



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

December 1995

A successful prosecution depends on the cooperation of the crime victim. Yet, in many cases of sexual assault and domestic violence, a woman who has been attacked frequently finds herself victimized a second time when her case goes to court. This is particularly true when the victim receives counseling from a domestic violence or rape crisis counselor who often is not a licensed psychologist or psychotherapist, and lacks the testimonial privilege afforded to other professionals such as psychotherapists or psychologists in most states.

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.

Sexual assault and domestic violence victims must be able to communicate freely with their counselors, secure in the knowledge that the private thoughts and feelings they reveal during counseling will not be publicized as a result of reporting the crime. Without assurances of confidentiality, sexual assault and domestic violence victims will be reluctant to contact rape crisis centers and battered women's shelters. Moreover, without the therapeutic benefits of counseling, victims may be hesitant to report crimes and aid in their prosecution. The effects will likely be felt by the victim's children, resulting in a cycle of abuse that will cost society for decades to come.

The United States Department of Justice has studied the ways that states have protected the communications between sexual assault and domestic violence victims and their counselors. Some states have enacted specific statutes extending a testimonial privilege to sexual assault and domestic violence counselors, but state courts have vitiated some of these privileges. Other state courts have recognized these privileges even in the absence of legislation.

We have drafted two model statutes, presenting alternative privileges in recognition of the differences of the various states' constitutions, case law, and statutes. This report should serve as a resource for further action. I encourage governors and state legislatures to give serious consideration to these model statutes and the adoption of legislation that protects these confidential communications from disclosure.

Bonnie J. Campbell
Director,
Violence Against Women Office

I. INTRODUCTION

During the consideration of the Violent Crime Control and Law Enforcement Act of 1994, the following Massachusetts case came to the attention of members of Congress:

In June 1994, the state supreme court ordered the YWCA in Springfield, Massachusetts, which administers a rape crisis counseling program, to produce confidential files to defense counsel in a rape case. Although the YWCA sought to protect the victim's privacy and initially defied the court order, the center eventually turned over the records as contempt penalties mounted. The center's attorney said that while legal advocates have been seeking and winning legal protections for rape counselors, only a few states grant rape counselors a testimonial privilege comparable to that of a doctor or priest. She said "Rape crisis centers can't function without confidentiality. [V]ictims must choose between prosecution and healing. If they choose prosecution, they must suffer in silence" as defendants gain access to information they have confided to their counselors. (Washington Post, June 24, 1994)

In response, Congress passed Section 40153 of the Violence Against Women Act, Confidentiality of Communications between Sexual Assault or Domestic Violence Victims and Their Counselors, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40153. The section directs the Attorney General to study and evaluate the manner in which states have taken steps to protect the confidentiality of communications between sexual assault or domestic violence victims and their counselors¹, and to develop model legislation that provides the maximum protection possible for the confidentiality of such communications within applicable constitutional limits. The Act also requires the Attorney General to make recommendations on the need for, and appropriateness of, further action by the federal government.²

¹ "Counselor" refers to the different types of individuals who may provide counseling or immediate assistance to sexual assault victims or domestic violence victims after an attack. Counselors may include social workers, physicians, psychiatrists, psychotherapists, psychologists, volunteers, advocates or other workers employed at a rape crisis center or battered women's shelter.

² This issue has been a priority for past administrations as well. In 1982, the Final Report of the President's Task Force on Victims of Crime recommended that "legislation should be proposed and enacted to ensure that designated victim counseling is legally privileged and not subject to defense discovery or subpoena." *Final Report of President's Task Force on Victims of Crime* (1982), at 17. The Task Force solicited testimony from victims on a number of issues, including the need for confidentiality for rape victim-counselor

In reviewing the ways in which states have protected the confidentiality of communications between a sexual assault or domestic violence victim and her³ counselor, the Department of Justice has performed legal and factual research, and has contacted by telephone sexual assault or domestic violence counselors, advocates, prosecutors, and criminal defense attorneys in different states. These professionals' views on the need for such legislation, the effectiveness of existing legislation, and other practical considerations were analyzed.

This report identifies the different types of state statutes addressing the confidentiality of communications between victims of sexual assault and/or domestic violence and their counselors. It also discusses the policy considerations that support the enactment of such statutes. Appendix 1 summarizes the main features of state statutes in tabular form and Appendix 2 describes each statute in more detail.

Model legislation was also drafted by drawing on existing state statutes and a model statute drafted in connection with the 1982 *Final Report of the President's Task Force on Victims of Crime*. In addition, specific recommendations for further federal action are included. Although the report and recommendations are made to the Congress, the solutions to the problems that victims of sexual assault and domestic violence face in trying to keep their communications with counselors confidential will be found through state government action. The

communications. The Task Force recommended that states adopt legislation to protect the confidentiality of communications between all crime victims and their counselors. *Id.* at 20-21. In 1986, the Department of Justice, Office for Victims of Crime, with the Victim-Witness Project of the Criminal Justice Section of the American Bar Association, prepared a model law for privileged communications between a crime victim and counselor. Since 1986, over half of the fifty states have adopted some form of legislation for these communications. The Office for Victims of Crime is currently developing a National Crime Victims Agenda and, in doing so, is reviewing, reporting the status of, and updating the recommendations provided in the 1982 *Final Report of President's Task Force on Victims of Crime*.

³ This report recognizes that victims of sexual assault and domestic violence may be male; however, the female pronoun is used in this report for consistency and as a matter of convenience in expression.

proposed model legislation is intended to assist and inform such efforts at the state level. The formulation of model legislation must be approached with flexibility in light of variations in state constitutions, case law and statutes. For this reason, we have refrained from proposing a single statute, and instead provide two models, one that grants an absolute privilege for confidential communications between victims of sexual assault and domestic violence and their counselors, and another that grants a qualified privilege for these communications.

II. REPORT AND FINDINGS

Since 1980, over half of the fifty states have enacted legislation addressing the confidentiality of communications between sexual assault and/or domestic violence victims and their counselors. The state statutes differ in the degree to which confidential communications are protected from disclosure. Some statutes provide a totally absolute privilege where disclosure is not permitted under any circumstances, others provide a semi-absolute privilege where disclosure may be permitted only under specified circumstances when disclosure serves the public interest, and still others provide a qualified privilege where disclosure is permitted after certain requirements are met or balancing tests are employed. State courts have reached different conclusions about the constitutionality of statutes providing totally absolute or semi-absolute privileges.

A. State Statutes

As of December 1995, twenty-seven states and the District of Columbia have enacted statutes that protect from disclosure, to differing degrees, confidential communications that arise from the relationship between sexual assault and/or domestic violence victims and their counselors.⁴ Some statutes address either sexual assault or domestic violence counselors, while

⁴ These states include Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Utah, Vermont, Washington, and Wyoming. The District of Columbia has also enacted similar legislation. The following states have not codified a testimonial privilege for these victim-counselor communications: Arkansas, Delaware, Georgia, Idaho, Kansas, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. Legislation on this issue is pending before the Texas

others address both sexual assault counselors and domestic violence counselors in the same statute. Some of these statutes address crime victims and victim counselors generally.

Eighteen statutes generally prohibit the disclosure of confidential communications between a sexual assault and/or domestic violence victim and a counselor absent the victim's consent. Seven of these eighteen statutes provide a totally absolute privilege and prohibit disclosure under any circumstances absent the victim's consent.⁵ In states with absolute privileges, counselors can assure victims that their communications will remain confidential because "in theory [an absolute privilege] grants complete protection against disclosure."⁶ Eleven of these eighteen statutes set forth a semi-absolute privilege and authorize disclosure in limited situations where disclosure of information is in the public interest, such as situations involving child abuse, child welfare, perjured testimony or the commission of a crime. A semi-absolute privilege grants complete confidentiality in all but enumerated, rare circumstances and gives adequate warning to the victim that communications may be disclosed in specific situations.⁷

Ten statutes provide a qualified privilege that authorizes disclosure after a court follows specific procedures, including the use of tests balancing the probative value of the evidence

Legislature. See appendices 1, 2. Because some state legislatures may have recently amended existing legislation or enacted new statutes, the Appendices should not serve as the definitive source for citation.

⁵ The following states have statutes establishing a totally absolute privilege: Colorado, Connecticut, Florida, Illinois, Massachusetts, Pennsylvania, and Vermont. While the legislatures in Connecticut, Massachusetts and Michigan enacted totally absolute privileges, the state courts have qualified the privileges. See *In re Robert H.*, *infra*; *Commonwealth v. Bishop*, *infra*, and *People v. Stanaway*, *infra*. The following states and the District of Columbia have statutes establishing privileges that have limiting conditions and thus, provide a semi-absolute privilege: Alabama, Alaska, Hawaii, Indiana, Michigan, Minnesota, New Jersey, New Mexico, Utah, and Wyoming. For a discussion of each state's particular statute, see appendices 1, 2.

⁶ See Anna Y. Joo, Note: *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 271 (Winter 1995).

⁷ See Joo, *supra* note 6, at 276-77.

against the need to keep the communications confidential and requirements of threshold showings of relevancy or materiality.⁸ Some statutes with a qualified privilege provide that courts may compel the counselor to testify about matters of proof concerning the chain of custody of evidence or about the victim's physical appearance at the time of the injury. In a state with a qualified privilege, a counselor cannot assure a victim at the outset of their counseling relationship that their communications will remain confidential, because a qualified privilege grants the defendant and the prosecution the opportunity to demonstrate that disclosure is warranted.

State supreme courts have reached different conclusions about the constitutionality of an absolute privilege. Some state courts have upheld absolute privileges.⁹ In *Commonwealth v.*

⁸ The states with such statutes are Arizona, California, Iowa, Kentucky, Louisiana, Maine, New Hampshire, New York, North Dakota and Washington. See appendices 1, 2. One commentator has noted that "the states that allow the privilege to be pierced differ somewhat in their requirements for: (1) the showing the defendant must make before the trial judge will be required to conduct an *in camera* hearing of the records; (2) the standard the court should use for deciding what portions, if any, of the records to disclose and (3) after the judge completes the review, what part of the records should be made available to the defense." Rachel Capoccia, *Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape Trials*, 68 SO.CAL.L.REV. 1335, 1377 (1995).

Because a qualified privilege provides access to the privileged information upon a threshold showing by a defendant, qualified privileges generally are not subject to constitutional attack. *People v. Pena*, 487 N.Y.S.2d 935, 937-39 (N.Y. 1985) (court judicially fashioned a qualified privilege on facts); *State v. Espinosa*, 733 P.2d 1010 (Wash. 1987); *State v. Kalakosky*, 852 P.2d 1064 (Wash. 1993) (court held that it is constitutional to require person charged with sexual offense to make threshold showing of materiality before presumptive privileged records of rape crisis center are reviewed by trial court).

⁹ See, e.g., *Commonwealth v. Wilson*, 602 A.2d 1290 (Pa. 1992), *cert. denied*, *Aultman v. Pennsylvania*, 504 U.S. 977 (1992) and *People v. Foggy*, 521 N.E.2d 86, 88 (Ill. 1988), *cert. denied*, 486 U.S. 1047 (1988). Both the Pennsylvania and Illinois legislatures enacted or amended existing legislation to provide for an absolute privilege after observing the effects of a qualified privilege. See also *People v. Dist. Court, City & Cty. of Denver*, 719 P.2d 722 (Colo. 1986) (privilege between psychologist and patient established by statute operated to protect sexual assault victims from disclosure of post-assault treatment records; vague assertion that victim may have made statements to therapist during post-assault psychological treatment that might possibly differ from victim's anticipated trial testimony did not provide sufficient basis to justify ignoring victim's right to rely upon statutory privilege with respect

Wilson, 602 A.2d 1290 (Pa. 1992), *cert. denied*, *Aultman v. Pennsylvania*, 504 U.S. 977 (1992), the Pennsylvania Supreme Court held that the statutory privilege for rape crisis counselors was absolute, and prevented the production of documents, as well as the testimony of counselors. The court reasoned that the legislative history demonstrated that the statute was intended to remedy what the legislature perceived as a grave injustice committed against those who were forced by economic necessity to seek counseling from a public center rather than a private therapist. The court held that the Confrontation Clause was not violated because the clause guarantees a defendant the ability to question adverse witnesses and "[t]hat ability does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."¹⁰ In *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988), *cert. denied*, 486 U.S. 1046 (1988), the Illinois Supreme Court held that the trial court's refusal to conduct an in camera inspection of the victim's counseling files did not violate the defendant's right of confrontation under the Sixth Amendment or his right to due process under the Fourteenth Amendment. The strong public policy supporting the privilege as expressed in the statute, as well as the defendant's failure to provide any showing that the files contained exculpatory and impeachment information, influenced the court's decision. The court noted that if a rape crisis counselor could not guarantee confidentiality to a victim, the effectiveness of rape crisis centers would be undermined.

Other state courts have conducted in camera reviews to determine if confidential communications should be disclosed to defendants in order to protect their constitutional rights.¹¹ In *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994), *cert. denied*, *Michigan v. Caruso*,

to treatment records and was insufficient to establish violation of defendant's right to confrontation; right of confrontation is not absolute, and under appropriate circumstances, court may assert discretion to limit cross-examination without violating right of confrontation).

¹⁰ See *Wilson*, 602 A.2d at 1296. The court also determined that the absolute privilege did not violate the Sixth Amendment's Compulsory Process Clause or the defendant's rights under the Pennsylvania constitution.

