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Concerning AB-160, (Sec. 18.) Amendments to Chapter 49, sections 19 to 26, inclusive - of the Nevada Revised Statutes.

As the Director of the Sexual Assault Support Services program I would like to help you to understand the issues faced by small victim service organizations such as mine. Including myself, I have two full-time and two part-time staff members, and approximately 15-20 volunteers. We provide immediate face-to-face crisis intervention services to approximately 20 sexual assault victims each month, and telephone support to approximately 25-30 more individuals monthly. On at least 35 separate occasions during the last calendar year, we had two or more victims at the hospital at the same time. On one particular day in September, we provided face-to-face services to 6 individual victims in a 12-hour period. This required 4 individual advocates.

Recruiting volunteers who are not only willing, but also able, to go the hospital at any time of the day or night and stay there for at least 3 hours (often times much more) is not an easy task. Fortunately, we have a small but very dedicated group of volunteers. The fact that our volunteers are able to schedule their own "on-call" shifts during times that do not have negative affects on their personal lives or work schedules is what keeps my volunteers involved in this type of service. These volunteers have regular jobs, attend classes at the University or Community College and raise families.

The advocates with my program are specifically trained not to ask questions about issues that may be used in court. Being called to court to testify can have a tremendous impact on their lives. It can result in lost wages, missed classes and/or being pulled away from family responsibilities. Our volunteers are not paid for the services they provide, but do it out of the goodness of their hearts. Our advocates are trained to provide support, we:

- **do not** take official reports or statements
- **do not** collect evidence
- **do not** provide legal advise
- **do not** make judgements concerning the validity of reports or statements
- **do not** require incidents to be reported as a basis for providing services

- do provide immediate crisis intervention
- do provide emotional support to victims and their family members or friends
- do provide information and referrals to other available services
- do provide access to emergency assistance (shelter, short term lodging, transportation, emergency security measures such as lock and/or window repair/replacement.)

The confidentiality between an advocate and victim should be the most important part of the service we provide. Unfortunately, we are not able to guarantee victims that what they say will be kept in confidence, and therefore, we often discourage victims from discussing the details of the assault and the feelings they may be experiencing. If we are not able to openly discuss issues such as drug/alcohol abuse, sexuality, behaviors leading up to the assault, or even the relationship between the victim and offender, we may not make the appropriate referrals and therefore, may not provide the best possible service.

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ASSEMBLY JUDICIARY
DATE: 3/10/03 ROOM: 3138 EXHIBIT 5
SUBMITTED BY: KATHY JACOBS

Status of the Law

Victim-Counselor Privilege Laws

Traditionally, many types of communication have been protected from disclosure in court. These include communication between husband and wife, physician and patient, attorney and client, clergy and parishioner, and psychotherapist and patient. Recently, confidential communication generated in the course of a counseling relationship has also been afforded statutory protection from disclosure. In general, these so-called victim-counselor privilege laws enable counselors to maintain the confidentiality of information revealed to them, even if they are called to testify as a witness in a trial or another proceeding. As proposed model legislation drafted by DOJ provides, "A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between a victim and a victim counselor, in any criminal, civil, legislative, administrative, or other proceeding. Confidential communications may be disclosed by a person other than the victim only with the prior written consent of the victim."[2]

In addition to preventing counselors from testifying or being compelled to testify in court, many privilege laws directly extend protection to a counselor's written records, such as reports, memoranda, and working papers produced during the course of the counseling.[3] DOJ's proposed model legislation defines "confidential communications" as

> [a]ny information, whether written or spoken, which is transmitted between a victim . . . and a victim counselor in the course of the counseling relationship and in private, or in the presence of a third party who is present to facilitate communication or further the counseling process.[4]

Even in the absence of specific statutory language, courts have interpreted the privilege to apply to records and materials developed throughout a counseling relationship. As the Pennsylvania Supreme Court reasoned, "the statutory privilege considered here must extend to the subpoena of records and other documents developed throughout the counseling relationship, any other interpretation of the statute would render the entire privilege meaningless. . . . Insulating the counselor from giving testimony would be inconsequential, as most information the counselor might give would be available in the records themselves."[5]

