocates from crisis centers (DVP Funded Programs) across the state who provided vital information about their agency practices and identified areas of concern. This information has been the primary driving force in seeking clarification regarding imminent danger to self or others and developing this Guide.

We also greatly appreciate the assistance of the DVP Danger to Self or Others Committee Members: Rob Gallup – Division of Criminal Justice, Office of Victims Programs, Erin Jemison – Colorado Coalition Against Sexual Assault, Linda Johnston –Colorado District Attorney Council, Jean McAllister – Division of Boards and Commissions, Denise Washington – Colorado Coalition Against Domestic Violence, and Betty Wytias – Attorney General’s Office. Their guidance, support, and collaboration ensured that the best interests of advocates and victims across the state were represented.

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TABLE OF CONTENTS

Background	4
State (DVP) Rule	5
Definitions	6
Policy Recommendations	7
Sample Policies	8
Summary of Colorado Attorney General Informal Opinion	11
Professional Mental Health Providers (Note)	12
Resources	13

BACKGROUND:

In July of 2010, the Colorado Department of Human Services (CDHS), Domestic Violence Program (DVP) was contacted by several crisis centers (DVP funded crisis centers/programs) who expressed confusion regarding State Rule 12 CCR 2512-2 (DVP), §12.201.2.C.6, which instructs advocates to notify victims that reporting “danger to self or others” in addition to mandatory child abuse reporting is an exception to confidentiality. This confusion was the result of recent training from a project named the, “CCADV Privacy and Confidentiality Project,” which stated that the only exception to confidentiality was mandatory child abuse reporting.

As a result of the request for clarification from crisis centers, the DVP sought counsel and feedback from many stakeholders, including the crisis centers, the Colorado Coalition Against Domestic Violence (CCADV), CDHS Boards and Commissions, the DVP Advisory and Funding Recommendation Committees, as well as individual confidentiality and domestic violence experts. Most information received indicated that reporting danger to self or others to the proper authorities is an exception to confidential victim communications, particularly in practice.

In addition, the DVP confidentially surveyed the funded crisis centers in 2011 to determine how individual crisis centers responded to issues of “danger to self or others.” Of approximately 100 contacts, the DVP received 40 total responses to the survey. Of those responses, 32 indicated that their program practices “duty to warn,” five indicated that their program did not practice “duty to warn,” and three indicated that they were not sure whether their program practiced “duty to warn.” One program, which elected not to participate in the survey, emailed that they act in accordance with their contractual obligations under the guidance of state and federal statutory case law. Of particular note, for those crisis centers that indicated “no” to the question of whether their program practiced “duty to warn,” when it came to specific homicide/suicide questions, each implemented a practice that resembles “duty to warn” (i.e., calling law enforcement, mental health services, etc.).

Due to the nature of the issue and based on advice from CDHS, the DVP determined the best course of action was to seek an informal opinion from the Attorney General’s (AG) office to determine validity of the rule as it pertained to reporting danger to self or others. This course of action also allowed for a thorough evaluation of the State rule in relation to Colorado and Federal statutes, case law, rule, and funding requirements, before DVP provided a definitive response and official guidance to DVP funded programs

The subsequent Colorado AG Informal Opinion is the result of months of work by the DVP and analysis by the AG’s office. The conclusion of the AG’s opinion is that the DVP Rule, §12.201.2 C. 6, does not conflict with the victim advocate privilege statute, see § 13-90-107(1)(k), C.R.S. (2011), or any other State or Federal confidentiality provisions.

As stated in the Attorney General’s Opinion:

The victim advocate privilege protects communications between an advocate and a client. This privilege does not protect sharing information about child abuse and neglect, and it does not require that victim advocates allow someone to kill themselves or others in order that confidentiality is maintained. It is a testimonial privilege and exists in contrast to notifying a client about the limitations to confidentiality. The victim advocate privilege statute deals with a situation in which a shelter advocate would be requested or subpoenaed to be “examined” as a witness regarding communications, including written records generated, between her and the client while in a shelter setting. This is not the situation contemplated by the Rule of proactively “reporting” a situation in which the client is purportedly a “danger to [her]self or others.” The reporting would not constitute a waiver of privilege or confidentiality.¹

In January of 2012, the DVP convened a committee with the purpose of assisting the DVP in developing a strategy for distributing the Attorney General’s Opinion and providing guidance to the DVP funded programs regarding the DVP rule, danger to self or others. This committee consisted of representatives from: CCADV, the Colorado Coalition Against Sexual Assault (CCASA), the Division of Criminal Justice – Office of Victims Programs (DCJ), Colorado District Attorney Council (CDAC), the CDHS Division of Boards and Commissions, and the AG. The work of this committee has resulted in this **“DANGER TO SELF OR OTHERS: DVP Rule Guidance”** (Guide).