¹¹ See, e.g., *In re Robert H.*, 509 A.2d 475, 483 (Conn. 1986) (in certain circumstances, statutory privilege for communications between sexual assault victims and counselors must yield to defendant's constitutional right to confrontation); *Commonwealth v. Bishop*, 617 N.E.2d 990 (Mass. 1993) (court articulated standard for disclosure of victim's privileged records to provide defendant with fair trial); *State v. Kalakosky*, 852 P.2d 1064 (Wash. 1993)

115 S.Ct. 923 (1995), the court held that where the defendant makes a showing of good faith belief, grounded on some demonstrable fact, that the privileged records of a psychologist, sexual assault counselor, or social worker are likely to contain material information necessary to the defense, an in camera review of these records must be conducted to ascertain whether such records contain evidence that is reasonably necessary to the defense.¹² The court defined material to mean "exculpatory evidence capable of raising a reasonable doubt about the defendant's guilt." Id. at 575, n. 40. In *Advisory Opinion to the House of Representatives*, 469 A.2d 1161 (R.I. 1983), the Rhode Island Supreme Court, considering two statutes prepared by the state legislature, held that an absolute privilege for confidential communications between sexual assault counselors and sexual assault victims would violate the federal and state constitutional rights of the accused to confront his or her accusers, to obtain compulsory process, and to offer testimony. The court found that a qualified privilege -- which permits in camera review of confidential communications if the defense demonstrates that there is reason to believe that the witness knows and/or the material sought contains information that is

(court held that qualified privilege was constitutional; defendant must make a particularized showing that records are likely to contain material relevant to the defense); *State v. Speese*, 528 N.W.2d 63 (Wis. 1995) (when criminal defendant seeks access to privileged records, and makes preliminary showing that privileged information is material to defense and necessary to fair determination of guilt or innocence, defendant is entitled to in camera inspection of records; if witness possessing the privilege refuses to consent to in camera inspection, trial court should suppress witness's testimony).

¹² The court stated: "We hold that where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to the defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary and therefore, essential, to the defense. Only when the trial court finds such evidence, should it be provided to the defendant." *Stanaway*, 521 N.W. 2d at 562. The court explained that in camera inspection resolves the competing interests at stake: "Where the defendant has made the required showing, in camera inspection of privileged documents by the judge strikes the delicate balance between the defendant's federal and state constitutional rights to discover exculpatory evidence shielded by privilege, and the Legislature's interest in protecting the confidentiality of the therapeutic setting." *Stanaway*, 521 N.W.2d at 575. The court also held that the complainant must also expressly waive an absolute privilege before the court will conduct an in camera review. If the complainant refuses to waive the privilege, the court will suppress the complainant's testimony.

relevant to a material issue in the case and is clearly exculpatory in nature -- would be constitutional.

The United States Supreme Court has not granted certiorari in any of the state court decisions concerning the constitutionality of testimonial privileges for communications between victims and counselors and has not addressed the issue of whether such an absolute testimonial privilege is constitutional.¹³ The United States Supreme Court has recently granted certiorari in *Carrie Jaffee v. Marylu Redmond, et al.* (No. 95-266), a case that could have implications for state statutory testimonial privileges. The case presents the question of whether the federal courts should recognize a privilege under Rule 501 of the Federal Rules of Evidence for confidential communications between a clinical social worker and a patient. Many commentators have argued that absolute testimonial privileges for sexual assault and/or domestic violence counselors are constitutional.¹⁴

¹³ The United States Supreme Court addressed the scope of a criminal defendant's right of effective cross-examination under the Sixth Amendment in the context of a statutory privilege in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The *Ritchie* decision involved a Pennsylvania statute that protects the confidentiality of child abuse investigations conducted by a state agency and authorizes disclosure in limited circumstances, including a court order. In *Ritchie*, a plurality of the Supreme Court held that denying the defendant access to the agency's files did not violate the defendant's right to effective cross examination under the Confrontation Clause of the Sixth Amendment. The plurality viewed the right of cross examination as a right available at trial which is unconstitutionally restricted by limitations on questioning.

A majority of the Court applied a due process analysis to the defendant's claim regarding the Compulsory Process Clause, and held that the defendant's rights to due process required that the trial court conduct an *in camera* review for the existence of exculpatory material evidence. The Supreme Court recognized the strong public interest in the confidentiality of information contained in the agency's files. It distinguished the child abuse records statute from statutes that expressly prohibit disclosure in all circumstances. The court referred to the Pennsylvania statute which provides an absolute privilege from disclosure for communications between sexual assault victims and their counselors, but declined to rule on the constitutionality of statutes providing an absolute privilege.

¹⁴ Most law review articles argue that such absolute privileges are constitutional. See Maureen B. Hogan, *The Constitutionality of An Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling*, 30 B.C.L.REV. 411, 458-76 (March 1989); Joo, *supra* note 6, at 292-

B. Federal Privileges

While states have enacted statutes establishing testimonial privileges for many confidential communications, including those between psychotherapists or psychologists and their patients, the federal government has not enacted such legislation. The confidentiality of victim-counselor communications in federal cases depends on judicially-created privileges, although numerous federal statutory privileges exist to protect other confidential information.¹⁵ For example, Congress has enacted what is commonly known as the "Researcher's Privilege," contained in 42 U.S.C. § 3789g(a), which covers research conducted by the National Institute of Justice, the Bureau of Justice Statistics, and the Bureau of Justice Assistance.

299; Michael Lawrence, *Rape Victim Counselor Communications: An Argument for an Absolute Privilege*, 17 U.C.D. L. REV. 1213 (1984); Maxine Hoffman Neuhauser, *The Privilege of Confidentiality and Rape Crisis Counselors*, 8 WOMEN'S RIGHTS LAW REPORTER 185, 196 (1985). *But see*, Capoccia, *supra* note 8 at 1351 (supporting a qualified privilege for rape crisis counselors and records in acquaintance rape trials- "While it will not be necessary in every case to allow the defense to go on a fishing expedition through the victim's privileged counseling records, there will certainly be some cases where the demands of justice will require the court to pierce this privilege.").

¹⁵ Federal cases addressing testimonial privileges for sexual assault and domestic violence victim counselors typically review state court decisions in the context of petitions for writs of habeas corpus challenging state court convictions. *See, e.g., Saari v. Toombs*, (No.1:90-CV-431)(W.D. Mich. 1992) ("There are no federal cases which discuss the application of the *Ritchie* due process analysis to a state absolute privilege."); *Roberts v. Singletary*, 29 F.3d 1474 (11th Cir. 1994), *cert denied*, 115 S.Ct. 2560 (1995) (although court found defendant's confrontation clause claim to be procedurally defaulted, court noted that defendant would not be entitled to access to privileged communications).

The Federal Rules of Evidence contain only one rule relating to privilege. Rule 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the *privilege* of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501 (emphasis added).

The original Advisory Committee on Rules of Evidence had proposed, and the Supreme Court had approved, the inclusion of the following privileges in the Federal Rules of Evidence: required reports, spousal, attorney-client, psychotherapist-patient, clergy-communicant, political vote, other official information, and identity of informer. This proposal became controversial and specific privileges were not included in the Federal Rules of Evidence as enacted. These categories of privilege are often permitted, however, because they are regarded as comprised within the courts' interpretation of the "common law . . . in the light of reason and experience."¹⁶ Moreover, the intent of Rule 501 is not to limit federal privileges, but to allow for further development: "In rejecting the proposed rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis and to leave the door open to change."¹⁷

As sexual assault and domestic violence prosecutions are usually handled at the state level, the privilege rules in such cases depend on state law. When these issues do arise in

¹⁶ MCCORMICK ON EVIDENCE § 76.1 (West 4th ed., 1992).

¹⁷ See *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting 120 CONG. REC. 40891 1974, (statement of Rep. Hungate)).

federal cases¹⁸:

{})In determining whether to recognize a claimed privilege and to define the scope of the privilege, the courts balance the need for disclosure of facts in federal litigation against the need for confidentiality on a case by case basis. In federal criminal cases, the need for disclosure of relevant evidence carries greater weight than in federal civil cases because of the defendant's Sixth Amendment and Due Process Rights. Federal courts sometimes take note of trends in state law in considering the wisdom of recognizing or modifying a privilege. Some federal courts have considered state privileges as creating an expectation of privacy which federal courts should honor unless there is a strong countervailing federal interest in disclosure.¹⁹

C. Policy Considerations

1. Extent of the Problem of Violence Against Women

Violence against women is a serious threat to society. The Bureau of Justice Statistics' August 1995 National Crime Victimization Survey²⁰ -- which was redesigned two years ago to improve estimates of difficult to measure crimes, such as rape, sexual assault and domestic

¹⁸ For example, the Violence Against Women Act provides that the interstate violation of a protection order, which protects a domestic violence victim from a batterer, is a federal crime. A person may not cross state lines with the intent to engage in conduct that violates a protection order and subsequently engage in such conduct. 18 U.S.C. § 2262.

¹⁹ See LYNNE A. MARKS & SUSAN H. RAUCH, NATIONAL CENTER ON WOMEN AND FAMILY LAW, PROTECTING CONFIDENTIALITY OF VICTIM-COUNSELOR COMMUNICATIONS, 368-69 (1993).

²⁰ RONE BACHMAN & LINDA SALTZMAN, *Violence Against Women: Estimates from the Redesigned Survey*, United States Department of Justice, Bureau of Justice Statistics (August 1995). The Report noted that estimating rates of violence against women, especially sexual assault and other incidents committed by intimate offenders, continues to be a difficult task. Many factors inhibit women from reporting these crimes either to police or to government interviewers. The private nature of the event, the perceived stigma and the belief that no purpose would be served in reporting the crime keep an unknown number of the victims from talking about the event. Also, the National Crime Victimization Survey does not address crimes against victims below the age of twelve.

violence -- recently reported that:

- Women age 12 or older annually sustained almost 5 million violent victimizations in 1992 and 1993. About three-quarters of all lone-offender violence against women and 45% of violence involving multiple-offenders was perpetrated by offenders the victim knew. In 29% of all violence against women by a lone offender, the perpetrator was an intimate (husband, ex-husband, boyfriend, or ex-boyfriend).
- Women were about 6 times more likely than men to experience violence committed by an intimate.
- Based on reports to interviewers, women annually experienced about 500,000 rapes and sexual assaults. Friends or acquaintances of the victims committed over half of these rapes or sexual assaults. Strangers were responsible for about 1 in 5.

2. Role of Counseling

Society must provide support and protection for women who are the victims of violence. Many organizations provide psychological crisis counseling to ease the real and profound psychological trauma of victimization. The development of rape crisis centers and battered women's shelters has demonstrated the need for, and benefits derived from, counseling. The 1986 Report accompanying the Office for Victims of Crime Model Legislation observed that:

Institutionalization of crime victim counseling resulted from the 1960's and 1970's efforts of the women's movement to ameliorate social and psychological injuries of rape victims. By the end of the 1970's the success of such efforts had spread to the family violence arena, which began offering similar counseling for victims of that crime. Today hundreds of programs around the country offer counseling to victims of sexual assault and domestic violence.²¹

Victims of sexual assault and domestic violence experience both emotional and physical trauma. Counseling may be their only source of comfort. Rape victims suffer intense physical, psychological, and emotional injury; rape is a total violation of, and a very personal intrusion

²¹ See Report accompanying the Office for Victims of Crime's Proposed Model Legislation - Privileged Victim/Counselor Communications, (1986) at I-5.

into, one's privacy.²² Victims of acquaintance rape also experience a traumatic sense of betrayal. The emotional and psychological reactions of a traumatized victim range from fear, anger and depression, to shame, guilt and disgust. In addition to the wounds inflicted by the rape itself, a social stigma attaches to the rape victim, causing her additional suffering.²³

Counseling is essential for victims of domestic violence to enable them to escape from abusive relationships. To be abused by a spouse, a parent, a trusted adult or one's own child, or to witness such abuse, carries with it a particular agony, and victims wrestle with conflicting feelings of fear, loyalty, love, betrayal, guilt, shame, lack of self worth and blame.²⁴ Friends who might otherwise be a source of support besitate to intrude on the privacy of "family matters" or "choose sides."²⁵ Centers for battered women provide shelter, counseling, clothing, food, transportation, child care, health care, drug and alcohol abuse education, assistance with obtaining government benefits, and advocacy services related to criminal, civil and administrative proceedings, a range of services more extensive than those usually provided by sexual assault centers. It has been observed that:

The counseling services and shelter offered by battered women's programs are the most effective means of protecting battered women and ending domestic violence because of the special nature of domestic violence and the unique combination of services offered

²² See Hogan, *supra* note 14, at 423 (quoting *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 138 (Pa. 1981) (Larsen J. dissenting)). Professional counselors and psychiatrists have identified the condition of Rape Trauma Syndrome to characterize the wide range of emotional and psychological reactions that rape victims experience. Rape has a devastating impact on the mental health of victims, with nearly one-third (31%) of all rape victims developing rape-related Post-traumatic Stress Disorder sometime in their lifetimes. See NATIONAL VICTIM CENTER AND THE NATIONAL CRIME VICTIMS RESEARCH AND TREATMENT CENTER AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, RAPE IN AMERICA, 7 (1992). See also Joo, *supra* note 6, at 262-63.

