NCEDSV
Nevada Coalition to **END** Domestic and Sexual Violence

ADVOCATE'S GUIDE TO EVIDENCE COLLECTION

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Nevada Coalition to End Domestic and Sexual Violence

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INTRODUCTION

Most victim-survivors of domestic and sexual violence will be involved with either the criminal or civil legal system; mostly likely both. Recent trauma and the complexities of those systems require an advocate to fully understand their basic concepts in order to help a victim-survivor successfully navigate either system to get the justice they seek.

PROOF

The basis for any legal system is proof. The Cambridge dictionary defines proof as an act or piece of information that shows that something exists or is true. In the law, proof consists of the spoken, written or physical evidence in a trial. In the criminal system, the prosecution (District Attorney or City Attorney) has to prove *beyond a reasonable doubt* that the person charged (defendant) with the crime did what they are accused of. Reasonable doubt means that the prosecution must convince the jury that there is no other reasonable explanation that can come from the evidence presented at trial. That in order for someone to be found guilty , the prosecution must remove any reasonable doubt in the mind of the judge or jury that the defendant is guilty of the crime they were charged with.

In the civil system (protection order, divorce, custody), the victim-survivor will have to prove *with a preponderance of evidence* that what they claim is true. Preponderance of evidence means the plaintiff (in this case victim-survivor) has to show that the fact or event was more likely to have happened than not happen.

No matter the system or situation, the victim-survivor will have to collect evidence. This guide will help advocates understand how to effectively and ethically assist their clients in evidence collection.

EVIDENCE

What is evidence? Evidence is information that can prove something is or isn't true. Collecting evidence and having it admissible in court is not a simple process. Title 4 of the Nevada Revised Statutes (NRS) defines evidence and the court rules to get evidence admitted. This guide is going to focus on chapters 48 -52. This section addresses Admissibility, Privileges, Witnesses, Hearsay, and Documentary and other Physical Evidence.

It is important to remember; advocates should ***never*** hold on to anything that could be used as evidence for a victim-survivor. While that seems helpful and harmless it is anything but**.** The reason Advocates shouldn't hold onto evidence is because it puts them into "the chain of custody". The chain of custody is defined as "a process that tracks the movement of evidence through its collection, safeguarding, and analysis lifecycle by documenting each person who handled the evidence, the date/time it was collected or transferred, and the purpose for the transfer."

Touching or storing evidence for safety or any other reason puts the advocate into that chain of custody. Being a part of the chain of custody makes an advocate subject to being subpoenaed. As the advocate you may have unique knowledge about the victim-survivor

you're working with. If you are subpoenaed, you are subject to questioning about anything. That could possibly hurt your clients case and for that reason Advocates and victim-service agencies should always resist testifying in court.

ADMISSIBILITY

Evidence is information that is relevant.[1] In this case, relevance means having information that helps to prove a fact more or less true.[2] But there are several reasons why relevant evidence may **not** be admissible. The most common reason is the evidence may be unfairly prejudicial against the defendant[3]. Unfairly prejudicial means the evidence may lead the jury to decide the case on something other than the facts. That "something" is usually emotional reasons— such as hostility or moral judgement against the defendant.

Specifically, in cases involving domestic violence, the NRS allow for testimony about the effects of domestic violence, including physical, emotional or mental abuse, behavior and perception.[4] Basically this is having an expert witness provide information on the dynamics of domestic violence**.** The expert witness role is different depending on the type of case and who is "calling" (or using) the expert. In criminal cases, if an expert is being called (or introduced) by the prosecution, the expert usually focuses on general information about domestic violence, but ***not*** on the facts of the specific case. If called by the defense, the expert usually will discuss why someone is exempted from the liability of their action due to the abuse. For more information about expert and fact witnesses, please see the witness section.

Generally, the previous sexual conduct of the victim-survivor of sexual assault cannot be used in a criminal court to discredit the victim-survivor.[5] It can, however, be brought up to prove consent.[6] However, there is a very specific procedure that must be followed that includes a hearing outside the presence of the jury[7]. Additionally, it must be proven that the evidence is not unduly prejudicial against the victim-survivor.[8] Finally, it can be requested that the address and telephone number of the victim-survivor be excluded from the record.[9]

PRIVILEGE

In Nevada, there is "privilege of communication" between a victim-survivor's advocate and victim-survivor.[10] A victim-survivors advocate is defined as someone who works or

