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PRIVACY OF VICTIMS' COUNSELING COMMUNICATIONS

LEGAL SERIES #8 BULLETIN

Message From THE DIRECTOR

Over the past three decades, the criminal justice field has witnessed an astounding proliferation of statutory enhancements benefiting people who are most directly and intimately affected by crime. As of 2000, all states had passed some form of legislation to benefit victims. In addition, 32 states have recognized the supreme importance of fundamental and express rights for crime victims by raising those protections to the constitutional level.

Of course, the nature, scope, and enforcement of victims' rights vary from state to state, and it is a complex and often frustrating matter for victims to determine what those rights mean for them. To help victims, victim advocates, and victim service providers understand the relevance of the myriad laws and constitutional guarantees, the Office for Victims of Crime awarded funding to the National Center for Victims of Crime to produce a series of bulletins addressing salient legal issues affecting crime victims.

Privacy of Victims' Counseling Communications, the eighth in the series, provides an overview of state laws and current issues related to the privacy of communications between victims and their counselors. Although several state legislatures have enacted laws on this issue, statutes vary greatly depending on the type of counselor covered by

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Introduction

Privacy issues concern crime victims throughout the criminal justice process. Some victims, afraid of harassment or retaliation by offenders, may worry that who they are and where they live may be readily available through public records or court testimony. Fear about who might have access to victim impact statements, presentence reports, and compensation files may result in restrained responses and guarded participation by victims. Moreover, to cope with the complicated emotions that often accompany the physical injuries and trauma resulting from a crime, many victims turn to counseling, only to find that the personal thoughts they share may be disclosed during the trial. According to a report issued by the U.S. Department of Justice's (DOJ's) Violence Against Women Office (VAWO), the need to protect a crime victim's confidential counseling communications is critical:

> A successful prosecution depends on the cooperation of the crime victim. Yet, in many cases . . ., a woman who has been attacked frequently finds herself victimized a second time when her case goes to court. . . . In far too many cases, defense attorneys subpoena counseling records and call counselors as witnesses. The attorneys use the records to shift the court's focus from the crime to the victim's thoughts and comments regarding the emotionally devastating incident. Often, victims face the threat that their most intimate feelings will be disclosed in open court and become a matter of public record.[1]

Several state legislatures have responded by enacting laws intended to protect the privacy of communications between victims and their counselors or therapists.

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

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the privilege and the extent of the protection afforded crime victims. This bulletin and the others in the Legal Series highlight various circumstances in which relevant laws are applied, emphasizing their successful implementation.

We hope that victims, victim advocates, victim service providers, criminal justice professionals, and policymakers in states across the Nation will find the bulletins in this series helpful in making sense of the criminal justice process and in identifying areas in which rights could be strengthened or more clearly defined. We encourage you to use these bulletins not simply as informational resources but as tools to support victims in their involvement with the criminal justice system.

John W. Gillis
Director

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]

Current Issues

DOJ recommended that its 1995 report on victim-counselor confidentiality and proposed model legislation be disseminated to governors, attorneys general, and legislators in states that do not have privilege laws for sexual assault and domestic violence victims and their counselors.[34] In addition, states already providing protection were encouraged to examine how the privilege works in practice, review court decisions, and consider amendments to provide the maximum confidentiality protection possible. To date, relatively little legislative activity has addressed victim-counselor confidentiality issues. Only a few states with existing privilege laws amended those laws, and Montana passed a victim-counselor privilege law for the first time in 1997.[35]

Anecdotal reports from victim advocates and victim service providers in the field indicate that unwanted disclosure of counseling records has generally been avoided by informal (i.e., other than legislative) means.[36] Victim service providers who counsel victims have adjusted their policies and procedures to conform with the confidentiality limitations in their states. For example, they take fewer notes to avoid having records subpoenaed.