²³ See Hogan, *supra* note 14, at 423 (citing *In re Pittsburgh*, 428 A.2d at 140 (Larsen, J. dissenting)).

²⁴ See U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT iii (1984).

²⁵ See U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT iii (1984).

by battered women's programs. . . . Battered women's shelters and services provide the means to stop the abuse and help the battered woman leave. . . . The counseling offered by battered women's programs is essential to a battered woman's ability to end the violent relationship and rebuild her life.²⁶

3. Testimonial Privileges Protecting Victims of Sexual Assault and Domestic Violence

The confidentiality statutes identified in Appendix 2 reflect the recognition by state legislatures of the importance of victim counseling for the emotional and psychological recovery of victims of sexual assault and domestic violence.²⁷ Advocates and counselors emphasize the importance of statutes granting a testimonial privilege²⁸ to communications between sexual assault victims or domestic violence victims and their counselors. The Office for Victims of

²⁶ See MARKS & RAUCH, *supra* note 19, at 23-29.

²⁷ In recognition of an individual's right to privacy, states have also enacted nondisclosure laws that prohibit shelters or counseling centers from disclosing "information about their shelters and their residents, clients of domestic violence programs, the whereabouts of battered women, whether or not they are staying at a shelter, or information received by clients served at a shelter as a condition for receiving funding." See Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L. Q. 273, 297-8 (Summer 1995). Federal law requires that domestic violence shelters receiving federal funds have a written policy mandating the confidentiality of shelter records. *Id.* at 294-95. The Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10413 (1995) and the Victims of Crime Act, 42 U.S.C. §§ 10601-10607 (1995), have provisions requiring that the address of a shelter not be disclosed to anyone unless authorized by the operators of the shelter, and that a written policy be in place to keep shelter records confidential. Unlike testimonial privileges, nondisclosure laws apply not only during court proceedings but also outside the litigation forum. MARKS & RAUCH, *supra* note 19, at 232-34. The nondisclosure laws focus more on the relationship between individuals and institutions than the relationship between individuals and professionals. Nondisclosure laws usually do not prevent courts from compelling "counselors to disclose records or testify about communication with battered women." Zorza, *supra*, at 298.

²⁸ Evidentiary privileges differ from the patient or client confidentiality afforded by physicians, attorneys, counselors and other professionals. Confidentiality of communications is prompted by the ethical guidelines of those professions and may apply in all situations, whereas evidentiary privileges only reflect legal rules governing the disclosure or admissibility of evidence in judicial proceedings or other proceedings.

Crime Report explained that "States have found it advantageous to have a statutory privilege rather than to rely on a judicially recognized privilege. This is true of even states whose statutes provide only a limited privilege."²⁹ It has been observed that "[i]n the absence of a statute granting an absolute privilege, the rape victim's rights are often undermined by the judicial interpretation of the situation."³⁰

Testimonial privileges protect confidential communications that are made in the context of specific relationships by granting certain individuals the ability not to disclose information revealed to them in confidence, if they are called as a witness during a trial or other proceeding. The rationale for these types of privileges, which may result in the exclusion of relevant evidence, is that society considers the creation and maintenance of such relationships to be beneficial. Sexual assault and domestic violence counselors perform many services for victims similar to the services provided by attorneys, social workers, psychotherapists, psychologists, or clergy. Most states recognize the need for confidentiality in these relationships and have codified attorney-client, social worker-client, psychotherapist/psychologist-patient and priest-communicant privileges in their statutes. A victim who seeks counseling from a rape crisis center or battered women's shelter rather than from a private psychologist may do so because of her economic circumstances. The victim's economic status should not result in a victim having less protection from disclosure for her communications to her counselor.³¹ The

²⁹ See Report accompanying Office for Victims of Crime's Proposed Model Legislation-Privileged Victim/Counselor Communications, at 1-6.

³⁰ See Bridget M. McCaffery, *The Existing Confidentiality Privileges as Applied to Rape Victims*, 5 J. L. & HEALTH 101, 135 (1990-91). McCaffery noted that "[i]n the absence of a statute, the victim's rights are less influential than the defendant's rights to the court." *Id.*

³¹ See Joo, *supra* note 6, at 266: "Focusing on the purpose of the communication rather than on the occupation of the counselor avoids the social inequality created by granting a privilege to one type of counselors, such as psychiatrists and psychologists, whose clients tend to be more affluent, while denying the privilege to another type, such as social workers and sexual assault counselors, whose clients tend to be poor." As one Judge stated:

Withholding the privilege of confidentiality from the rape victim/rape crisis center counselor relationship works an invidious discrimination against those unable to afford a psychologist or psychiatrist and will deprive these victims of their equal protection under the law.

enactment of a codified privilege for sexual assault and domestic violence counselors represents the extension of the protections for psychotherapists and psychologists that state legislatures or state common law have already recognized as legitimate and necessary.

4. Analysis of Justification for Victim/Counselor Privileges

Wigmore has identified four elements necessary to justify establishing a testimonial privilege: (1) the communications must originate in confidence; (2) confidentiality must be essential to the proper maintenance of the relationship; (3) the relationship must be one that society deems worthy of protecting; and (4) disclosure must injure the relationship more than it benefits the litigation.³² To determine the appropriateness of extending the testimonial privilege to the sexual assault or domestic violence victim - counselor relationship, that relationship may be examined under these criteria.³³ Applying Wigmore's test, there are persuasive policy arguments supporting the protection of victim counselor-victim communications.

a. Communications between victims and counselors originate in confidence

Communications with a sexual assault victim or a domestic violence victim are initiated in confidence during private meetings between the victim and the counselor either over the telephone or in secure offices. Some counseling centers may have specific protocols concerning confidentiality and may inform victims that the session is confidential at the outset of the relationship. In general, both the victim and the counselor assume that communications made during counseling are meant to be confidential.

In Re Pittsburgh Action Against Rape, 428 A.2d 126, 147 (Penn. 1981) (Larsen, J., dissenting).
See also MARKS & RAUCH, *supra* note 19, at 77-78.

³² JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2285 (John T. McNaughton rev. ed. 1961).

³³ Joo, *supra* note 6, at 258-61; Hogan, *supra* note 14, at 420-22; Neuhauser, *supra* note 14, at 188-92; McCafferty, *supra* note 30, at 136-138.

b. Confidentiality is essential

The success of the counselor/victim relationship is based upon the development of the victims' trust that they may confide sensitive and intimate information fully and freely to their counselors.³⁴ Confidentiality is essential for effective counseling because without an assurance of confidentiality, victims may avoid treatment altogether or may withhold certain personal feelings and thoughts because they fear disclosure.³⁵ Experience has shown that the

³⁴ MARKS & RAUCH, *supra* note 19, at 48-64. Commentators have noted that:

The purpose of rape counseling laws is to encourage the sense of security and free flow of information essential for recovery from the effects of sexual assault. A goal of crisis counseling is to provide private, secure consultations after an attack. The existence of trust is of paramount importance in creating a non-threatening and therapeutic atmosphere. The assurance of complete, absolute confidentiality is essential for this development of trust and therefore for effective counseling. The privilege also protects the victim's privacy interests in the relationship and in receiving effective and sensitive therapy to enable her to recover from the psychological[,] emotional and social injuries inflicted by sexual assault.

MARKS & RAUCH, *supra* note 19, at 148.

³⁵ The Report accompanying the Office for Victims of Crime's Proposed Model Legislation states:

Unfortunately, however, counseling may not benefit victims and, in fact, may add to their trauma if the confidential communications exchanged between victims and counselors during treatment are able to be utilized as evidence in court proceedings. Victims often speak to their counselors about their fears and feelings arising from the crime. Such reactions may be related to their personal histories and psychological make-up. Victims who are under the impression that they are revealing such information solely for therapeutic purposes are often dismayed and feel betrayed when their counselors are compelled to disclose their communications before the public at an open trial. Victims who realize in advance that their

communications between victims and counselors are so extremely personal that the mere possibility of exposure to just one individual other than one's personal counselor may inhibit a victim.³⁶ For example, there is some evidence that concerns about potential disclosure in litigation do inhibit victims. For example, 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.³⁷ In addition to this inhibiting effect on victims, victim counselors may take otherwise undesirable measures to avoid the risk of disclosure in litigation, such as not keeping notes or other records of counseling sessions. It has been observed that:

When the therapeutic relationship is not confidential, it is not effective because of the personal and embarrassing nature of the crime. . . . Due to societal prejudice, many women are not reporting rapes since they would rather abstain from being further violated in the courtroom. Further, if women knew that their confidential statements made in therapy would become part of public record, even more women would refrain from prosecuting their attacker. As

communications may be subject to disclosure may avoid counseling altogether.

Id. at I-5.

³⁶ See Hogan, *supra* note 14, at 471. See also Joo, *supra* note 6, at 284 n. 183: "In her remarks at the Educational Conference of Superior Court Justices, Braintree, Massachusetts (May 8, 1992), Veronica Reed Ryback reported that when informed of the consequences of [*Commonwealth v. Stockhammer*, 570 N.E.2d 992 (Mass. 1991) (inspection of confidential communications by trial judge was held inadequate; judge might not be in best position to know what information would be useful for defendant to impeach witness)], 30% of the survivors raised concerns about counseling, avoiding full disclosure about their personal history, and 10% refused counseling outright."

³⁷ The Pennsylvania Supreme Court noted that after the decision in *Pittsburgh Action Against Rape*, the therapeutic relationship between rape victims and rape crisis counselors was disintegrating, and data showed that the effectiveness of the centers was diminishing. *Wilson*, 602 A.2d at 1294 n.6.

a result, few victims will actually bring their attacker to justice.³⁸

Domestic violence and sexual assault counselors and advocates stated that it was vitally important for victims to receive assurances at the outset of counseling that anything said during the sessions would be confidential and could not be revealed without the victim's permission.³⁹ Some felt it was "absolutely critical" for the victim to receive this assurance because of the need to build trust between the victim and the counselor. Many of the counselors felt it would be "very" to "highly" detrimental to the counseling process, if the communications were subject to compulsory disclosure, because, according to one sexual assault counselor:

You would throw out the purpose of counseling, which is to heal the survivor. The goal of counseling isn't and shouldn't be to help build or destroy a case. We are not here to help or hinder law enforcement.

A prosecutor who tried rape cases stated that sometimes rape crisis counselors encouraged victims not to go forward with the prosecutions because it would be detrimental to their mental health to testify and be cross-examined in a public trial.

One domestic violence counselor said that the threat of disclosure would cause victims to stop seeking counseling altogether. A victims' advocate explained that when counselors are forced to divulge confidential information, there is a substantial chilling effect on the victim/counselor relationship. The advocate stated that when counselors warn victims that they might have to testify at trial and that their records might be subpoenaed, victims are more reluctant to be open and honest about their experiences. Thus, the trusting relationship that could exist if communications were absolutely confidential fails to develop. A counselor explained that confidentiality "goes to the heart of what we do," and that it is critical that victims receive assurances at the outset of counseling that anything that is said during the

³⁸ See McCafferty, *supra* note 30, at 142.

³⁹ During the course of drafting this report, many sexual assault and domestic violence counselors, advocates, and criminal defense attorneys were contacted by telephone. Unattributed quotes throughout this report are from these telephone interviews.

sessions will be confidential. The counselor said:

There is no point in doing this type of work if a client can't trust the counselor. It would make everything pointless. The result would be devastating beyond articulation. It is virtually impossible to sustain a client/counselor relationship without confidentiality.

A sexual assault victim advocate said that if the counselor did not promise confidentiality, victims could end up censoring comments, "not revealing any bad, extreme emotions or negative thoughts. . . . This would prevent the healing process." Another domestic violence counselor said that allowing disclosure under certain circumstances:

. . . adds to a distrust of the system and sets up a situation where the victim doesn't know what to expect. This dynamic mirrors what she faces in an abusive relationship - never knowing what to expect.

c. Society supports the counselor-victim relationship

The counselor-victim relationship is one society deems worthy of protection.⁴⁰ At least 27 states and the District of Columbia have already protected the confidentiality of communications between sexual assault and/or domestic violence victims and their counselors. Many states and local communities support counseling programs for crime victims because of the benefit not only to the individual victim but also to society, as the victim may be able to

⁴⁰ See section "Role of Counseling", *supra* at p. 12.

recover from the trauma of the crime and return to a productive life.⁴¹ As one judge stated:

At the onset of counseling the victim is informed that her communications will be confidential, and her willingness to disclose information quite obviously is based upon that expectation. . . . If that confidentiality is removed, that trust is severely undermined, and the maximum therapeutic benefit is lost. The inability of the crisis center to achieve its goals is detrimental not only to the victim but also to society, whose interest in the report and prosecution of sexual assault crimes is furthered by the emotional and physical well-being of the victim.⁴²

Other benefits result from increased victim participation and cooperation in reporting and prosecuting rape and domestic violence which are among the most underreported crimes.⁴³

d. Disclosure injures the counselor-victim relationship more than it benefits litigation

In some states, defense counsel routinely file motions seeking access to confidential communications that may reveal that the victim had made contradictory statements during

⁴¹ See MARKS & RAUCH, *supra* note 19, at 23-29. See also Joo, *supra* note 6, at 264-66; Hogan, *supra* note 14, at 471 (quoting *In re Pittsburgh Action Against Rape*, 428 A. 2d 126, 138 (Pa. 1981)):

The rape counseling relationship clearly furthers several important public interests. First, the rape counseling relationship assists rape victims in their recovery from the trauma rape inflicts. The relationship enables victims to recover from the disruption of emotional stability caused by the rape and to return to their lives as professionals, wives, and mothers. Clearly society possesses a compelling interest in the rehabilitation of rape victims. Additionally, the rape counseling relationship promotes the judicial process itself because the relationship provides a victim with the necessary psychological and emotional support necessary to report the crime and to aid the police and the prosecution.