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[1]Dictionalry.cambridge.org
2 Nev. Rev. Stat § 48.015
3 *Ibid.*
[4]Nev. Rev. Stat. § 48.035
[5]Nev. Rev. Stat. § 48.061
[5] Nev. Rev. Stat. § 50.090
[6] Nev. Rev. Stat. § 48.069
[7] Nev. Rev. Stat. § 48.069
[8] *Ibid*.
[9] Nev. Rev. Stat. § 48.071
[10] Nev. Rev. Stat. § 49.2541

volunteers for a community-based, campus, or tribal domestic or sexual violence program who has at least 20 hours of training.[11] The rule of privilege means that a victim who contacts or gets services from a victim-survivor's advocate has the right to disclose, and prevent anyone else from disclosing confidential communications.[12] Communications includes all records and any verbal conversations.[13]

Basically, all of the activities and conversations between a victim-survivor's advocate and a victim-survivor are confidential (under federal law) and privileged (under state law). Usually, privilege is claimed when a program receives a subpoena for records in conjunction with either a criminal or civil legal action. If a program receives a subpoena for a victim-survivors' records or for an advocate to testify, it is important that the program respond to the subpoena. If the subpoena is issued by the opposing attorney, the program can respond to the attorney and inform them about the program's confidentiality obligations and legal privilege.

It may also be possible that your client's attorney is subpoenaing the agency for records. When this happens, it is important to have a conversation with your clients about the risks of releasing records and breaching (or breaking) confidentiality. Additionally, explore with the client other ways of getting the needed information into court. If the client is sure they want their records to be given to the attorney, the client must sign a release of information before the agency should release the records. And the advocate should be clear that the agency will fight a subpoena for an advocate to give testimony to validate or explain the records. Fighting the subpoena should happen even when the client has given consent. Because again, once on the stand advocates may unwittingly reveal information harmful to the client's case.

If the subpoena is signed by a judge, the program should work with an attorney and contest the subpoena on the basis of confidentiality and privilege. For these type of scenarios its always helpful if a program has an attorney on retainer or has an attorney working "pro bono" (free). Most judges will honor the privilege and "quash" or "vacate" the subpoena. To "quash" means to stop something from happening and "vacate" means to cancel it or make it null and void. The result is that the information is not released.

The exceptions to privilege are:

- If the reason the victim-survivor is getting services is to commit or plan to commit a crime;
- If something in the communications rises to the level of abuse or neglect; or
- The victim-survivor is bringing legal action against the agency.

If the victim-survivor fits any of the above circumstances privilege does not apply and the information is subject to release. Additionally, if there is a third party, other than an official

[11] Nev. Rev. Stat. § 49.2545
[12] Nev. Rev. Stat. § 49.257
[13] Nev. Rev. Stat. § 49.2546

interpreter (not friend or family), present, the information is neither confidential or privileged and is subject to release

WITNESSES

There are two kinds of witnesses, expert and fact. An expert testifies about general information to educate the judge and jury about myths and common misconceptions about domestic or sexual violence and victim-survivor behavior. This information can apply to any case. A fact witness testifies as to the facts of the specific case. For example: a "fact" witness could be the victim-survivor's neighbor who called the police. The neighbor would be able to testify as to what they heard or saw.

Expert witnesses are not always like the ones in movies. Advocates can be expert witnesses. Best practices stress, however, that they should not provide expert testimony in their own community/county. NCEDSV has the expert witness project which trains advocates to provide expert witness advocacy. If you are interested in this, contact NCEDSV at info@ncedsv.org for more information.

As mentioned earlier, advocates should never be **fact** witnesses. This is because once an advocate is on the stand, they are subject to cross examination by the violent partners' attorney. This means the lawyer for the defendant (the person charged with the crime) can ask questions of the advocate about anything the victim-survivor said while on the stand in court. While wanting to provide testimony can be well intentioned, something may be revealed that may harm the client instead of helping their case. Advocates should work with the client and their attorney to find another way for the information to be presented in court that doesn't violate confidentiality or privilege.

Friends, family, and bystanders can be fact witnesses, if they have personal knowledge of what happened.[14] This doesn't mean they were told by someone (which is hearsay[15]), but that they actually saw (witnessed) what happened.

If someone is subpoenaed to be a witness, and they fail to appear, the court can issue a material witness warrant.[16] A material witness warrant is issued when the prosecution petitions the court to have a key (material) witness in a case picked up by the police and held in custody (jail) because the witness is refusing to testify.[17] The witness will have a hearing within 72 hours of the beginning of the detention.[18]

While it isn't considered a best practice for prosecutors, in some jurisdictions, material witness warrants have been issued for victim-survivors. If a victim-survivor is arrested,

[14] Nev. Rev. Stat. § 50.025
[15] Hearsay is defined as testimony about out of court statements that are involving someone other than the person that is testifying. Black's Law Dictionary, http://thelawdictionary.org/
[16] Nev. Rev. Stat. § 50.205
[17] *Ibid.*
[18] *Ibid.*

there must be a hearing before a judge within 24-hours to determine if detention (or their being locked up) is warranted.[19]

If an advocate is aware of a client being detained due to a material witness warrant, they can help by connecting the victim-survivor with an attorney or by bringing the case to the attention of your local legal aid agency.