One issue that has yet to be adequately addressed in several states is the need to extend the available privilege to include interpreters who sit in on counseling sessions. A few states, like Georgia and Colorado, have resolved this issue legislatively. Under Georgia law, "[w]henever a hearing impaired person communicates with any other person through the use of an interpreter and under circumstances which make such communications privileged, the presence of the interpreter shall not vitiate such privilege and the interpreter shall not be required to disclose the contents of such communication."[37] In Colorado, "[i]f a qualified interpreter is called upon to interpret privileged communications, the interpreter shall not testify without the written consent of the person who holds the privilege."[38]

To protect the confidentiality of counseling communications, some prosecutors employ a "don't ask/don't tell" policy.[39] Even in Pennsylvania, which offers a statutory absolute privilege, the courts have held that the voluntary release of counseling records by a victim to the prosecution constitutes a waiver of the privilege.[40] The following proposed model language outlines circumstances under which a victim waives the privilege:

> A victim does not waive the protections afforded by this Act by testifying in court or other proceeding. However, if the victim intentionally partially discloses the contents of a confidential communication in the course of testifying, then either party may request the court or hearing officer to rule that justice requires that the protections . . . be waived to the extent they apply to that portion of the communication.[41]

The threat of disclosure may be especially problematic for victims when they obtain services from advocates and service providers within the criminal justice system, who are precluded from coverage under counselor privilege laws because of their connection with the government. Ordinarily, a defendant's access to confidential information is limited to information that has been obtained by prosecutors and other government employees. Some experts recommend that prosecutors be discouraged from inquiring whether a victim has undergone counseling so as not to have counseling records in their custody, potentially making the records subject to disclosure requests by defense attorneys. A more realistic solution might be to encourage prosecutors to seek a protective order to ensure that any counseling records of which they become aware will not be subject to disclosure.

Future of Victim-Counselor Privilege

Although little recent legislative activity has related to victim-counselor privilege, the U.S. Supreme Court reviewed the issue in 1996. In the case of *Jaffee* v. *Redmond*,[42] the Supreme Court recognized a psychotherapist privilege for the first time. Although no federal psychotherapist-patient privilege law was in effect, the Court was able to establish the privilege pursuant to Rule 501 of the Federal Rules of Evidence, which "authorizes federal courts to define new privileges . . . by interpreting common law principles in the light of reason and experience."[43] In the course of its opinion, the Court found the four elements traditionally viewed as necessary to establish a privilege to apply to the psychotherapist-patient privilege. Those elements, as formulated by Dean Wigmore, are 1) communication must originate in a confidence that it will not be disclosed; 2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; 3) the relationship must be one that the community believes ought to be fostered; and 4) the injury that would inure to the relationship by the disclosure of the

communications must be greater than the benefit that would be gained thereby for the correct disposal of the litigation.[44]

More significantly, the Court extended the privilege to a clinical social worker, finding that "the reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker. . . . Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist . . . but whose counseling sessions serve the same public goals."[45]

This ruling is extremely encouraging for the future of victim-counselor privilege. Already, the U.S. Supreme Court has found Rule 501 to be, by its own language, open-ended. The Court observed that the rule "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.' "[46] So far, the Court's rulings support the recognition of an absolute rather than a qualified privilege. Although the Supreme Court has not ruled directly on any qualified privilege laws, its rejection of the balancing component of such laws indicates that they are likely to be struck down if presented to the Court for review. As the Court stated in *Jaffee*,

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[47]

Thus, the groundwork has been laid for similar findings in cases involving other types of victim counselors.

Conclusion

All crime victims must be able to communicate freely with their counselors. Not only is counseling helpful in moving victims toward recovery, it may be essential, in some cases, to enable a victim to escape an abusive relationship or to effectively assist in the investigation and prosecution of a crime. The U.S. Supreme Court's ruling has given victim advocates and victim service providers an opportunity to urge their state legislatures to reexamine and strengthen state victim-counselor privilege laws so victims can get the counseling they need, secure in the knowledge that their privacy will be protected.

Notes

1. Bonnie J. Campbell, Preface to U.S. Department of Justice, Report to Congress: The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors: Findings and Model Legislation (1995) [hereinafter Report to Congress]. The Violence Against Women Act (VAWA) enacted in 1994 included provisions directing the U.S. Attorney General to study and evaluate the manner in which states act to protect the confidentiality of communications between sexual assault or domestic violence victims and their counselors. In December 1995, the results of the study were released in this Report to Congress. Although the study focused specifically on sexual assault/domestic violence victim-counselor privilege, many of its findings can be extended to counseling relationships involving victims of other crimes. A summary of the report can be found in the National Criminal Justice Reference Service's Abstracts Database at AbstractsDB.ncjrs.org.