The purpose of this Guide is to clearly communicate the DVP rule related to danger to self or others as well as provide clarification on the language of the rule. The Guide also serves to provide sample policies for DVP funded programs to utilize and adapt for their programmatic needs.

PROPOSED STATE DVP RULE (12.201.3 – Confidentiality Requirements):

The DVP is currently in the process of revising all DVP rules. Until those revisions are complete, Rule 12.201.2.C.6 remains in effect. DVP will notify DVP funded programs of revised or new rules and effective date, when applicable. This does not impact the purpose of this Guide, as the intent of the proposed rule below is to further clarify “danger to self or others,” the language found in the current rule. DVP funded programs are still required to develop a written policy that informs clients of limitations on confidentiality.

¹ *Victim Advocate Privilege – Informal Opinion –2011*, Attorney General’s Office

The current DVP rule, §12.201.2.C.6 is as follows:

- C. Funded programs shall develop a written policy regarding confidential communications. The written policy shall minimally include:
6. Notifications of limitations on confidentiality to minimally include reporting of known or suspected child abuse or neglect, *or danger to self or others. (Emphasis added)*

The proposed DVP rule, §12.201.3, is as follows:

Funded programs shall develop a written policy regarding confidential communications. The written policy shall minimally include:

Notifications of limitations on confidentiality to include:

- Reporting of known or suspected child abuse or neglect, or
- Credible and imminent threat by client of danger to self or others

DEFINITIONS:

There is a clear and distinct difference between confidentiality and privilege for a victim advocate as defined in § 13-90-107(1)(k)(II), C.R.S.

Confidentiality is a legal term that refers to information that cannot be disclosed without the permission of the individual to whom it pertains. This permission is generally granted through a written release of information. When cited as an ethical principle, confidentiality implies an explicit contract or promise not to reveal anything about a client except under certain circumstances. There are two circumstances in which confidential information may be disclosed without the express consent of the impacted person: mandatory child abuse reporting and reporting a credible and imminent threat by client of danger to self or others.

Privilege (or privileged communication) is a legal term describing certain, specific types of relationships that enjoy protection from disclosure in legal proceedings. Privilege is granted by law and belongs to the client in the relationship. When there is privileged communication, neither party to the communication may be required to testify in court regarding the content of the communication. In the case of DV advocates, this privilege applies when DV survivors work with staff and volunteers at community-based agencies (DVP funded programs), but not with DV advocates employed by law enforcement.

The DVP Rule requires that DVP funded programs develop a policy to provide notice to clients of circumstances that may result in disclosure of confidential information, specifically: child abuse and credible and imminent threat by client of danger to self or others. The latter exception is very narrowly defined and is only triggered in sophisticated circumstances. This is not an emotional response, rather a credible plan to cause serious harm. And, it is triggered after an advocate has done everything they can to discuss alternative options to no avail.

DVP funded program staff are placed in the challenging position of determining if information disclosed by the victim meets the threshold of an imminent threat of danger to self or others. Ultimately victims' advocates must determine if failure to disclose confidential information is likely to result in serious harm, injury, or death to the victim or another person. Below are some scenarios that exemplify when disclosure may be appropriate and when it may not. Please keep in mind that this is not an exhaustive list and the DVP recommends that programs seek additional training from mental health experts, community experts, CCASA, or CCADV, in addition to contacting the DVP with any questions or concerns.

Example 1: You are providing advocacy for a client and in the course of the conversation, she tells you she wishes her husband were dead. ***This is an emotional response and does not likely meet the threshold of credible and imminent threat.***

Example 2: It is 4:30 pm. You are providing advocacy for a client and in the course of the conversation she tells you that she has just bought a gun and shells this morning and that she is going to be outside her husband's office at 5:00 pm today and will kill him. You talk with her about her circumstances, try to discuss other options, etc., and try to keep her engaged until after 5. At 4:45, she looks at her watch and says, "It's getting late. I've got to do this now. There's no other way to save my children." She then bolts from your office, runs to her car, and drives off rapidly toward her husband's office, which is about 10 minutes away. ***This would likely trigger a circumstance where the advocate would need to disclose confidential information to the appropriate authorities as there is a credible and imminent threat made by the victim against her husband. There is a significant risk that if the advocate does not disclose this information, the husband may end up harm, injured, or killed.***