⁴² *Wilson*, 602 A.2d at 1295.

⁴³ NATIONAL CRIME PREVENTION COUNCIL, PREVENTING VIOLENCE AGAINST WOMEN - NOT JUST A WOMEN'S ISSUE 1 (1995).

counseling sessions which may show that the victim has a motive to lie about the charge or is biased.⁴⁴ Defense counsel seek access to statements made by the victim in therapy that are inconsistent with her in-court statements -- for example, statements that raise doubts as to her identification of the perpetrator or statements in which a victim confides to her counselor that she may perjure herself.⁴⁵

⁴⁴ The prevalence of attempts by defendants to gain access to confidential communications between sexual assault or domestic violence victims and their counselors seems to vary greatly. For example, a public defender in Trenton, New Jersey, who handles these types of cases, has practiced 27 years and had yet to see the problem in an actual case. However, a sexual assault counselor in New Jersey stated that both prosecutors and defense attorneys have attempted to gain access to confidential communications. A public defender in Philadelphia comes in contact with this issue in 25% to 50% of her cases. Both New Jersey and Pennsylvania have statutes with absolute privileges. See also Joo, *supra* note 6, at 283 (quoting Rorie Sherman, Rape Victims' Records Vulnerable: Massachusetts Prosecutors, Therapists See a Chilling Effect, NAT'L L.J., Dec. 28, 1992, at 1, 27 (quoting Marianne Winters of the Rape Crisis Program of Worcester, Inc.). Some rape crisis counseling centers have been held in contempt of court and fined daily because they refused to release confidential information to courts. See e.g. *Commonwealth v. Rape Crisis Services of Greater Lowell, Inc.*, 617 N.E.2d 635 (Mass. 1993); *Commonwealth v. Rape Crisis Program of Worcester, Inc.*, 617 N.E.2d 637 (Mass. 1993). One sexual assault counselor in Massachusetts estimated that most rape crisis centers receive 5-6 subpoenas every year.

⁴⁵ See McCafferty, *supra* note 30, at 136. Typically, defendants attempt "to use the counselor's records primarily to impeach the victim through the utilization of assertions made during therapy which differ from those stated in court." See McCafferty, *supra* note 30, at 108. Defendants also attempt to use counseling records to cast doubt on a victim's mental health or to question the victim's character. *Id.* Commentators have stated that:

Unlike the subpoenas served on rape crisis centers, most of the subpoenas of battered women's programs do not arise in criminal proceedings brought against the assailant. More typically, subpoenas are served upon programs in the course of custody cases, child abuse proceedings, and civil suits in which the battered woman is a party. Subpoenas have also been issued from grand juries investigating criminal charges against either the battered woman or the batterer.

MARKS & RAUCH, *supra* note 19, at 172.

A battered women's advocate emphasized the distinction between sexual assault and domestic violence on the issue of confidential communications. With sexual assault, the issue

Defense attorneys claim that the right to effective cross-examination and to impeach witnesses is undermined by privileges for communications between victims and counselors. They argue that privilege statutes are invalid because an absolute privilege denies access to relevant information and potentially exculpatory evidence in violation of their clients' constitutional rights to confrontation, compulsory process, or due process.⁴⁶

For some rape crisis centers, attempts to force the disclosure of confidential communications are such a pervasive problem that they choose not to keep detailed records.⁴⁷ This strategy may have a detrimental effect on the continuity of the counseling and the ability of the centers to report accurate statistics. One counselor stated that because confidentiality can be an issue, the center instructs counselors to keep their notes extremely brief and to recognize that certain factual information -- for example use of medication, or even a victim's use of counseling services -- can be used to discredit the victim during trial. Accordingly, these counselors are careful about what they record in their notes that are completed during and after counseling sessions.

is usually that defense attorneys in criminal cases are trying to gain access to counseling records. With domestic violence, it is more likely that prosecutors are trying to obtain records in order to prosecute batterers when a victim may be a reluctant witness and has not waived the privilege, or child protective services workers are trying to gain access to the records in order to protect children.

⁴⁶ The Sixth Amendment provides that a defendant in a criminal prosecution "shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . .". The confrontation clause of the Sixth Amendment guarantees a criminal defendant the right of cross-examination -- the right to face adverse witnesses and the opportunity to challenge the credibility of the witnesses and the truth of their statements. Defendants contend that an absolute privilege impedes the effective cross-examination of witnesses and prevents the use of prior inconsistent statements to impeach witnesses. The compulsory process clause protects criminal defendants by providing a compulsory method to obtain witnesses and evidence in their favor. Defendants have maintained that an absolute privilege prevents them from calling a counselor as a possibly favorable witness and from offering possibly exculpatory evidence that may be in the counselor's records.

⁴⁷ See Joo, *supra* note 6, at 271-72.

Issues addressed during counseling are usually not relevant to the litigation process because the victim's feelings, rather than factual information about the crime, are generally the focus of the treatment process. The counselor's knowledge about the circumstances of the crime is likely to be incomplete, relating to the victim's fears rather than the commission of the crime.⁴⁸ In addition, any admissible evidence which the counselor could provide about independently observable facts may be furnished by other witnesses.

Counselors argue that the failure to extend confidentiality to crisis counseling undermines the effectiveness of the counseling. Some victims who need this kind of help might fear to seek it.⁴⁹ Without the protection of confidentiality, victims have found their files subpoenaed by the defense, and feel betrayed when thoughts and feelings that they considered private are open to public scrutiny in a courtroom. This sense of betrayal may adversely affect their treatment.

Considering the arguments of both sides, it is clear that disclosure injures the counselor-victim relationship more than it benefits litigation. "Undeniably, there is a necessity for the courts to develop rules of privilege by balancing the defendant's Sixth Amendment right to confront his accuser with the victim's right to privacy[; however, because] the issue in a rape case is not the victim's mental health, but rather the events of the incident in question, an

⁴⁸ A "victim's statements in therapy are made in an attempt to sort out her feelings regarding the attack and are not meant as testimonials for the record." McCafferty, *supra* note 30, at 108. McCafferty states:

In a rape case, the victim's mental anguish is merely a consequence of the crime. The fact at issue in a rape case is the act itself, and not the victim's mental conditions as a result of the act. Yet, our judicial system often subjects the victim to a plethora of inquiries regarding her mental health.

Id. at 102. Another commentator has stated "the counselor's primary purpose is to 'help the victim understand and resolve her feelings about the event,' not investigate the rape." Capoccia, *supra*, note 8, at 1348 (citing *People v. Foggy*, 521 N.E.2d at 91 (citing statement in amicus brief)).

⁴⁹ Absent assurances of confidentiality, the information from the victim might not exist in the first place. See McCafferty, *supra* note 30, at 109-10 and citations therein.

absolute privilege will not deter the truth-finding process.⁵⁰ Defendants are still afforded the opportunity to cross-examine the victim while victims are able to maintain successful confidential relationships with their counselors. The existence of a testimonial privilege for communications between sexual assault and domestic violence victims and their counselors represents a recognition that in certain instances, society's interest in preserving and supporting that counseling relationship outweighs the defendant's efforts to gain access to information which may or may not be relevant and may be available from other sources.

5. Absolute or Qualified Privilege

Criminal defense attorneys in general are opposed to any privilege that may work against their clients' interests. The idea that evidence should be privileged even if it may be exculpatory is directly at odds with many of their concepts of justice and due process, irrespective of the benefits the privilege may provide to the victim. However, most criminal defense attorneys surveyed for this report recognized the therapeutic value that the privilege provides to the victim.

Criminal defense attorneys consistently experienced difficulties in meeting a threshold requirement of relevancy or reasonableness that is required to obtain an in camera review of the communications by the judge. They wondered how attorneys would establish the relevancy of a communication if they had never been given access to the communication in the first place. When attorneys were satisfied with the results of their requests for in camera reviews, satisfaction seemed to reflect the infrequency with which the issue was presented and/or resignation to leaving the matter to judges' discretion. One criminal defense attorney questioned the ability of judges to make informed decisions about the value of certain information, because the judges may not be aware of the trial strategies of the defense. This attorney suggested that participants from both the local defense and prosecution bars should be present during in camera reviews to guarantee more dependable, objective decisions about the value of the confidential information.

⁵⁰ McCafferty, *supra* note 30, at 119.

Counselors and victims' advocates uniformly support an absolute privilege⁵¹ for sexual assault and domestic violence counselors and believe that qualified privileges for these communications are inadequate. One sexual assault counselor saw the absolute privilege "as the cornerstone of what we do. It is also a catalyst that helps survivors come forward." A victims' advocate explained that when counselors are forced to testify about communications, these communications are often misconstrued and taken out of context, to the detriment of the victim.⁵² The advocate described one case where a victim had told the counselor that she had previously undergone counseling. When the counselor testified about this at trial, the defense attorney used the information to buttress his theory that the woman was insane and had fabricated the entire story. The advocate noted that it can be very detrimental to the victim when defense attorneys go on "fishing expeditions" through counselors' records. Another sexual assault counselor in Illinois, where there is a statutory absolute privilege, explained that "90% [of the subpoenas for counselors or confidential information] are from defense attorneys who just don't know that we have a privilege. . . . Almost all of the time, the subpoenas are quashed."

⁵¹ One rape crisis center director felt that exceptions concerning child abuse, the commission of a crime and perjury were warranted, and consequently did not support a totally absolute privilege (as opposed to a semi-absolute privilege). This observer stated that such exceptions can function as a "safety net" for counselors, allowing them to break confidentiality when maintaining secrecy could be disastrous in situations involving child abuse or the future commission of a crime. Another victims' advocate likewise believed that there are certain justifiable exceptions -- for example, when the counselor is truly convinced that there is a realistic possibility that a victim may resort to violence herself.

⁵² See Joo, *supra* note 6 at 262-67. See also Donna St. George, *The Dilemma: A Fair Trial vs. A Victim's Privacy: The Confidentiality Issue Has Set Stage on a Protracted Legal Battle*, PHILADELPHIA INQUIRER, Oct. 29, 1989, at C3 ("The role of counseling is to deal with somebody's feelings, it's not to deal with the facts of a case. We don't ask them to reveal in detail what happened during the assault. We deal with their feelings.").

III. RECOMMENDATIONS

The administration of the criminal justice system in the prosecution of sexual assault and domestic violence is primarily a state and local responsibility. However, the federal government can play an important auxiliary role by developing and analyzing information concerning issues of common concern to all states and localities.⁵³ Without a testimonial absolute privilege for confidential communications to their counselors, victims may be reluctant to discuss their feelings openly and honestly during counseling, and to assist in prosecutions, because of the possibility that their counselors could be called to testify. At the same time, in certain states, state constitutional provisions and case law may require a qualified privilege to safeguard the defendants' constitutional rights. The Department of Justice has developed model legislation that provides the maximum protection for the confidentiality of communications between victims of sexual assault and domestic violence and their counselors to the extent permissible under the jurisprudence of the various states. In drafting the model legislation, the Department reviewed the existing state statutes addressing these types of confidential communications, the case law addressing the state statutes, and the model statute prepared by the Office for Victims of Crime in 1986.

The purpose of the proposed model statutes is to encourage victims of sexual assault and domestic violence to feel secure in seeking counseling, to make full and honest disclosures to their counselors, and to receive the maximum psychological and therapeutic benefit from counseling which will assist them in their personal recovery and result in the prosecution of these crimes. Two types of model statutes with varying degrees of confidentiality were drafted with the nuances of the individual state constitutions and case law in mind. The following factors were considered:

- (1) whether victims would forego counseling if they were not given assurances that what they told their counselors would remain confidential and not be disclosed in court, and whether counseling programs for victims of sexual assault and domestic violence would be able to achieve their goal of helping victims recover from the trauma associated with these crimes if there were no assurances that the

⁵³ See U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT, at 55.

communication would be kept confidential;

- (2) whether an absolute privilege or a qualified privilege for communications between victims of sexual assault or domestic violence and their counselors provides the maximum guarantee of confidentiality;
- (3) whether a semi-absolute privilege, which enumerates specific conditions for disclosure in rare circumstances for compelling reasons (such as child abuse or the future commission of a crime), is warranted;
- (4) the possibility that an absolute privilege may be held to violate the rights of criminal defendants under federal or state constitutions by hampering their ability to cross-examine witnesses effectively and denying them the opportunity to obtain exculpatory evidence and present it at trial;
- (5) whether a threshold showing of materiality and relevance by the individual seeking disclosure prior to an *in camera* review is necessary to protect the confidentiality of victims' communications and whether a court should, in the context of a qualified privilege, employ a balancing test or require a showing of constitutional deprivation before confidential communications would be ordered to be disclosed;
- (6) what limitations on the disclosure of confidential communications between victims of these crimes and their counselors, short of absolute privilege, are most likely to ensure that the counseling programs will not be undermined;
- (7) when reviewing the confidential communications at issue, whether judges are in the best position to conduct a balancing test or to make a determination that disclosure is necessary;
- (8) whether adequate procedural safeguards are in place to prevent unnecessary or damaging disclosures while the courts are considering the issue of disclosure of confidential communications;
- (9) who should be considered counselors in light of constitutional requirements that information available to the government must be disclosed to the defense in certain circumstances if the information is favorable to the defendant⁵⁴; and
- (10) whether the victim should be the sole holder of the privilege.