2. Report to Congress, *supra* note 1, Model Legislation, Absolute Privilege § 103. The model legislation applies only to sexual assault and domestic violence victims. Those references have been purposely excluded whenever language from the model is quoted to make it applicable to all crime victims; in practice, however, it may be necessary to limit the protection to victims of violent crime, because victims of some other crimes may not meet the legal criteria for privilege. "In conferring a privilege, lawmakers must assess whether the relationship meets the established criteria for privileged communications. That is, the communication originated in confidence, confidentiality is essential to the maintenance of the relationship, and the relationship is one that society deems worthy of protecting." Mary Ann Largen, *Confidentiality in the Sexual Assault Victim/Counselor Relationship*, in Rape and Sexual Assault III: A Research Handbook 214 (Ann Wolbert Burgess, ed., 1991).

3. For example, Ariz. Rev. Stat. Ann. § 13-4430 (West 2000); Conn. Gen. Stat. Ann. § 52-146k (West 2001); 735 Ill. Comp. Stat. 5/8-802.1 (2001); Iowa Code § 915.20A (2001); Mass. Ann. Laws ch. 233, §§ 20J, K (Law. Co-op. 2001); N.J. Stat. Ann. § 2A:84A-22.14 (West 2001); Utah Code Ann. § 78-3c-3 (2001); Wyo. Stat. Ann. § 1-12-116 (Michie 2001).

4. Report to Congress, *supra* note 1, Model Legislation § 102(A). The terms "victim," "victim counseling center," and "victim counselor" are also defined.

5. *Commonwealth* v. *Wilson*, 602 A.2d 1290, 1295 (Pa. 1992).

6. Martha F. Davis and Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 Fordham Urb. L.J. 1141, 1150–51 (1995), citing Michael J. Strube and Linda S. Barbour, *The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment*, 45 J. of Marriage and the Fam. 785, 786 (1983).

7. *Jaffee* v. *Redmond*, 518 U.S. 1, 17 (1996) (citing the Ct. App., 51 F.3d, at 1358, n.19).

8. For example, Ala. Code §§ 15-23-40–45 (2001); Cal. Evid. Code §§ 1035–1036.2, 1037–1037.7 (Deering 2001); Fla. Stat. chs. 90.5035, .5036 (2000); Ind. Code Ann. §§ 35-37-6-1–11 (Michie 2000); Me. Rev. Stat. Ann. tit. 16, §§ 53-A, -B (West 2000); Mont. Code Ann. § 26-1-812 (2000); N.M. Stat. Ann. §§ 31-25-1–6 (Michie 2001); 23 Pa. Cons. Stat. § 6102 (2001), 42 Pa. Cons. Stat. § 5945.1 (2001); Vt. Stat. Ann. tit. 12, § 1614 (2001).

9. For example, Ariz. Rev. Stat. § 13-4430 (2000); Iowa Code § 915.20A (2001); N.J. Stat. Ann. §§ 2A:84A-22.13–.16 (West 2001).

10. The number of training hours required varies, ranging from 15 hours in Colorado to 40 hours in most of the states with counselor privilege laws on the books, including Alaska, California, Illinois, Kentucky, Minnesota, New Jersey, New Mexico, Pennsylvania, and Wyoming.

About This Series

OVC Legal Series bulletins are designed to inform victim advocates and victim service providers about various legal issues relating to crime victims. The series is not meant to provide an exhaustive legal analysis of the topics presented; rather, it provides a digest of issues for professionals who work with victims of crime.

Each bulletin summarizes—

- Existing legislation.
- Important court decisions in cases where courts have addressed the issues.
- Current trends or "hot topics" relating to each legal issue.

11. Report to Congress, *supra* note 1. The DOJ's study that included most of the privilege laws currently in effect identified three degrees of privilege—absolute, semiabsolute, and qualified.