POLICY RECOMMENDATIONS:

The DVP recognizes the diversity of communities throughout Colorado and the availability of resources in each. For some communities, the mental health provider is the first contact when danger to self or others is triggered, while in other communities; law enforcement is the first point of contact. Here are some examples of how some DVP funded programs across the state respond when confronted by situations of danger to self or others:

- In one community, the DV advocate calls law enforcement to request a wellness check for any clients they deem suicidal or homicidal. Law enforcement and/or medical staff such as ambulance responders, is the entity that determines whether an individual should be placed on an M1 (mental health) hold. Law enforcement receives a large amount of mental health training and is therefore the most appropriate entity to respond.
- In another community, a mental health provider is readily available to make assessments and is the most appropriate entity to respond.
- In another community, law enforcement is called to do a wellness check by the DV crisis center. Law enforcement is the most appropriate responder due to the imminent nature of the issue. Once law enforcement is on the scene, they immediately contact mental health services and mental health services make an assessment.
- Some crisis centers have mental health workers employed on staff and as such, refer to those therapists' clients who they may have immediate concerns about. This enables the therapist, who has the expertise, to work with the client and make decisions about next steps.

The DVP recognizes the varied approaches practiced across the state and relies on each crisis center to determine what is the best process within their community. DVP guides that a best practice is for each community to determine their process for issues relating to danger to self or others and establish cooperative agreements and training with relevant entities. DVP also strongly recommends that each crisis center establish regular training with experts in the community and in the fields of suicide and homicide to ensure an understanding of how to assess and best practices with respect to these issues.

SAMPLE POLICIES:

The DVP has found several sample policies regarding danger to self or others. These sample policies may be used to guide the development of policies that fit the needs of Colorado crisis centers, clients, and communities. The DVP expects that funded crisis centers comply with DVP rule and have a policy addressing danger to self or others. The DVP may review policies at site visits, as a part of the application process, or as needed.

The DVP staff is available and willing to review and assess draft policies that meet the requirements of the Rule as well as provide technical assistance. In addition, crisis centers may also contact CCASA and CCADV to receive technical assistance on this issue.

Sample Policy: 1
Adapted from: Notice of Your Right to Confidentiality
Distributed by the Washington State Coalition Against Domestic Violence
Model Protocol on Confidentiality when Working with Battered Women-2007

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 (who has received at least 15 hours of training as a victim’s advocate per §13-90-107(l)(k), C.R.S.); and
- 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 an exception exists. Exceptions include: mandatory child abuse reporting and credible and imminent threat by client of danger to self or others.

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.

It is your choice to decide what information you share about yourself. If you sign a release, 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.

I understand the information provided on this form.

_____ **Participant Signature**

_____ **Date**

Sample Policy: 2
Adapted from Illinois Coalition Against Domestic Violence
Program Sample Of Client Confidentiality Agreement:
Illinois Domestic Violence
Services Guidelines Manual

Summer 2007
Revised: June 2010

I, _____, agree to abide by [PROGRAM NAME HERE] Domestic Violence Program's Confidentiality Policy, including the following:

1. I shall never, in verbal or written exchange, divulge any information about another client (including their families) receiving services through the [INSERT PROGRAM NAME HERE] Domestic Violence Program.
2. I shall abide by this Agreement even when I am no longer receiving services at [INSERT PROGRAM NAME HERE].
3. I understand that no information regarding my case will be disclosed to anyone outside of [INSERT PROGRAM NAME HERE], without my signed Release of Information, unless:
 - **In case of any disclosure involving child abuse or neglect.**
 - **In case of a credible and imminent threat by client of danger to self or others.**

I understand that failure to abide by this Confidentiality Agreement will result in my termination of services from the program.

I further understand that when I reveal information about myself to another client, it does not make that client legally responsible in upholding client confidentiality.

Client Signature

Date

Staff Signature

Date

Summary of Colorado Attorney General’s Opinion

DVP Rule Regarding Harm to Self or Others²

Question: Whether DVP Rule § 12.201.2 (B)(6) is in conflict with any statute or law regarding victim advocate privilege or any other confidentiality provision.