⁵⁴ See *Brady v. Maryland*, 373 U.S. 83 (1963); *Jencks v. United States*, 353 U.S. 657 (1957).

Based on the report, the Department of Justice makes the following recommendations:

- ◆ The model legislation, accompanied by this report, should be disseminated to governors, attorneys general and legislators in states that do not have legislation addressing the confidentiality of communications between sexual assault and domestic violence victims and their counselors and states that have a qualified privilege. States should be encouraged to adopt legislation to protect these important communications to the extent permissible under those states' constitutions, statutes and case law.
- ◆ Technical assistance should be provided to states considering the adoption of new legislation, or the amendment of existing legislation, to adopt a statutory privilege that protects communications between sexual assault victims and domestic violence victims and their counselors from disclosure to the maximum extent possible.
- ◆ Efforts should be made to raise the awareness of victims, advocates, counselors, attorneys and judges about the existence of state statutes.
- ◆ The necessity for judicial training on this issue should be evaluated.
- ◆ A national study should be conducted, five years from the date of this report, to review the status of state statutes and case law to ensure that states are protecting confidential communications between sexual assault and domestic violence victims and their counselors to the maximum extent possible.
- ◆ States that have adopted legislation should be encouraged to examine how the privilege works in practice, review case law, and consider amendments if necessary, to ensure that confidential communications between sexual assault and domestic violence victims and their counselors are protected to the maximum extent possible.
- ◆ Section 40153 of the Violence Against Women Act

also charged the Judicial Conference of the United States with evaluating and reporting to Congress its views on whether the Federal Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in federal court proceedings. The Judicial Conference's recommendations, if any, and the need for further examination should be studied.

STUDY OF STATE STATUTES

APPENDIX 1

()

()

()

ANALYSIS OF STATE STATUTES CONCERNING THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS - December 1995

State	Rape Crisis / Sexual Assault Counselor Privilege Statute	Domestic Violence Counselor Privilege Statute	Victim Counselor Privilege Statute	Absolute Privilege Statute	Qualified Privilege Statute
Alabama	X	X		semi-absolute	
Alaska	X	X		semi-absolute	
Arizona			X		X
Arkansas					
California	X	X			X
Colorado	pending legislation	X		X	
Connecticut	X	X		X (but see case law)	
Delaware					
Florida	X	X		X	
Georgia					
Hawaii			X	semi-absolute	
Idaho					

State	Rape Crisis / Sexual Assault Counselor Privilege Statute	Domestic Violence Counselor Privilege Statute	Victim Counselor Privilege Statute	Absolute Privilege Statute	Qualified Privilege Statute
Illinois	X	X		X	
Indiana	X	X		semi-absolute	
Iowa			X		X
Kansas					
Kentucky	X				X
Louisiana		X			X
Maine	X				X
Maryland					
Massachusetts	X	X		X (but see case law)	
Michigan	X	X		semi-absolute (but see case law)	
Minnesota	X			semi-absolute	
Mississippi					
Missouri					
Montana					
Nebraska					

State	Rape Crisis / Sexual Assault Counselor Privilege Statute	Domestic Violence Counselor Privilege Statute	Victim Counselor Privilege Statute	Absolute Privilege Statute	Qualified Privilege Statute
Nevada					
New Hampshire	X	X			X
New Jersey			X	semi-absolute	
New Mexico	X	X		semi-absolute	
New York	X				X
North Carolina					
North Dakota			X		X
Ohio					
Oklahoma					
Oregon					
Pennsylvania	X	X		X	
Rhode Island					
South Carolina					
South Dakota					
Tennessee					
Texas					
Utah	X			semi-absolute	
Vermont	X	X		X	

State	Rape Crisis / Sexual Assault Counselor Privilege Statute	Domestic Violence Counselor Privilege Statute	Victim Counselor Privilege Statute	Absolute Privilege Statute	Qualified Privilege Statute
Virginia					
Washington	X				X
West Virginia					
Wisconsin					
Wyoming	X	X		semi-absolute	
District of Columbia	X			semi-absolute	

APPENDIX 2

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Alabama</p> <p><i>The Victim Counselor Confidentiality Act of 1987</i></p> <p>ALA. CODE §§ 15-23-41 to -46 (1994)</p>	<p>The Alabama statute provides a semi-absolute privilege if victim or victim's custodial guardian or guardian ad litem does not consent to disclosure. Case law authorizes an <u>in camera</u> review for information relevant to the issue of credibility.</p> <p><i>Schaefer v. State</i>, 1995 Ala. Crim. App. LEXIS 54 (Under certain circumstances, witness's claim of statutory privilege may violate defendant's sixth amendment right of confrontation; although opportunity for cross-examination is central to right of confrontation, "[t]here are strong public policy reasons for maintaining confidentiality" of privileged records; trial court must balance the competing interests on a case-by-case basis and examine the records <u>in camera</u> to determine if there is exculpatory or impeachment material).</p>	<p>The counselor cannot be compelled to give testimony or to produce records concerning confidential communications for any purpose in any criminal proceeding or to provide testimony in any civil or criminal proceeding that would identify the name or information about the facility that provided emergency shelter to the victim.</p>	<p>A counselor is an employee or supervised volunteer of an organization that provides counseling to victims which is not affiliated with a law enforcement agency or a prosecutor's office and whose duties include treating victims for any emotional or psychological condition from a sexual assault or family violence.</p> <p>A communication is any information between a victim and a victim counselor which is disclosed in the course of treatment for any emotional or psychological condition resulting from sexual assault or family violence.</p>	<p>The statute does not relieve counselors of their duty to report suspected child abuse or neglect or any evidence that the victim is about to commit a crime. The privilege is waived if the victim brings a malpractice action against the victim counselor or the center.</p> <p>Only the victim (or guardian of a minor or incapacitated victim) may waive the privilege for victim/counselor confidential communications. See <i>Jordan v. State</i>, 607 So. 2d 333 (Ala. Crim. App. 1992)</p>
<p>Alaska</p> <p><i>Privilege relating to domestic violence and sexual assault counseling</i></p> <p>ALASKA STAT. § 12.45.049 (1994)</p> <p>Privilege relating to domestic violence and sexual assault counseling</p> <p>ALASKA STAT. § 9.25.4000 (1994)</p> <p>Confidential Communications</p> <p>ALASKA STAT. § 25.35.100-.35.150 (1994)</p>	<p>The Alaska statute provides a semi-absolute privilege if the victim or the victim's custodial guardian or guardian ad litem does not consent to disclosure.</p> <p>ALASKA STAT. § 9.25.400 and ALASKA STAT. § 12.45.049 state that confidential communications between a victim of domestic violence or sexual assault and a victim counselor are privileged as under AS 25.35.100 -- 25.35.150.</p>	<p>A victim or a counselor may not be compelled without appropriate consent to give testimony or to produce records concerning confidential communications for any purpose in any criminal, civil, legislative, or administrative proceeding.</p>	<p>A counselor is an employee or supervised volunteer of a victim counseling center who has had 40 hours of training and whose duties include victim counseling.</p> <p>A covered communication is information exchanged between the victim and the counselor that is disclosed during counseling resulting from a sexual assault or domestic violence.</p>	<p>The privilege does not apply to reports of suspected child abuse or neglect; evidence that a victim is about to commit a crime; a proceeding that occurs after a victim's death; a communication relevant to an issue of breach by the victim or counselor of a duty arising out of the counselor relationship; an excited utterance; a child-in-need-of-aid proceeding; a communication made during the victim-counselor relations relating to the commission of a crime; or in a criminal proceeding where the physical, mental or emotional condition of victim is raised in the victim's defense.</p> <p>The victim is the holder.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Arizona</p> <p><i>Consultation between Crime Victim Advocate and Victim; privileged information; exception</i></p> <p>ARIZONA REV. STAT. § 13-4430 (1994)</p>	<p>The Arizona statute provides a qualified privilege. If an <u>in camera</u> review reveals exculpatory material, the information must be disclosed to the defendant.</p>	<p>A crime victim advocate shall not disclose as a witness any communication between himself and the victim without the victim's written consent.</p> <p>The defendant may make a motion for disclosure of the privileged information and if the court finds that there is reasonable cause to believe the material is exculpatory, the court will hold a hearing <u>in camera</u>. If the material is found to be exculpatory, it shall be disclosed to the defendant. If, with the victim's consent, the advocate discloses, to the prosecutor or law enforcement agency, any privileged communication, the prosecution shall disclose the material to the defendant's attorney. If a crime advocate is employed or authorized by a prosecutor's office, the advocate may disclose information to the prosecutor with the oral consent of the victim.</p>	<p>A crime victim advocate is a person who is employed or authorized by a public or private entity that receives public funding primarily to provide counseling or other assistance to a crime victim.</p> <p>A communication includes records; notes, documents, correspondence, reports, memoranda, except compensation or restitution information, that contain opinions, theories or other information made while advising, counseling or assisting the victim or that are based on the communications between the victim and the advocate.</p>	<p>A communication is not privileged if the crime victim advocate knows that the victim will give or has given perjured testimony or the communication contains exculpatory material.</p> <p>The crime victim advocate may disclose compensation or restitution information.</p> <p>The statute does not specify who holds the privilege.</p>
<p>Arkansas</p>				

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>California</p> <p><i>Article 8.5, Sexual Assault Victim-Counselor Privilege</i></p> <p>CAL. EVID. CODE §§ 1035 - 1036.2 (1995)</p>	<p>The California statute provides a qualified privilege. The court must conduct a balancing test and if the need for relevant evidence outweighs the effect on the victim and the treatment relationship from disclosure, the information must be disclosed pursuant to conditions ordered by the court.</p>	<p>The court may compel disclosure if the information constitutes relevant evidence and if the court determines that the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services.</p> <p>The court may also compel disclosure in proceedings related to child abuse.</p>	<p>A sexual assault victim counselor is a person engaged in a rape crisis center who renders advice or assists sexual assault victims and who has received a certificate for completing training and who is a psychotherapist, has a master's degree or has one year of counseling experience or least six months of which is in rape crisis counseling or has 40 hours of training and is supervised by a person who qualifies as a counselor or (b) a person who is employed by any specified organization, whether compensated or not, who counsels and assists sexual assault victims and who is a psychotherapist who has a master's degree or has one year of counseling experience or at least six months of which is in rape crisis counseling or has the minimum hours of training for counseling and is supervised by a person who qualifies as a counselor.</p> <p>A confidential communication is information transmitted between the victim and the sexual assault counselor in confidence and includes all information regarding the facts and circumstances involving the alleged sexual assault and also includes all information regarding the victim's prior or subsequent sexual conduct and opinions regarding the victim's sexual conduct or reputation in sexual matters.</p>	<p>When ruling on a motion for disclosure, the court may require the victim, the counselor or both to disclose the information in chambers. The judge may determine that the information is privileged and must not be disclosed. If the court determines information shall be disclosed, the court shall so order and inform the defendant. The court shall order a hearing, out of the presence of the jury, where the counselor may be questioned about the information. The court shall then rule on what information may be used by the defendant and the nature of permissible questions.</p> <p>The victim is the holder of the privilege.</p> <p>See CAL. EVID. CODE § 912 (1995) (waiver of privilege)</p>
<p>California</p> <p><i>Article 8.7, Domestic Violence Victim-Counselor Privilege</i></p> <p>CAL. EVID. CODE §§ 1037 - 1037.7 (1995)</p>	<p>The California statute provides a qualified privilege. The court must conduct a balancing test and if the need for relevant evidence outweighs the effect on the victim and the treatment relationship from disclosure, the information must be disclosed pursuant to conditions ordered by the court.</p>	<p>The procedures for disclosure track those outlined above for the <i>Sexual Assault Victim-Counselor Privilege</i>, CAL. EVID. CODE § 1035.</p>	<p>A domestic violence counselor is either (a) person who is employed by any organization, whether compensated or not, who renders advice or assists victims of domestic violence, who has received specialized training, and who either (1) has a master's degree in counseling; or has one year of counseling experience; or (2) has at least 40 hours of training and is supervised by an individual who qualifies as a counselor or (3) is a psychotherapist; or (b) a person who is employed by any organization, whether compensated or not, who counsels and assists victims of domestic violence, and who is (1) a psychotherapist; has a master's degree; or has one year of counseling experience; or (2) has the minimum training for counseling and is supervised by an individual who qualifies as a counselor.</p> <p>A confidential communication is information transmitted between the victim and the counselor in confidence and includes all information regarding incidents of domestic violence as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser.</p>	<p>The procedures for disclosure track those outlined above for the <i>Sexual Assault Victim-Counselor Privilege</i>, CAL. EVID. CODE § 1035.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Colorado</p> <p><i>Who May Not Testify Without Consent</i> COLO. REV. STAT. § 13-90-107(b) (1994)</p> <p>A 1995 Bill Colo. S.B. 153 was introduced to amend the statute and add references to sexual assault victims and rape crisis centers.</p>	<p>The Colorado statute provides an absolute privilege.</p> <p><u>People v. Dist. Court, City & Cty. of Denver</u>, 719 P.2d 722 (Colo. 1986) (Privilege between psychologist and patient established by statute operated to protect sexual assault victims from disclosure of post-assault treatment records; vague assertion that victim may have made statements to therapist during post-assault psychological treatment that might possibly differ from victim's anticipated trial testimony did not provide sufficient basis to justify ignoring victim's right to rely upon statutory privilege with respect to treatment records, and was insufficient to establish violation of defendant's right to confrontation; right of confrontation is not absolute, and under appropriate circumstances, court may assert discretion to limit cross-examination without violating right of confrontation)</p>	<p>A private victim's advocate shall not be examined as to any communication made to such victim's advocate by a victim of domestic violence in person or through the media of written records or reports without the consent of the victim.</p>	<p>A private victim's advocate is a person at a battered women's shelter or similar community based advocacy program, for victims of domestic violence whose primary function is to counsel victims of domestic or family violence and who has undergone not less than 15 hours of training as an advocate and who supervises employees of the program, administers the program or works under the direction of the supervisor of the program.</p>	<p>The victim holds the privilege.</p>
<p>Connecticut</p> <p><i>Privileged communications between battered women's or sexual assault counselor and victim</i> CONN. GEN. STAT. § 52-146k (1994)</p>	<p>The Connecticut statute provides an absolute privilege if the victim or the victim's custodial guardian does not consent to disclosure. The statute has been modified by case law. <u>In re Robert H.</u>, 509 A.2d 475 (Conn. 1986) (In certain circumstances, statutory privilege for communications between sexual assault victims and counselors must yield to defendant's constitutional right to confrontation)</p>	<p>A battered women's counselor or a sexual assault counselor shall not disclose any confidential communications made to the counselor at any time by a victim in any civil or criminal case or proceeding or in any legislative or administrative proceeding unless the victim making the confidential communications waives the privilege nor disclose the information about the battered women's center or rape crisis center or the identity of the battered women's counselor or sexual assault counselor in any civil or criminal proceeding.</p>	<p>A counselor is any person engaged in a battered women's center or rape crisis center who has undergone a minimum of 20 hours of training, who is certified as a counselor by the center, who is under the control of a direct service supervisor of a center and whose primary purpose is the rendering of advice, counsel and assistance to and the advocacy of the cause of battered women or victims of sexual assault.</p> <p>A communication is information transmitted between victim and counselor in the course of relationship and by a means that does not disclose the information to a third party and includes all information received by and advice, report, or working paper given or made by such counselor in the course of the relationship with the victim.</p>	<p>The privilege does not apply in matters of proof concerning chain of custody of evidence or the physical appearance of the victim at the time of injury, or where the sexual assault counselor knows that the victim has given perjured testimony and the defendant or the state has made an offer of proof that perjury may have been committed.</p> <p>Failure of any party to testify pursuant to the statute should not result in an inference unfavorable to the state or defense.</p> <p>The victim is the holder of the privilege.</p>
<p>Delaware</p>				