12. Fla. Stat. chs. 90.5035, .5036 (2000); 23 Pa. Cons. Stat. § 6116 (2001).

13. Alaska Stat. §§ 09.25.400, 12.45.049, 18.66.200–.250 (Michie 2001); Haw. R. Evid. 505.5; N.J. Stat. Ann. §§ 2A:84A-22.13–.16 (West 2001), N.J. R. Evid. 617.

14. Ariz. Rev. Stat. § 13-4430 (2000); Cal. Evid. Code §§ 1035–1036.2, 1037–1037.7 (Deering 2001); N.H. Rev. Stat. Ann. §§ 173-C:1–:10 (2000).

15. *In re Pittsburgh Action Against Rape*, 428 A.2d 126 (Pa. 1981).

16. *Id.* at 127.

17. *Id.* at 150.

18. 42 Pa. Cons. Stat. § 5945.1 (2001).

19. See *Wilson*, 602 A.2d at 1294, n.6.

20. *People* v. *District Court of Denver*, 719 P.2d 722 (Pa. 1986); *People* v. *Foggy*, 521 N.E.2d 86 (Ill. 1988).

21. *In re Robert H.*, 509 A.2d 475 (Conn. 1986); *Commonwealth* v. *Bishop*, 617 N.E.2d 990 (Mass. 1993).

22. See *Bishop*, 617 N.E.2d at 997–98.

23. *Commonwealth* v. *Fuller*, 667 N.E.2d 847 (Mass. Sup. Ct. 1996).

24. *Commonwealth* v. *Tripolone*, 681 N.E.2d 1216 (Mass. Sup. Ct. 1997).

25. Two cases are currently pending: *Commonwealth* v. *Neumeyer*, 718 N.E.2d 869 (Mass. Ct. App. 1999), and *Commonwealth* v. *Sheehan*, 722 N.E.2d 25 (Mass. Ct. App. 2000).

26. For example, *People* v. *Stanaway*, 521 N.W.2d 557 (Mich. 1994), *cert. denied sub nom. Michigan* v. *Caruso*, 115 S. Ct. 923 (1995).

27. See *Stanaway*, 521 N.W.2d at 574.

28. See *Jaffee*, 518 U.S. at 2.

29. *People* v. *Foggy*, 521 N.E.2d 86 (Ill. 1988), *cert. denied*, 486 U.S. 1046 (1988).

30. N.J. Stat. Ann. § 2A:84A-22.13 (West 2001).

31. Report to Congress, *supra* note 1, Model Legislation § 100.

32. American Psychological Association, Ethical Principles of Psychologists and Code of Conduct, Standard 5.01 (Dec. 1992); American Counseling Association, Code of Ethics and Standards of Practice A.3a (eff. July 1995).

33. Report to Congress, *supra* note 1, at 18.

34. *Id.* at 29.

35. Mont. Code Ann. § 26-1-812 (2000).

36. An informal polling of victim policy advocates from five mid-Atlantic states was conducted at a Mid-Atlantic Regional Roundtable held at the offices of the National Center for Victims of Crime on January 14, 2000, in Arlington, Virginia.

37. Ga. Code Ann. § 24-9-107 (2000).

38. Colo. Rev. Stat. § 13-90-209 (2000).

39. W. Murphy, *Minimizing the Likelihood of Discovery of Victims' Counseling Records and Other Personal Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right to Confidentiality*, 32 New England L. Rev. 983 (1998).

40. *Commonwealth* v. *Davis*, 674 A.2d 214 (Pa. 1996).

41. Report to Congress, *supra* note 1, Model Legislation §§ 105, 106.

42. See *Jaffee*, 518 U.S. at 1.

43. *Id.* at 8 (citing *Trammel* v. *United States*, 445 U.S. 40, 47 (1980)).

44. 8 John H. Wigmore, Evidence § 2285 (McNaughton rev. 1961).

45. See *Jaffee*, 518 U.S. at 15, 16.

46. *Id.* at 9.

47. *Id.* at 17, 18 (citing *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981)).

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