Depositions can be used in limited circumstances instead of a witness testifying. Usually this is because someone is older than 70, dead, too ill to attend a trial, or considered a vulnerable person.[20] However, in order for a deposition to be admissible in court, there is a specific procedure to be followed. This procedure includes petitioning the court to allow for a deposition versus having the witness testifying. Then the witness is subpoenaed and notice is given to the opposing party (defense counsel or adverse party) that this person will be giving a deposition. Either the client's attorney or the prosecutor will question the witness. Then the opposing party is given an opportunity to ask questions (cross examine) the witness.[21]

DOCUMENTING ABUSE

Abusive partners will often use technology to threaten and/or harass their victim. Because technology is so pervasive in our society, demanding a client not to use it isn't practical. So, it is important that advocates learn to help victim-survivors to safety plan around technology and how to document abuse. The National Network to End Domestic Violence has developed the Safety Net, www.techsafety.org project to assist victim-survivors and advocates to understand the varying dynamics of technology abuse, safety planning, and documentation.

EVIDENCE LOG

First, victim-survivors should log all abuse or suspicious activity they are experiencing. While the log itself *may not* be admissible in court, it will give the victim-survivor the chance to show a pattern of abuse. Also, this can be used as an evidence log. So, the log should include the date, time, location, what happened and content. Also what evidence the victim-survivor has—a photo, an email, a message on social media, or a voice mail. Each log entry and corresponding piece of evidence should be numbered so the police, court, or attorney can easily follow the events.

Second, save everything to do with the event. As tempting as it may be to delete a threatening email or text message, keeping it as evidence is important.

Information that should be in the evidence log is:

- Date of the event
- What happened

[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*

- Whether or not the police were called
- The event number from the police
- Was a report taken or did the victim-survivor file a report
- What evidence was collected. (screenshot of social media post, photo of the abusive partner at the house, or their car driving by)

With the evidence log and pieces of evidence, the victim-survivor can tell law enforcement or the court their story about the pattern of abuse that is occurring.

SCREENSHOTS

Since so much abuse is technology-based, it is important to know how to document information that comes in through email, text message or on social media. One of the most efficient ways is to take a screenshot.

Here are several ways to take a screenshot in various formats.

Windows computer: Press the key on the keyboard that says: PrtScn, PrtScr, or Print Screen. Then, open a word processing program like Word or Google Docs and paste the image into the document (ctrl-v).

Android Phones: There is no standardization with Android-based phones. You may have to search "How to take a screenshot on a [insert your specific phone] for example: Samsung Galaxy 32, Google Pixel 6 Pro, etc.) But try these first:

- Press the Down Volume and Home button at the same time
- Press the On/Off button and the Home button at the same time.

The picture will be saved in your photo gallery.

Apple Mac computer—Press Shift, Command, and 3 at the same time. This will save a screenshot onto your desktop as a picture.

Apple iPhone or iPad—There are two options:

- Press the On/Off button and the home button at the same time.
- Press the On/Off button and the Up Volume button at the same time.

The picture will be saved in your photo app.

However, because technology is ever-changing advocates should encourage survivors to research recent information for their device.

EMAIL

A victim-survivor should log every email sent by the abusive partner. Unless there is a specific exemption, like arranging for court-ordered child visitation, a TPO is a no-contact order. So even if the email isn't abusive, the abuser's email violates the TPO.

It is recommended that a victim-survivor create a folder in the email account so all emails from the abusive partner can be stored there. So, it is crucial ***not to forward or delete*** the

email. Instead, print the email, save it as a PDF or take a screenshot. However, make sure the email header is visible when you do so.

The email header shows many things. The most important item is the IP address of the sender. From the IP address, the email can be traced back to the originating computer. This article *How to Trace Email IP Address and Learn Who Sent You the Email* by CTemplar gives a complete breakdown of what you can find in an email header and how to trace an email. This article also shows how to find the email header on various email applications. If yours isn't shown, do an online search for "find email header and IP address in [insert email application]".

If the victim-survivor is printing the email, keep the physical copy with the evidence log in a folder or envelope. When you print out an email, it may change how the email looks. It could be harder to get admitted into court.[22] So, if after printing, it looks different than on the screen, a victim-survivor should take a screenshot of the email (see above to take a screenshot) and then print the screenshot.

PHOTOS

Photos are an excellent way to provide evidence of what happened. Advocates should remind victim-survivors to log and photograph anything out of the ordinary. For example, a victim-survivor has a TPO, and her tires were slashed. Yes, she should log that her tires were slashed and take a photo. However, these two things may or may not be related. Because the victim-survivor did not observe the abusive partner damaging her car, they cannot say that their partner was to blame. However, it does show a pattern of events. The Court will probably omit this from evidence, but it does get give the court a full picture of what is happening to the victim-survivor.