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Florida</p> <p><i>Sexual Assault Counselor/Victim Privilege</i></p> <p>FLA. STAT. ANN. § 90.5035 (West 1994)</p>	<p>The Florida statute provides an absolute privilege if victim does not give prior written consent to disclosure.</p>	<p>A victim has a privilege to refuse to disclose or prevent any person from disclosing a confidential communication to a sexual assault counselor or any record made in the course of counseling.</p>	<p>A sexual assault counselor is any employee of a rape crisis center whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault or battery.</p> <p>A confidential communication is any communication made by the victim to a sexual assault counselor or any record made in the course of advising, counseling, or assisting the victim, and extends to advice given by the counselor in the course of that relationship.</p>	<p>The victim, or the victim's guardian or conservator or personal representative if victim is deceased, may waive the privilege.</p>
<p>Florida</p> <p><i>Domestic Violence Advocate/Victim Privilege</i></p> <p>FLA. STAT. ANN. § 90.5036 (West 1995)</p>	<p>The Florida statute provides an absolute privilege if victim does not give prior written consent to disclosure.</p>	<p>A victim has a privilege to refuse to disclose or prevent any person from disclosing a confidential communication to a domestic violence advocate or any record made in the course of counseling.</p>	<p>A domestic violence advocate is any employee or volunteer who has thirty hours of training in assisting victims of domestic violence and is an employee of or volunteer for a program for victims of domestic violence whose primary purpose is the rendering of advice, counseling, or assistance to victims of domestic violence. To qualify under the statute, the domestic violence advocate must be registered under section 415.605 at the time the communication is made.</p> <p>A communication is confidential if it relates to the incident of domestic violence, an alleged act of domestic violence or an attempted act of domestic violence and is not intended to be disclosed to third persons other than those persons present to further the victim's interest in the consultation, assessment or interview or those persons to whom disclosure is reasonably necessary to accomplish the purpose for which the domestic violence advocate is consulted.</p>	<p>The victim, or the victim's guardian or conservator or personal representative if victim is deceased, may waive the privilege.</p>
<p>Georgia</p>				

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Hawaii</p> <p><i>Victim Counselor Privilege</i> <i>Hawaii Rules of Evidence</i> HAW. REV. STAT. § 505.5 (1994)</p> <p>The commentary to Rule 505.5 states that "[T]his rule encourages and protects the counseling of emotionally distressed victims of violent crimes by according privileged status to confidential communications made in the course of the counseling process."</p>	<p>The Hawaii Rules provide a semi-absolute privilege.</p>	<p>A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to a victim counselor for the purpose of counseling or treatment for the emotional or psychological effects of sexual assault, domestic violence, or child abuse or neglect, and to refuse to provide evidence that would identify the name or information about a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim.</p>	<p>A victim counselor is either a sexual assault counselor or domestic violence victims' counselor. A sexual assault counselor is an employee or volunteer at a sexual assault crisis center who has undergone 35 hours of training and is under control and supervision of a social worker, nurse, psychiatrist, psychologist, and whose primary function is the rendering of advice, counseling or assistance to victims of sexual assault. A domestic violence victims' counselor is an employee or volunteer in a domestic violence victims' program who has undergone 25 hours of training and is under the control and supervision of a domestic violence victims' program.</p> <p>A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the provision of counseling or treatment services to the victim or those reasonably necessary for the transmission of the communication.</p>	<p>The privilege does not apply to:</p> <ol style="list-style-type: none"> (1) perjured testimony by the victim; (2) the physical appearance and condition of victim; (3) breach of a duty by the victim counselor or victim counseling program; (4) mandatory reporting of abuse or neglect; (5) proceedings for hospitalization; (6) an examination by court order of the victim's physical, mental or emotional condition; (7) a condition or an element of the claim or the defense; or (8) proceedings against the victim counselor. <p>The victim is the holder. The victim counselor is presumed to have authority to claim the privilege on behalf of the victim.</p>
<p>Idaho</p>				
<p>Illinois</p> <p><i>Privileged Communications between Domestic Violence Counselors and Victims</i> ILL. REV. STAT. ch. 60, para. 227 (1995)</p>	<p>The Illinois statute provides an absolute privilege if the victim does not give written consent to disclosure.</p>	<p>No domestic violence advocate or counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal case or proceeding or in any legislative or administrative proceeding without the written consent of the domestic violence victim except (1) in accordance with the provisions of the Abused and Neglected Child Reporting Act or (2) in cases where failure to disclose is likely to result in an imminent risk of serious bodily harm or death of the victim or another person.</p>	<p>Domestic violence advocate or counselor means any person (a) who has undergone a minimum of 40 hours of training in domestic violence advocacy, crisis intervention, and related areas, and (b) who provides services to victims through a domestic violence program either on an employed or volunteer basis.</p> <p>A confidential communication means any communication between an alleged victim of domestic violence and a domestic violence advocate or counselor in the course of providing information, counseling, or advocacy. The term includes all records kept by the advocate or counselor or by the domestic violence program in the course of providing services to an alleged victim concerning the alleged victim and the services provided.</p>	

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Illinois</p> <p><i>Confidentiality of Statements Made to Rape Crisis Personnel</i> 713 ILCS § 5/8-802.1 (1995)</p> <p>The intention of the statute is "to protect victims of rape from public disclosure of statements they make in confidence to counselors of organizations established to help them. Because of the fear and stigma that often results from those crimes, many victims hesitate to seek help even where it is available at no cost to them. As a result they not only fail to receive needed medical care and emergency counseling, but may lack the psychological support necessary to report the crime and aid police in preventing future crimes." In 1984, the Illinois legislature amended the statute to make the privilege absolute.</p>	<p>The Illinois statute provides an absolute privilege if the victim does not give written consent to disclosure.</p> <p><u>People v. Foggy</u>, 521 N.E.2d 86 (Ill. 1988), cert. denied, 486 U.S. 1047 (1988) (Absolute privilege for rape crisis counselors was constitutional; trial court's refusal to conduct <u>in camera</u> inspection of victim's counseling files did not violate defendant's right of confrontation under Sixth Amendment or right to due process under Fourteenth Amendment; strong public policy supporting privilege and expressed in statute as well as defendant's failure to provide any showing that files contained exculpatory and impeachment information influenced court and resulted in court's refusal to permit defendant's constitutional rights to override privilege).</p>	<p>No rape crisis counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal proceeding as to any confidential communication without the written consent of the victim or a representative of the victim.</p>	<p>A counselor is a psychologist, social worker, employee or volunteer in any organization or association defined as a rape crisis organization who has undergone 40 hours of training and is supervised.</p> <p>A confidential communication is any communication between a victim and a rape crisis counselor in the course of providing information, counseling, and advocacy. The term includes all records kept by the counselor or the organization in the course of providing services to an alleged victim concerning the alleged victim and the services provided.</p>	<p>A rape crisis counselor may disclose confidential communication without consent if failure to disclose is likely to result in a clear or imminent risk of serious physical injury or death to the victim or another person.</p> <p>Any rape crisis counselor or organization participating in good faith in the disclosure of records or communications shall be immune from civil and criminal liability.</p> <p>Any rape crisis counselor who knowingly discloses any confidential communication in violation of the Act commits a Class C misdemeanor.</p> <p>The victim is the holder.</p>
<p>Indiana</p> <p><i>Privileged Communications: Victim Counselors</i> IND. CODE ANN. § 35-37-6-1 to 11 (Burns 1994)</p>	<p>The Indiana Code provides a semi-absolute privilege if the victim or custodian or guardian does not consent to disclosure.</p>	<p>A victim or a victim counselor may not be compelled to give testimony or to produce records concerning confidential communications in any judicial, legislative or administrative proceeding.</p> <p>The statute includes relatives of the victim.</p> <p>A victim counselor or a victim may not be compelled to provide testimony in any judicial, legislative, or administrative proceeding that would identify the name or information about any facility that provided temporary emergency shelter to the victim of the offense unless the facility is a party to the proceeding.</p>	<p>A victim counselor is any employee or supervised volunteer of a victim counseling center who provides treatment to a victim for an emotional or psychological condition resulting from a sex crime and does not include employees of law enforcement agencies.</p> <p>A communication is any information exchanged in private between a victim and a victim counselor and disclosed in the course of the counselor's treatment of the victim for any emotional, psychological condition resulting from a sex crime, battery against a child, disabled person or an endangered adult, or spouse, neglect of a dependent or incest and does not include law enforcement officers or their employees or agents.</p>	<p>If the victim partially discloses the contents of a confidential communication in the course of testifying, either party may request the court to rule that justice requires waiver of the privilege to the extent the privilege applies to that portion of the communication.</p> <p>The privilege does relieve a victim counselor of the duty to report suspected child abuse, neglect, battery or exploitation.</p> <p>A counselor may not waive the protection afforded the victim except to respond to a malpractice suit brought by the victim.</p> <p>The victim is the holder of the privilege.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Iowa</p> <p><i>Victim counselor privilege</i> IOWA CODE § 236A.1 (1995)</p>	<p>The Iowa code provides a qualified privilege.</p>	<p>A victim counselor shall not be examined or required to give evidence in any civil or criminal proceeding as to any confidential communication made by a victim.</p> <p>Upon a motion, a court may compel disclosure if (1) the information is relevant and material evidence, (2) the probative value of the information outweighs the harmful effect on the victim, the counseling relationship, and the services, (3) the information cannot be obtained by reasonable means from any other source. The court may require the counselor or the victim, or both, to disclose the information in chambers. The court may determine that the information is privileged and it shall not be disclosed. If the court determines that certain information may be subject to disclosure, a hearing will be held out of the presence of the jury where the counselor may be examined. The court shall determine which information, if any, may be disclosed and may enter an order describing what may be disclosed and prescribing the permissible line of questioning. The moving party may then offer evidence pursuant to the court order.</p>	<p>A victim counselor is any person who is engaged in a crime victim center and is supervised and whose primary purpose is the rendering of advice counseling and assistance to victims of crime and who has had 20 hours of victim assistance training.</p> <p>A confidential communication is any information shared between a crime victim and a victim counselor within the counseling relationship and includes all information advice, reports or working papers given to or prepared by the counselor in the course of the treatment.</p>	<p>The privilege under this section does not apply in: (1) matters of proof concerning the chain of custody of evidence; (2) in matters of proof concerning the physical appearance of the victim at the time of the injury or the counselor's first contact with the victim after the injury; or (3) where the counselor has reason to believe that the victim has given perjured testimony and the defendant or the state has made an offer of proof that perjury may have been committed.</p>
<p>Kansas</p>				

