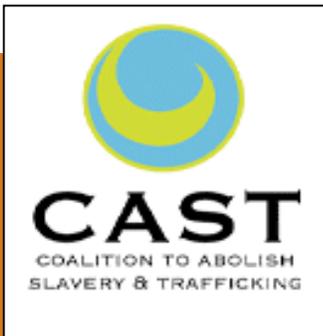


# CASEWORKER PRIVILEGE FACT SHEET



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## THE BENEFITS AND LIMITATIONS TO HUMAN TRAFFICKING VICTIM-CASEWORKER PRIVILEGE

In September 2005, California passed the California Trafficking Victims Protection Act. The Act criminalized trafficking, provided victims civil remedies, and created a statewide task force to review and make recommendations to combat human trafficking and modern-day slavery. The Act also created a **human trafficking victim-caseworker privilege** in order to encourage trust and frank communications. This fact sheet provides a brief background on this privilege and suggested best practices so that caseworkers do not inadvertently waive this privilege.

### WHAT IS PRIVILEGE?

Testimonial privileges permit a person to refuse to disclose and to prohibit others from disclosing confidential information in judicial proceedings. Testimonial privilege allows an individual to refuse to answer questions in trials, hearings, petitions, depositions or other matters formally before the court. Testimonial privileges are based on society's desire to foster certain relationships and ensure that individuals feel comfortable disclosing full information to those assisting them. These protected relationships have lead to privileges that you may have heard of:

- attorney-client privilege
- physician-patient privilege
- psychiatrist-patient privilege

### WHAT IS THE HUMAN TRAFFICKING VICTIM – CASEWORKER PRIVILEGE?

Human trafficking victim-caseworker privilege allows both the victim and the caseworker, on the victim's behalf, to refuse to answer questions in judicial proceedings that would divulge confidential information (i.e. information divulged in meetings between the caseworker and client.) The privilege is based upon society's recognition that caseworkers provide technical and emotional support to victims and that they must have full

### WHO QUALIFIES AS A HUMAN TRAFFICKING CASEWORKER?

Although many people assist victims of human trafficking, California has a specific definition of who can claim privilege as a human trafficking caseworker. California Evidence Code § 1038.2(b) defines two types of human trafficking caseworkers.

#### CASEWORKER TYPE 1

- (1) An employee OR volunteer working with an organization that meets all the basic services required for DV shelter based programs including:
  - a. providing shelter 24 hours a day, seven days a week;
  - b. a 24 hours a day, seven days a week telephone hotline;
  - c. temporary housing and food facilities;
  - d. psychological support;
  - e. referral's in the community;
  - f. drop in center;
  - g. arrangements for school age children to continue their education; and
  - h. emergency transportation

#### AND

- (2) Who meets one of the following requirements
  - a. Is a psychotherapist OR
  - b. has a master's degree in counseling or a related field; OR
  - c. has one year of counseling experience, at least six months of which is in the counseling of human trafficking victims OR
  - d. has 40 or more hours of training and is supervised by a counselor who meets the criteria in subsection (b or c)
- (3) The 40 training hours must include:
  - a. history of human trafficking;
  - b. civil and criminal law as it relates to human trafficking;
  - c. societal attitudes towards human trafficking;
  - d. peer counseling techniques;
  - e. housing;
  - f. public assistance and other financial resources available ;
  - g. referral services available; and
  - h. privileged communications

CASEWORKER TYPE 2

- (1) An employee OR volunteer working for an organization that provides victim and witness assistance to human trafficking victims including:
- providing comprehensive services to crime victims;
  - is recognized by the board of supervisors as a major provider of comprehensive services to crime victims; and
  - is selected by the board to receive funds

AND

- (2) Who meets one of the following requirements:
- Is a psychotherapist OR
  - has a master's degree in counseling or a related field OR
  - has one year of counseling experience, at least six months of which is in rape assault counseling OR
  - Has the minimum training for human trafficking counseling required by guidelines established by the California government (Note: these guidelines have not yet been completed) AND is supervised by an individual who qualifies as a counselor under subsection (a, b, or c)
- (3) Training must include:
- law;
  - victimology;
  - counseling techniques;
  - client and system advocacy;
  - referral services; and
  - privileged communication

Best Practice Tip #1: If Unsure, Limit Contact

Because the privilege applies only to those who fit the statute's definition of caseworker, individuals who are unsure of their status should read the above information, check with an attorney, and limit contact with the victim until their status is definite.

### WHAT CONFIDENTIAL COMMUNICATIONS DOES THE PRIVILEGE PROTECT?

The privilege does not protect all communications between the victim and caseworker. Only confidential communications are protected under privilege. California Evidence Code defines "confidential communication" as:

"information transmitted between the victim and the caseworker in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom

information or an accomplishment of the purposes for which the human trafficking counselor is consulted. It includes all information regarding the facts and circumstances involving all incidences of human trafficking."