Specific Victim-Counselor Privilege Laws

Although every state affords testimonial privilege to psychotherapists and their patients, many victims receive counseling from service providers who, though publicly funded and more affordable, do not have the same credentials or professional license as psychotherapists and often are not provided a communications privilege. This is a significant distinction for many victims. For example, domestic violence victims are more likely to seek counseling from public resources because they are often denied access to financial resources by their abusers. One study showed that 27 percent of battered women had no access to cash, 34 percent had no access to a checking account, and 51 percent had no access to credit cards.[6] Many victim advocates and victim service providers argue that victims who receive counseling from rape crisis centers or domestic violence shelters should not be denied the privilege while victims who are able to pay for counseling from psychotherapists in private practice receive the privilege. Otherwise, the privilege is conditioned solely on the victim's ability to pay, and the victim's economic status becomes the basis for denying the privilege. Applicable case law has supported this premise when extending testimonial privilege to social workers and other counselors, providing that "[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose."[7]

Because of the sensitive nature of sexual assault crimes and the need to protect domestic violence victims from future harm, most of the legislation extending testimonial privileges to counselors has been limited to these two victim populations. More than half of the states have passed laws extending privilege to sexual assault/rape crisis and domestic violence counselors.[8] A few states' privilege laws apply to victim counselors in general.[9] In most states, counselors must complete a specified number of training hours to qualify for the privilege.[10]

Types of Victim-Counselor Privilege Laws

Victim-counselor privilege laws generally fall into one of three categories: absolute, semiabsolute, and qualified.[11] These classifications apply to the victim-counselor privilege laws in effect today.

Some states, like Florida and Pennsylvania, have enacted statutes that provide an absolute privilege prohibiting disclosure of confidential counseling records and communications under any circumstances without the victim's consent.[12] Absolute privilege laws provide the broadest privacy security, protecting virtually all communications between a victim and counselor.

Other states, including Alaska, Hawaii, and New Jersey, specify exceptions to the victim-counselor privilege within their respective statutes.[13] These states set forth a semiabsolute privilege and authorize disclosure in limited situations when disclosure of information is in the public interest. The most common exceptions involve reporting of abuse or neglect of a child or vulnerable adult, perjured testimony, evidence of the victim's intent to commit a crime, or malpractice proceedings against the counselor. Although these laws do not provide the unlimited confidentiality of absolute privilege laws, they do provide complete protection from disclosure except under narrowly defined circumstances.

The remaining states, such as Arizona, California, and New Hampshire, have a qualified privilege that authorizes disclosure if a court finds it appropriate given the facts of the case.[14] In making that determination, a court must use a balancing test, weighing the value of the evidence to the defendant against the victim's need to keep the communication confidential. The defendant is required to establish that the information sought for disclosure is at least minimally relevant or material to his or her defense. Often, the court will conduct an *in camera* (in chambers) review of the evidence before making a decision. As a result, the confidentiality of counseling communications is decided on a case-by-case basis, and both parties are given the opportunity to make their arguments for or against disclosure.

Court Role in Defining Victim-Counselor Privilege Laws

The courts have played a significant role in further defining the limits of victim-counselor privilege laws. An example is the development of Pennsylvania's absolute privilege law.

In January 1981, the Pennsylvania Supreme Court issued an opinion on whether a court presiding over a rape trial could authorize the defendant's attorney to inspect the files of Pittsburgh Action Against Rape (PAAR), a rape crisis center.[15] The files contained copies of communications between the rape victim and center personnel. At that time, no statutory privilege existed to protect communications between rape crisis center personnel and sexual assault victims from disclosure. The trial court had issued an order permitting the defendant's counsel to inspect the portion of PAAR's files containing a statement made by the victim on the night of the alleged rape. PAAR's director refused to comply with the court's order and was subsequently held in contempt. The director appealed, asking the court to create an absolute privilege to protect the confidentiality of the victim's counseling records. The appellate court responded, stating, "Although we recognize the important societal interest in promoting

such communications, we also recognize the compelling societal interest in the truth-seeking function of our system of criminal justice."[16] The appellate court upheld the trial court's ruling allowing the defense counsel to inspect the files; however, it limited the inspection to the victim's statements about the offense.

In a passionate multiple-page dissent, Justice Rolf Larson stated, "I am convinced that an absolute privilege should exist for confidential communications made in the rape victim/rape crisis counselor relationship. . . . Since my position is, alas, only a dissent, I appeal to our legislature to take cognizance of the rape victim's plight and to act promptly and compassionately in legislatively enacting a rape victim/rape crisis counselor testimonial privilege."[17]

In response to the PAAR case, the Pennsylvania legislature created an absolute privilege law[18] in December 1981. In 1992, the Pennsylvania Supreme Court upheld the scope and constitutionality of the statute, specifically noting that the intent of the legislature was to override the decision of the court in the PAAR case.[19]