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Kentucky</p> <p><i>Counselor-client privilege</i> KRE 506 (1994)</p>	<p>The Kentucky rule provides a qualified privilege.</p> <p>(Kentucky repealed Kentucky Revised Statute § 421.2151. <i>Privileged Communication between sexual assault counselor and victim</i>, which provided for an absolute privilege if the victim had not given prior written consent to disclosure. The privilege did not apply (1) in matters of proof concerning chain of custody of evidence; (2) in matters of proof concerning the physical appearance of the victim at the time of the injury; (3) where the counselor had knowledge that the victim had given notice to the court that perjury may have been committed; or (4) to any information revealed by a victim which related to the identity of the victim's assailant.)</p>	<p>Rule 506(b) states that "a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of counseling the client, between himself, his counselor, and persons present at the direction of the counselor, including members of the client's family."</p>	<p>A counselor includes a school counselor, a drug abuse counselor, an alcohol abuse counselor or a sexual assault counselor. A sexual assault counselor is a person who is engaged by a rape crisis center, has undergone 40 hours of training and is under the control of a direct services supervisor of a rape crisis center whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.</p>	<p>There is no privilege for any relevant communication: (1) If the client is asserting his physical, mental, or emotional condition as an element of a claim or defense; or, after the client's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense. (2) If the judge finds: (A) that the substance of the communication is relevant to an essential issue in the case; (B) that there are no available alternate means to obtain the substantial equivalent of the communication; and (C) that the need for the information outweighs the interest protected by the privilege.</p> <p>The court may receive evidence <u>in camera</u> to make its findings.</p> <p>The victim or victim counselor (or that person's employer) may claim the privilege in the absence of the client but only on behalf of the client.</p>
<p>Louisiana</p> <p><i>Family Violence Shelters: Privileged Communications and Records</i> LA. REV. STAT. ANN. § 46: 212A.1 (West 1991)</p>	<p>The Louisiana statute provides a qualified privilege.</p>	<p>No person shall be required to disclose by way of testimony or otherwise in connection with any civil or criminal case or proceeding or by way of any discovery procedure, a communication made to a representative or employee of a community shelter by a victim (or potential victim) of any act of family or marital violence or by his or her children or communication by the employee or representative to a victim in the course of rendering authorized services, nor shall any person be required to produce, under subpoena, any records, documentary evidence, opinions or decisions relating to such a privileged communication.</p>	<p>A privileged communication means a communication made to a representative of employee of a community shelter by a victim. It also means a communication not otherwise privileged made by a representative or employee of a community shelter to a victim in the course of rendering authorized services.</p>	<p>The prosecuting attorney, any party in a civil proceeding or person arrested or charged with a criminal offense may petition the court for an <u>in camera</u> inspection of the records of the privileged communication concerning such person, alleging facts showing such records would provide favorable admissible evidence, and, in criminal proceedings, are relevant to the issue of guilt or punishment. If the court determines that the person is entitled to all or part of such records, it may order production and disclosure as it deems appropriate.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Maine</p> <p><i>Privileged Communications to Sexual Assault Counselors</i> ME. REV. STAT. tit. 16, § 53-A (West 1994)</p>	<p>The Maine statute provides a qualified privilege.</p>	<p>A sexual assault counselor may not be compelled to testify except with regard to reporting or cooperating in an investigation or giving evidence pursuant to the child protection laws or with the consent of the victim.</p>	<p>A sexual assault counselor is a person who has undergone a program of training from a rape crisis center which shall include, but not be limited to law, medicine, societal attitudes, crisis intervention, counseling techniques and referral services, and is either a staff member, paid or unpaid, or under the supervision of a staff member of a rape crisis center.</p>	<p>When "a court in the exercise of sound discretion deems the disclosure necessary to the proper administration of justice," none of the communications may be privileged and disclosure may be required.</p> <p>The victim is the holder.</p>
<p>Maryland</p>				
<p>Massachusetts</p> <p><i>Privileged Communications Between Sexual Assault Victims and Certain Counselors</i> MASS. ANN. LAWS ch. 213, § 20I (Law Co-op. 1995)</p> <p>On February 23, 1995, a bill relating to the protection of the confidentiality of victims of rape was introduced to the Massachusetts Legislature and to the Joint Committee on the Judiciary.</p>	<p>The Massachusetts statute provides an absolute privilege if the victim does not give her prior written consent. However, the <u>Bishop</u> decision provides for a balancing test to determine whether the defendant shall have access to the confidential information. <u>Commonwealth v. Bishop</u>, 617 N.E.2d 990 (Mass. 1993) (court articulated standard for disclosure of victim's privileged records to provide defendant with fair trial)</p> <p><u>Commonwealth v. Two Juveniles</u>, 491 N.E.2d 234 (Mass. 1986) (Under certain circumstances, absolute statutory privilege must yield to constitutional rights of defendant guaranteed by Sixth Amendment; before in camera inspection is justified, defendant must show a legitimate need for access to communications and that protected information is likely to be useful)</p>	<p>A sexual assault counselor shall not disclose a confidential communication, without the prior written consent of the victim; "provided, however, that nothing in this chapter shall be construed to limit the defendant's right of cross-examination of such counselor [sic] in a civil or criminal proceeding if such counselor [sic] testifies with such written consent."</p>	<p>A counselor is a person employed in a rape crisis center who has undergone 35 hours of training and who is under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist, or psychotherapist and whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault.</p> <p>A confidential communication is information transmitted in confidence by and between a victim of sexual assault and a sexual assault counselor by a means which does not disclose the information and includes all information received by the sexual assault counselor which arises out of and in the course of such counseling and assisting, including, but not limited to reports, records, working papers or memoranda.</p>	<p>To help trial judges determine the circumstances in which a defendant charged with rape or sexual abuse must have access to a victim's privileged records, the Supreme Judicial Court in <u>Commonwealth v. Bishop</u>, established the following five stage process: (1) determine whether the records are privileged; (2) determine whether the records are relevant to an issue in the case; (3) allow the defense counsel and prosecutor access to the relevant portions of the privileged records to determine if disclosure is required to provide the defendant a fair trial; (4) if disclosure is necessary for a fair trial, disclose the relevant records on appropriate terms and conditions; and (5) determine the admissibility of the records that counsel may wish to introduce in a voir dire examination.</p> <p>The victim is the holder.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Massachusetts</p> <p><i>Privileged Communications Between Domestic Violence Victims and Domestic Violence Victims' Counselors</i></p> <p>Mass. ANN. LAWS ch. 233, § 20K (1995)</p>	<p>The Massachusetts statute provides an absolute privilege if the victim does not give her prior written consent.</p>	<p>A domestic violence victim's counselor shall not disclose a confidential communication without the prior written consent of the victim; such confidential communication shall not be subject to discovery in any civil, legislative, or administrative proceeding without the prior written consent of the victim to whom such confidential communication relates.</p>	<p>Domestic violence victims' counselor is a person who is employed or volunteers in a domestic violence victims' program, who has undergone a minimum of 25 hours of training and who reports to and is under the direct control and supervision of a direct service supervisor of a domestic violence victims' program, and whose primary purpose is the rendering of advice, counseling, or assistance to victims of abuse.</p> <p>Confidential communication is information transmitted in confidence by and between a victim and a domestic violence victims' counselor by a means which does not disclose the information to a person other than a person present for the benefit of the victim, or to those to whom disclosure of such information is reasonably necessary to the counseling and assisting of such victim. The term includes all information received by the domestic violence victims' counselor which arises out of and in the course of such counseling and assisting including but not limited to reports, records, working papers or memoranda.</p>	<p>In criminal actions such confidential communication shall be subject to discovery and shall be admissible as evidence but only to the extent of information contained therein which is exculpatory in relation to the defendant; provided, however, that the court shall first examine such confidential communications and shall determine whether or not such exculpatory information is therein contained before allowing such discovery or the introduction of such evidence.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Michigan</p> <p><i>Confidential Communications Between Victim and Family Violence or Sexual Assault Counselor; Admissibility of Evidence; Consent of Victim</i></p> <p>MICH. COMP. LAWS § 60D. 2157a (1993) MICH. STAT. ANN. § 27A. 2157 (Callaghan 1994) (Revised Judicature Act)</p>	<p>The Michigan statute provides a semi-absolute privilege if the victim does not give prior written consent to disclosure.</p> <p><i>People v. Stanaway</i>, 521 N.W.2d 557 (Mich. 1994), cert. denied, <i>Michigan v. Caruso</i>, 115 S.Ct. 923 (1995) (Where defendant can establish reasonable probability that privileged records of psychologist, sexual assault counselor, social worker, or juvenile diversion officer are likely to contain material information necessary to defense, <i>in camera</i> review of records must be conducted to ascertain whether they contain evidence that is reasonably necessary and therefore essential to defense; defendant must make showing of good faith belief, grounded on some demonstrable fact)</p> <p><i>Saari v. Toombs</i>, No. 1:90-CV-431 (W.D.Mich. S.Div. 1992) (Federal magistrate concluded that compelling public interest in proper treatment and recovery of sexual assault victim overcomes defense's compulsory process claims comprising vague allegations supported by speculation that records might contain inconsistent statements)</p>	<p>A confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim.</p>	<p>A counselor is a person who is employed or who volunteers at a sexual assault or domestic violence crisis center and who in that capacity provides advice, counseling or other assistance to victims of sexual assault or domestic violence and their families.</p> <p>A confidential communication means information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and includes any report, working paper or statement contained therein given or made in connection with a consultation between a victim and sexual assault or domestic violence counselor.</p>	<p>The privilege does not apply to obligations relating to child welfare arising under section 1 of the Child Protection Act MICH. COMP. LAWS § 722.631</p> <p>The victim is the holder.</p>
<p>Minnesota</p> <p><i>Testimony of Witnesses</i></p> <p>MINN. STAT. § 595.02(k) (1994)</p>	<p>The Minnesota statute provides a semi-absolute privilege.</p>	<p>Sexual assault counselors may not be compelled to testify without the consent of the victim.</p>	<p>A counselor is a person who has undergone at least 40 hours of crisis counseling training and works under the direction of a supervisor in a crisis center whose primary purpose is to render advice.</p> <p>A communication is any opinion or information received from or about the victim.</p>	<p>A counselor may be compelled to disclose information in investigations or proceedings related to neglect or termination of parental rights if the court determines good cause exists. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the treatment relationship, and the treatment services if disclosure occurs.</p> <p>This provision does not relieve a counselor of the duty to report the maltreatment of minors and adults.</p> <p>The victim holds the privilege.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
Mississippi				
<p>Missouri In January 1995, a bill providing that any person acting as a counselor or advocate at a rape crisis center or a domestic violence program shall be incompetent to testify concerning a communication made to that person while rendering advice, advocacy, assistance or comfort to victims of sexual assault or domestic violence was introduced in the House and was withdrawn from further consideration in February.</p>				
<p>Montana</p>	<p><u>State v. Reynolds</u>, 792 P.2d 1111 (Mont. 1990) (Defendant was not denied right to confront witnesses or due process rights because of trial court's refusal to grant defendant's motion to obtain all of plaintiff's medical and psychiatric records).</p>			
<p>Nebraska Neb. Rev. Stat. 27-504 (professional counselor - client privilege)</p>				
<p>Nevada</p>				