Most victim-survivors will be taking photos with their cellphones. A victim-survivor should not think that they can just hand the judge their phone in court. First, the judge most likely will not accept it. Second, the judge can take the phone as evidence. Here is a way to collect photographic evidence in a way that will strengthen the odds of getting the photos accepted by the court.

First, the victim-survivor should include a date and time stamp on the photo. Inside every digital photo is something called metadata. Metadata is information that's used to describe the data that's contained in something. Another way to think of metadata is as a short explanation or summary of what the data is. Like the email header, the metadata provides a lot of information like the date, time, and location a photo was taken. The easiest way to get the information on a photo is to use a third-party app. There are several on the market for Android and iPhone. However, one that works for both is Auto Stamper for Photos. This app will allow a victim-survivor to add the photo's date, time, and location.

[22] National Council of Juvenile and Family Court Judges, *How to Gather Technology Abuse Evidence for Court,* https://www.ncjfcj.org/publications/how-to-gather-technology-abuse-evidence-for-court/ accessed 5/9/2022.

It is also essential to remind the victim-survivor not to change or doctor the date and time. To do so, the victim-survivor would be committing fraud on the court. Any changes made to the are traceable in the metadata.

Second, print out the photos. The court most likely will not allow the victim-survivor to show the photos on their phone. If the judge does, the victim-survivor risks having the phone taken by the court as evidence. With the photos, also have copy of the photos on a USB drive to give to the court and opposing counsel (or the adverse party).

Third, the victim-survivor should provide an authentication statement indicating who took the photo, when and where, and that it fairly and accurately shows what happened. If someone other than the victim-survivor took the photo, that person needs to be available to authenticate the photo in court.

VOICE MAIL

First and foremost, advocates should talk to victim-survivors about how they communicate with their partner and determine if they are required to have communication by the court for custody or any other reasons. It is always best to try and keep communication written so there is a trail. Advocates should recommend that all phone calls go to voice mail. If the victim-survivor needs to respond, they can respond in an email referencing the voicemail that was left. This will also give the victim-survivor time to react and process if necessary the content. It also allows them to edit their response in a neutral and unemotional way.

If a victim-survivor receives a threatening or abusive message, they should not delete it. It is always best to transfer the voicemails to a computer. Here is a link to a video that shows how to make that transfer. Like everything else, this should be logged in the evidence log.

The victim-survivor should also provide the court or law enforcement with a written version of the call and a copy on a USB drive. The written copy should be word for word of the phone call. Like with photos, the victim-survivor should provide an authentication statement and the subsequent emails.

SOCIAL MEDIA

If a victim-survivor is receiving communications from their abusive partner on social media, they should screenshot the message or take a photo of the message, and log it into the evidence log. Victim-survivors should not delete the message as tempting as it may be. The screenshot and photo should be treated the same as any photo.

Advocates should remind victims-survivors that some applications, like Snapchat, will send a notification to the sender; however, Facebook, Twitter, and Instagram do not.

SAVING DOCUMENTATION

The National Network to End Domestic Violence, Tech Safety project has developed an app called DocuSAFE. This app allows victim-survivors to electronically store information in one place. DocuSAFE also allows a victim-survivor to share information with someone, like their attorney.

Before downloading the app, a victim-survivor should always think through the safety ramifications. If the app is discovered or the abusive partner discovers the collection of evidence, the abuse may escalate. Advocates should safety plan with the victim-survivor around this.

Another simple way to keep the evidence in a safe place is to keep it in a file or manila envelope. It is always best if it can stay with the victim-survivor, but with a trusted friend or family member is good as well.

REPORTING ABUSE

When a victim-survivor is ready to report the abusive behaviors, they can file a police report or if there is a TPO in place, they can file an order to show cause with the court. The victim-survivor can do both. If the victim-survivor is filing a police report, they should attach *copies* of the evidence if the law enforcement agency will allow it. This includes the log and copies of any evidence that supports the log.

Additionally, if the victim-survivor is filing an order to show cause, they need to file a motion with the court. If there is only one piece of evidence, the victim-survivor can attach it to the motion. If there is more than one, then the victim-survivor should ask the court clerk for an "Exhibit Appendix" form.

As always, when a victim-survivor is engaging with the legal system, advocates should discuss safety planning as the violence may escalate.

OTHER REFERENCES

How to Gather Technology Abuse Evidence for Court, National Council of Juvenile and Family Court Judges.

Documentation Tips for Survivors of Technology Abuse and Stalking, NNEDV-Tech Safety Project

Preparing for Court by Yourself, NNEDV WomensLaw