

COLLABORATIVE DEFENSE TOOLKIT

Maintaining Privilege and Confidentiality

Confidentiality is very important to the attorney-client relationship and, by extension, to the support staff-client relationship. It is critical that client confidence be protected at all times by anyone who assists any client during their legal representation. Preserving confidentiality is crucial to maintaining the trust between the defense team and the client, as it is their professional obligation to protect the secrets of their client. This duty to the client continues even after the client's criminal case is closed and even after client services staff leave their positions.

When integrating non-attorney staff members to assist in client service delivery, defenders should clarify the expectations and rules of legal privilege and confidentiality between the client and the defense team. It is understood that, for the purposes of privilege and confidentiality, all internal client services staff (Advocates, mitigation specialists, social workers, etc.) shall be considered members of the defense team. This extends the legal privilege and confidentiality bestowed on attorneys under a jurisdiction's rules of professional conduct. Incorporating third-party client services staff does not automatically breach confidentiality or waive the attorney-client privilege, but lawyers, clients, and third parties should be mindful of the rules concerning third parties before sharing confidential information.

As a general rule, nothing learned in the course of work as a member of the defense team (including information learned from casual conversations) should ever, under any circumstances, be disseminated to anyone outside of that office. Even information that might already be "public knowledge" is not to be discussed by you with anyone who is not a member of the defense team without explicit consent from your client.

Some practical steps that attorneys, clients, and client services staff can take to preserve confidentiality are:

- Use caution when discussing or accessing confidential materials in public areas. Consider what is appropriate to be shared in public spaces where the conversation may be overheard or confidential legal materials may be seen by others.

Members of the defense team should be aware of their surroundings, and if they must discuss or access confidential information in a public area, take extra care to not be overheard, use unprotected public internet connections, or expose your laptop screen to any passerby.

- Clearly identify confidential communications and materials. Members of the defense team should clearly label documents and communications with confidentiality and privilege branding (e.g., “Privileged & Confidential, Attorney-Client Communication”).
- Make sure the attorney, or a member of the attorney’s office, is the primary recipient of all communication from the client or an external provider to prevent the spread of information to third parties who do not fall under legal privilege.

Third-Party Communications

Third parties or external service providers, such as medical facilities, homeless shelters, or civil legal aid offices, play important roles in helping clients meet their goals and access services. All members of the defense team should obtain clear written or oral consent from the client before sharing any confidential information with any third party.

When involving third parties (e.g., external providers) in service delivery, lawyers and client services staff should take the lead in referring the client to the third party and providing direction on the scope of matters that the third party will assist with. Third parties should also correspond directly with members of the defense team in providing assistance with client service delivery. Third parties should be clear that they are providing information at the request of counsel through the clear labeling of documents or communications sent to the attorney, client, or client services staff member as prepared at the request of the defender’s office.

Note: Mandated Reporters

Social workers play an instrumental role in the representation of clients as part of the defense team. Despite their necessity in representation, offices must understand the ethical obligations related to being considered mandated reporters. Most states have rules that require social workers to have a duty to report suspected abuse or neglect to the proper authorities, which would run contrary to attorney-client privilege.

Many public defenders have reconciled this potential conflict by treating social workers as part of the defense team. This allows social worker communications with clients to be protected by attorney-client privilege. Offices should consult with their local bar or state regulations to ensure there is no conflicting authority that would treat this relationship otherwise.