Rule: The Rule § 12.201.2 (B)(6) mandates that funded domestic violence programs have a written policy that minimally includes several confidentiality requirements, but also that there are exceptions – limitations – to confidentiality by the program. The section in question states:

C. Funded programs shall develop a written policy regarding confidential communications. The written policy shall minimally include:

6. Notifications of limitations on confidentiality to minimally include reporting of known or suspected child abuse or neglect, *or danger to self or others. (Emphasis added)*

Answer:³ No, the Rule does not mandate that programs violate confidentiality or privilege. It requires that clients be notified of possible, specified, limited exceptions to confidentiality. The Rule does not violate a testimonial privilege because

- a victim advocate would not be testifying when reporting child abuse/neglect or a client being a danger to herself or others, but would only be reporting to the appropriate person or agency a limited, threatening situation and would be taking preventive measures to avoid, for example, a suicide or homicide.

The Rule does not violate confidentiality because

- the DVP Rule is consistent with legal standards developed over the past several decades (Colorado and Federal laws and rules as well as case law).

Note:

1. Nothing in the Rule requires informing individuals who are targets of potential harm.
2. DVP Rules state the minimum elements of policies relating to confidentiality. Programs may, and should, develop policies that provide more specificity regarding process and protocols, including to whom reports may or should be made, under what conditions reports are to be made, etc.
3. Exceptions to confidentiality may also exist with respect to the license of the professionals employed by the program. Acting as a victim advocate does not change licensed professional’s responsibilities.

² The full 12 page opinion may be obtained by emailing Tomei.Reif@state.co.us or calling 303-866-3150.

³ To answer this question, The Attorney General’s Office reviewed victim advocate privilege codified at § 13-90-107(1)(k), C.R.S. and §13-90-107 privileges generally; the Violence Against Women Act (“VAWA”), 42 U.S.C. § 13925; the Family Violence Prevention and Services Act (“FVPSA”), 42 U.S.C. § 10406; HIPAA, 45 CFR 164.512; § 12-36-135, 13-21-117, 13-21-108, 13-21-115.5, 27-65-105 C.R.S. and numerous State and Federal case decisions.

PROFESSIONAL MENTAL HEALTH PROVIDERS:

As a result of the DVP's examination of the State Rule, a subsequent concern arose regarding whether professional mental health providers were obligated to follow the requirements of their licensure or if as a result of working as a DV advocate and not a therapist or social worker they are required to follow the victim advocate requirements outlined in § 13-90-107(1)(k), C.R.S. Under § 13-21-117, C.R.S., mental health providers have an express duty to warn when a client has communicated a serious threat of imminent physical violence against a specific person or persons.

The DVP encourages professional mental health providers working at a DVP funded program as advocates to comply with the requirements of their licensure. According to the Informal Opinion provided by the Colorado Attorney General: *"The DVP Rule does not create any duty to warn any particular individual but it does require that each program develop its policy about exceptions to confidentiality. This may vary if the director or supervisor is also a licensed professional subject to the duty to warn statute. Acting as a victim advocate does not change licensed professional's responsibilities."*

Questions regarding licensure requirements should be directed to the Department of Regulatory Affairs (DORA).

RESOURCES:

COLORADO SUICIDE & CRISIS HOTLINES

<http://suicidehotlines.com/colorado.html>

SUICIDE PREVENTION HOTLINE:

1-800-273-8255

National Network to End Domestic Violence (NNEDV)

Model Policy: Confidentiality, Privacy, and VAWA 2005 for Community-Based Domestic Violence/Sexual Assault Advocacy Programs

This model policy has sections addressing: general principles; a written agreement to maintain confidentiality; definitions including what constitutes confidential and personally identifying information; the prohibition to release information to anyone outside the agency (e.g. shelter address, staff and survivor information); protocols for releases of information; and possible exceptions to confidentiality including mandatory reporting. This policy is intended to be signed by all agency/program staff.

Request this Template: NNEDV does not post this template online, but you may request that NNEDV email it to you using NNEDV's Request this Template Form at: <http://tools.nnedv.org/template/request>

TECHNICAL ASSISTANCE:

COLORADO COALITION AGAINST DOMESTIC VIOLENCE (CCADV)

<http://ccadv.org/> 303.831.9632

COLORADO COALITION AGAINST SEXUAL ASSAULT (CCASA)

<http://ccasa.org/> 303.839.9999

COLORADO DEPARTMENT OF REGULATORY AFFAIRS (DORA)

<http://www.dora.state.co.us/>

FOR MANDATORY REPORTING OF CHILD ABUSE:

Please contact county/human services Child Welfare program. List can be found at

<http://www.colorado.gov/cs/Satellite/CDHS-ChildYouthFam/CBON/1251590165629>

For information or to obtain additional copies of this Guide, contact:

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or call DVP at 303-866-3150