This means that the victim-caseworker privilege does not keep communications confidential if:

- An unnecessary third person is present at the conversation between the victim and caseworker OR
- the victim discloses the information to a third person.

Communications are not confidential if either situation occurs because they indicate the victim's lack of desire to keep the communications confidential. If a third person does not become aware of the contents of the communications, a court should conclude that "all facts and circumstances involving all incidences of human trafficking" are confidential.

#### Best Practice Tip #2: Warn the victim not to disclose the information to anyone

Warn the victim that disclosing the privileged information to a third person shows intent not to keep the information confidential and hence destroys the victim-caseworker privilege.

### WHAT IF A THIRD PERSON IS PRESENT OR LATER KNOWS OF THE CONTENTS OF THE COMMUNICATIONS?

The presence of a third person or disclosure of confidential information to a third person at a later time does not automatically destroy privilege. The definition of "confidential communication" contemplates situations when a **third person is necessary to further the victim's interest**. For example: some individuals, such as interpreters, are clearly necessary third persons to further the victim's interest. Others such as attorneys are not as clear.

The courts have yet to interpret the human trafficking victim-caseworker privilege. However, based on past court rulings regarding other privileges, it is possible that the presence of or disclosures to attorneys could destroy human trafficking victim-caseworker privilege.

"TESTIMONIAL PRIVILEGES ARE BASED ON SOCIETY'S DESIRE TO FOSTER CERTAIN RELATIONSHIPS...."

Best Practice Tip #3: Judge Whether the Third Person is Necessary Before Disclosing Information

Caseworkers should only disclose information to third persons such as attorneys or even other caseworkers or staff on a **NEED TO KNOW BASIS**. Although it may be frustrating to not be able to freely communicate, caseworkers must use their best judgment when determining when to disclose certain information or risk waiving the privileged relationship. Ask yourself the following question:  
-Is the third person necessary to assist the client?

**IF A COMMUNICATION IS CONFIDENTIAL, CAN THE VICTIM OR CASEWORKER ALWAYS REFUSE TO**

The human trafficking victim-caseworker privilege is not absolute. Caseworkers cannot always refuse to divulge confidential information. California Evidence Code § 1038.1(a) states that a court may compel disclosure if the court determines that the value of the confidential information in determining the case's outcome is greater than fostering the victim's relationship with his/her caseworker. For example in a civil suit, where the client is asking for damages based on mental health issues a court is likely to waive the caseworker privilege.

Caseworkers MUST inform the victim of this limitation on the privilege.

**WITH ALL THESE LIMITATIONS ON THE PRIVILEGE, HOW CAN A CASEWORKER BEST ENSURE THE VICTIM'S PRIVACY?**

Best Practice Tip #4: Inform the victim that the privilege is limited but describe the legal procedure.

Telling a victim that the privilege is limited may discourage many victims from confiding in a caseworker. Thus it is important that the victim is informed how the court determines whether the information must be disclosed. Inform the victim that:

- the human trafficking victim-caseworker privilege was enacted because California highly values the victim-caseworker

-the court will determine whether the criminal defendant's constitutional rights outweigh the purpose of the privilege outside the presence of the person seeking the confidential information.

- the court will NOT disclose confidential communication without careful consideration.

Best Practice Tip #4: Do not attend law enforcement meetings with clients

It is best if caseworkers avoid attending meetings between the victim and police officers or prosecutors because privilege may be waived.

At times, following this directive is impossible because sometimes the client requires the emotional and mental support of the caseworker. If a caseworker attends a meeting try limiting communication with the third-party as much as possible. Question whether it is necessary to speak in front of a third person. Ask:

- Do I have the choice to refrain from speaking in front of a third person and providing information about the client?

**OTHER BEST PRACTICE TIPS:**

Remind the victim about the privilege regularly to make sure s/he continues thinking about it.

Whenever possible provide limited, written waivers of privilege.

Inform the victim that if s/he wishes to share information with a third person, s/he must sign a written release specifying to whom and to what extent the caseworker can disclose information. The written release shows the victim's intent to maintain confidentiality over all other information.

Ask about and document ONLY information necessary for service provision

It is generally not important for a case-worker to know the whole story of a client's trafficking experience. If you are required to testify or your documents are subpoenaed, the less you know the better.

Additionally, before documenting client issues, think about whether this documentation is necessary and how it might make the client look in front of a jury if the records are subpoenaed. Less documentation is generally better.

If a subpoena for case files or documents is

*IF YOU HAVE FURTHER QUESTIONS PLEASE CONTACT CAST: CHARLES SONG, LEGAL DIRECTOR OR STEPHANIE RICHARD, STAFF ATTORNEY*

*PHONE: 213-356-1906*

*FAX: 213-65-5257*

*MATERIALS CREATED BY: STEPHANIE BANG, ESQ. STEPHANIE RICHARD, ESQ.*