Privilege laws in other states have not fared as well. Although state courts have generally upheld absolute sexual assault victim-counselor privileges in the face of defendant claims of constitutional entitlement,[20] courts in a few states, such as Connecticut and Massachusetts, have limited the absolute privilege established by statute.[21] Massachusetts courts have been especially influential in molding the scope of the state's counselor privilege. After the legislature passed a law intended to establish an absolute privilege, the Massachusetts Supreme Judicial Court determined that, under certain circumstances, a defendant must have access to privileged materials to have a fair trial. The court qualified the privilege by establishing a five-step procedure for judges to follow when weighing a sexual assault victim's statutorily protected privacy interest against the defendant's constitutional rights.[22] This balancing test was later modified to increase the standard of need that a defendant must satisfy before being granted access to a victim's privileged counseling records.[23] In July 1997, the Massachusetts Supreme Judicial Court acknowledged for the first time that crime victims may have a constitutional right to protect the confidentiality of their counseling records, thereby opening the door to broaden the privilege's scope.[24] The Massachusetts courts continue to wrestle with the counselor privilege issue.[25]

Just as some absolute privilege laws have been judicially limited, courts in a few states also have modified semiabsolute privilege laws.[26] For example, the Michigan Supreme Court modified that state's privilege law, holding that, "in an appropriate case there should be available the option of an *in camera* inspection by the trial judge of the privileged record on a showing . . . that there is a reasonable probability that the records are likely to contain material information necessary to the defense."[27] In contrast, because a qualified privilege grants both the defendant and the prosecution the opportunity to demonstrate whether disclosure is appropriate, these laws typically are not challenged as unconstitutional.

Rationale for the Privilege

Both courts and legislatures have acknowledged the importance of confidentiality in promoting an effective counseling relationship. The U.S. Supreme Court observed that

> effective psychotherapy . . . [d]epends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[28]

Likewise, the Illinois Supreme Court noted that "if a rape crisis counselor could not guarantee confidentiality to a victim, the effectiveness of rape crisis centers would be undermined."[29]

New Jersey's semiabsolute victim privilege law specifies the legislature's intent in enacting a law that states, "Counseling of violence and victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; . . . . Confidentiality should be accorded all victims of violence who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists."[30] DOJ's proposed model legislation contains a findings and purposes section that outlines the need to protect victims' confidential communications with their counselors:

> This Act recognizes the important role of counseling in the ability of victims to recover from the trauma of the crime and in the achievement of legal safeguards and of the social and economic assistance essential to achieve protection from further criminal assault. . . . Without assurances that communications made during the counseling relationship will be confidential and protected from disclosure, victims will be even more reluctant to seek counseling or to confide openly to their counselors and to explore legal and social remedies fully.[31]

Most therapists are ethically required to inform their clients of any limitations on confidentiality at the beginning of a counseling relationship. Both the American Psychological Association and the American Counseling Association require their members to explain to clients any limitations and to identify foreseeable situations in which confidential communications might be subject to disclosure.[32] The level of confidentiality assurance that a counselor can provide for a victim depends on whether the applicable privilege is absolute, semiabsolute, or qualified.

A major benefit provided by laws guaranteeing absolute testimonial privilege is that counselors can provide upfront assurance for their clients that anything they discuss will be kept confidential. Such assurances can help victims feel secure enough to discuss their fears, thoughts, and feelings about the crime committed against them.

Although semiabsolute privilege laws are more limited than absolute privilege laws, counselors can still inform victims unequivocally that the confidentiality of their communications can be maintained in all but a few situations described within the statute. Because the limitations are clearly contained in the statutory language, victims can be given adequate notice of the type of circumstances that can trigger disclosure, enabling them to make informed choices concerning the information they share.

In states with qualified privilege laws, however, counselors cannot assure victims that their communications will remain confidential. Because courts determine whether there are grounds for disclosure in each case, counselors and their victims can never be sure when the defense's request for counseling records will be granted.

The likelihood that victims will forego the counseling they need may increase with their uncertainty about whether their communications will be kept confidential. In December 1995, VAWO issued a *Report to Congress* that presents agency findings on victim-counselor confidentiality and model legislation (segments of the model legislation have been quoted in this bulletin). The report notes that in "Massachusetts and Pennsylvania, following judicial decisions which refused to recognize a rape victim-counselor privilege, there were alleged decreases in the number of victims who sought counseling, increases in the proportion of phone calls from victims in which the victims would not disclose their identities, increased requests from victims to have their files destroyed, or a decreased likelihood that victims who received counseling would thereafter pursue prosecution of the offender."[33]

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