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>New Hampshire</p> <p><i>Confidential Communications between Victims and Counselors</i> N.H. REV. STAT. ANN. § 173-C:1 - C:10 (1994)</p>	<p>The New Hampshire statute provides a qualified privilege.</p>	<p>A victim has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by the victim to a sexual assault counselor or a domestic violence counselor.</p>	<p>A domestic violence or sexual assault counselor is any person who is employed or appointed or who volunteers in a domestic violence center or rape crisis center who renders support, counseling or assistance to victims and who has completed 30 hours of training in a bona fide program.</p> <p>A confidential communication means information transmitted between a victim of an alleged sexual assault or alleged domestic abuse, and a sexual assault or domestic violence counselor in the course of that relationship and in confidence and includes all information received by the counselor in the course of the relationship.</p>	<p>In order to seek access to privileged information, in discovery or at trial, a defendant must: (1) file a written pretrial motion with affidavit as to why discovery is requested and showing that there is a substantial likelihood that favorable and admissible information would be obtained and (2) establish by a preponderance of the evidence that: (a) the probative value of the information outweighs its prejudicial effect on the victim's recovery, privacy, or relationship with the counselor or the center; (b) the information sought is unavailable from any other source; and (c) there is a substantial probability that the failure to disclose that information will interfere with the defendant's right to confront the witnesses against him and his right to a fair trial. In ordering disclosure, the trial court shall make written findings which may be appealed interlocutorily to the N.H. Supreme Court.</p> <p>The victim is the holder. The privilege does not affect counselor's duty to report child abuse.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>New Jersey</p> <p><i>Victim Counselor's Privilege Admissibility</i></p> <p>N.J. REV. STAT. § 2A:84A-22.13 - 22.16 (1993)</p> <p>In adopting the statute codifying a victim-counselor privilege, the New Jersey Legislature declared that <i>inter alia</i> "[C]ounseling of . . . victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission. . . . [C]onfidentiality 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. Therefore, it is the public policy of this State to extend a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of these communications maintained by the counselor."</p> <p>See also New Jersey Rules of Evidence 517 (1994) Victim Counselor Privilege</p>	<p>The statute provides a semi-absolute privilege if the victim does not give prior written consent to disclosure.</p> <p><u>State v. J.G.</u>, 619 A.2d 232 (N.J. 1993) (Victim-counselor privilege is sufficiently broad to encompass confidential communications of both direct and secondary victims of violence; there was no basis to require <i>in camera</i> inspection of confidential files absent some compelling reason)</p>	<p>A victim counselor has the privilege not to be examined as a witness in any civil or criminal proceeding with regard to any confidential communication. Nor may a victim counselor or a victim be compelled to provide testimony in any civil or criminal proceeding that would identify the name or information about a domestic violence shelter or other facility unless the facility is a party to the proceeding.</p>	<p>A counselor is a person engaged in a victim counseling center who has undergone 40 hours of training and is under the control of a direct services supervisor and who has a primary function of rendering advice, counseling or assisting victims of acts of violence.</p> <p>A confidential communication means any information exchanged between a victim and a victim counselor in private and includes any advice, report or working paper made or given in the course of the consultation.</p>	<p>The statute provides that "nothing . . . shall be deemed to prevent the disclosure to a defendant in a criminal action of statements or information given by a victim to a county victim witness coordinator where the disclosure of the statements or information is required by the constitution of [New Jersey] or of the United States."</p> <p>The victim is the holder.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>New Mexico</p> <p><i>Victim Counselor Confidentiality Act</i></p> <p>N.M. STAT. ANN. § 31-25-1 to 6 (Michie 1995)</p>	<p>The New Mexico statute provides a semi-absolute privilege if the victim, custodial guardian, or guardian ad litem does not consent to disclosure. If the victim partially discloses the contents of a confidential communication in the course of her testimony, then either party to the action may request the court to rule that justice requires the privilege to be waived to the extent it applies to that portion of the communication.</p>	<p>A victim, a victim counselor without the consent of the victim, or a minor or incapacitated victim without the consent of a custodial guardian or a guardian ad litem appointed upon application of either party, shall not be compelled to provide testimony or to produce records concerning confidential communications for any purpose in any criminal action or other judicial, legislative or administrative proceeding.</p> <p>A victim counselor or a victim shall not be compelled to provide testimony in any civil or criminal proceeding that would identify the name or information about a safe house, abuse shelter or other facility that provided temporary emergency shelter to the victim unless the facility is a party to the proceeding.</p>	<p>A counselor is any employee or supervised volunteer of a victim counseling center or other organization that provides counseling to victims that is not affiliated with a law enforcement agency and who has successfully completed 40 hours of formal victim counseling training or has had a minimum of one year of experience and whose duties include victim counseling.</p> <p>A confidential communication means any information exchanged between a victim and a victim counselor which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from an assault or family violence.</p>	<p>The statute does relieve a victim counselor of a duty to report suspected child abuse or neglect, to report any evidence that the victim is about to commit a crime or to limit any testimonial privileges available to any person pursuant to other provisions of law.</p> <p>The N.M. supreme court may adopt rules of procedure and evidence to govern and implement the provisions of the Victim Counselor Confidentiality Act [N.M. STAT. ANN § 31-25-1 to 6]. 1978].</p> <p>If a victim brings a malpractice action against a counselor or the counseling organization, the victim counselor may disclose confidential communications.</p> <p>The victim is the holder.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>New York</p> <p>Rape Crisis Counselor N.Y. CIV. PRAC. L. & R. 4510 (Consol. 1994)</p> <p>See also N.Y. Crim. Proc. 60.76 (1994) Rules of evidence; rape crisis counselor evidence in certain cases ("where disclosure of a communication which would have been privileged pursuant to section 4510 of the civil practice law and rules is sought on the grounds that the privilege has been waived or that disclosure is required pursuant to the constitution of [New York] or the United States, the party seeking disclosure must file a written motion supported by an affidavit containing specific factual allegations providing grounds that disclosure is required. Upon the filing of such motion and affidavit, the court shall conduct an <u>in camera</u> review of the communication outside the presence of the jury and of counsel for all parties in order to determine whether disclosure of any portion of the communication is required.</p>	<p>The New York statute provides a qualified privilege.</p> <p><u>People v. Bridges</u>, 538 N.Y.S.2d 701 (1989) (Notes of rape crisis volunteer concerning statements made to her by victim regarding incident are not confidential communications protected from disclosure in defendant's trial by social worker privilege because although center has employees who are certified social workers, rape crisis volunteer was neither working in conjunction with certified social worker nor was she certified social worker herself so as to bring her notes under protection of statutory privilege)</p> <p><u>People v. Perg</u>, 487 N.Y.2d 935 (1985) (Court denied discovery of communications between victim and rape crisis center because defendant gave no indication that records had even slightest potential for revealing information that bore on issue of guilt or innocence, unreliability of witnesses or exculpatory material; court balanced defendant's 6th Amendment right of confrontation and cross-examination of adverse witness, right to exculpatory evidence and evidence material to issue of guilt or innocence and right to statements made by prosecution witnesses with right of complainant to seek counseling at rape crisis centers to aid her in dealing with trauma of rape and reasonable expectation that such counseling would not be made public)</p>	<p>A rape crisis counselor may not be required to disclose a communication made by client or advice given in course of services; nor will any records made in the course of the services or recordings of any communications made by or to a client be required to be disclosed nor shall the client be compelled to disclose such communications or records.</p> <p>N.Y. CIV. PRAC. L. & R. § 60.76 states that where disclosure of a communication which would have been privileged pursuant to N.Y. CIV. PRAC. L. & R. § 4510 is sought on the grounds that the privilege has been waived or that disclosure is required pursuant to the constitution of [New York] or the United States, the party seeking the disclosure must file a written motion supported by an affidavit containing specific factual allegations providing grounds that disclosure is required. The court shall conduct an <u>in camera</u> review of the communication outside the presence of the jury and of counsel for all parties in order to determine whether disclosure of any portion of the communication is required.</p>	<p>A rape crisis counselor is any person who has been certified by an approved rape crisis program as having satisfied training standards and who, regardless of compensation, is acting under direction and supervision of an approved rape crisis program.</p>	<p>A rape crisis counselor may disclose such otherwise confidential communication to the extent authorized by a client. A rape crisis counselor may not be required to treat as confidential communications by a client which reveal an intent to commit a crime or harmful act. There is no privilege in a case in which a client waives the privilege by instituting charges against the counselor or program and the action or proceeding involves confidential communications.</p> <p>The rape crisis privilege is not a ground for excluding evidence which otherwise would be admissible in child protective proceedings.</p>
<p>North Carolina</p>				

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>North Dakota</p> <p>Domestic Violence or Sexual Assault Program Records- Confidentiality - Exceptions - Penalty</p> <p>N.D. Cent. Code § 14-07.1-18 (1993)</p>	<p>The North Dakota statute provides a qualified privilege if the victim does not consent to disclosure.</p>	<p>All agents, employees, and volunteers participating in a domestic violence or sexual assault program shall maintain the confidentiality of the name, address, telephone number, personally identifying information, and case file or history of any client receiving services from a domestic violence or sexual assault program.</p>	<p>The information may not be disclosed unless (1) the client consents to release; (2) the agent, employee or volunteer determines that disclosure of the information is necessary for the efficient and safe operation of the program, the safety of an employee, agent, volunteer or client of the program or for the protection of a third party in need of protection, (3) a court of competent jurisdiction orders the disclosure after an in camera review and a written finding by the court that the information directly and specifically relates to a determination of child abuse and neglect or termination of parental rights; (4) an agent, employee or volunteer working with a domestic violence or sexual assault program has knowledge or reasonable cause to suspect a child has been abused or neglected.</p>	
Ohio				
Oklahoma				
Oregon				

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Pennsylvania</p> <p><i>Confidential Communications to Sexual Assault Counselors</i> 42 PA. CMB. STAT. § 5945.1 (1995)</p> <p>S.B. 965 was introduced in April 1995 and referred to the Judiciary Committee. Section 510(2) of the bill states that no coparticipant (a victim participating in group counseling) who is present during counseling may disclose a victim's confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.</p>	<p>The Pennsylvania statute provides an absolute privilege if the victim does not consent to disclosure.</p> <p><i>Commonwealth v. Wilson</i>, 602 A.2d 1290 (Pa. 1992), <u>cert. denied</u>, 504 U.S. 977 (1992) (Statutory privilege is absolute and does not violate defendants' constitutional rights; defendant cannot discover such privileged communications absent consent of holder of privilege; privilege applies to production of documents as well as to testimony of counselors; legislative history demonstrates clearly that statute was intended to remedy what legislature perceived as grave injustice committed against those who were forced by economic necessity to seek counseling from public center rather than private therapist.)</p> <p><i>Commonwealth v. Gibbs</i>, 642 A.2d 1132 (Pa. 1994) (court stated ordinarily "a criminal defendant's confrontation and compulsory process rights under the Pennsylvania Constitution must yield to the [statutory] privilege. The rationale underlying [the court's] conclusion [that the communications remain confidential] is that the legislature, by enacting that provision, has acknowledged the significance of the interest which it addresses and decided to afford that interest protection.")</p>	<p>A sexual assault counselor has a privilege not to be examined as a witness in any civil or criminal proceeding without the prior written consent of the victim being counseled by the counselor as to any confidential communication made by the victim or made in the course of the consultation as to any advice, report or working paper given or made during consultation.</p>	<p>A sexual assault counselor is a person who works at a rape crisis center and has undergone 40 hours of training and is under the control of a direct services supervisor of a rape crisis center whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.</p> <p>A confidential communication is information transmitted between a victim and sexual assault counselor in the course of the relationship</p>	<p>The victim is the holder.</p>

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Pennsylvania</p> <p><i>Domestic Relations; Protection from Abuse</i></p> <p><i>Confidentiality</i></p> <p>23 PA. CONS. STAT. § 6116 (1995)</p>	<p>The Pennsylvania statute provides an absolute privilege.</p>	<p>Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a co-participant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of victim. Neither the domestic violence counselor/advocate nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual assault relating to child protective services, a Federal or State mandatory reporting statute or a local mandatory reporting ordinance.</p>	<p>A domestic violence counselor/advocate is an individual who is engaged in a domestic violence program, the primary purpose of which is the rendering of counseling or assistance to victims of domestic violence, and who has undergone 40 hours of training.</p> <p>Confidential communications means all information, whether written or spoken, transmitted between a victim and a domestic violence counselor or advocate in the course of the relationship. The term includes information received or given by the domestic violence counselor or advocate in the course of the relationship, as well as advice, reports, statistical data, memoranda, or working papers, records given or made in the course of the relationship.</p>	
<p>Rhode Island</p>	<p><u>Advisory Opinion to the House of Representatives</u>, 469 A.2d 1161 (1983)(Absolute privilege for confidential communications between sexual assault counselor and sexual assault victim violates federal and state constitutional rights of accused to confront his or her accusers, to obtain compulsory process, and to offer testimony; privilege--which permits an <u>in camera</u> review of confidential communications if defense demonstrates that there is reason to believe that witness knows and/or material sought contains information which is relevant to material issue in case and admission of confidential communications evidence, which is clearly exculpatory in nature-- at trial is constitutional)</p> <p>The Rhode Island legislature has not enacted any laws concerning the confidentiality of rape crisis center counseling.</p>			
<p>South Carolina</p>				

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
South Dakota				
Tennessee Tenn. Code Ann. 63-22-114 (licensed professional counselor - client privilege)				
Texas	<p>In March, 1995, a House bill relating to the confidentiality of records which pertain to victims of family violence and sexual assault and a Senate bill relating to the certification of persons as advocates for victims of sexual assault and to confidential communications were introduced. The Senate bill relating to certification of sexual assault advocates and confidential communications has passed the Texas Senate and was reported favorably from the House Committee on Public Health. The House Bill on the confidentiality of records of family violence and sexual assault is pending in the House Committee on Juvenile Justice and Family Issues.</p>			

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Utah</p> <p><i>Confidential Communications for Sexual Assault Act</i> UTAH CODE ANN. §§78-3c-1 to 4 (1994)</p> <p>The purpose of the statute is "... to enhance and promote the mental, physical and emotional recovery of victims of sexual assault and to protect the information given by victims to sexual assault counselors from being disclosed."</p> <p>UTAH CODE ANN. § 78-24-8(6) (1995) states that there are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore a person cannot be examined as a witness in the following cases: ... A sexual assault counselor as defined in Section 78-3c-3 cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential communication as defined in Section 78-3c-3 made by the victim."</p>	<p>The Utah statute provides a semi-absolute privilege if the victim does not consent to disclosure.</p>	<p>Confidential communications are available to a third person when one of the following conditions is met: (1) the victim is a minor and the counselor believes it is in the best interest of the victim to disclose the communication to the victim's parents, (2) the victim is a minor and the minor's parents/guardians have consented to disclosure to a third party based upon representations by the counselor that disclosure is in the best interest of the minor victim, (3) the victim is not a minor, has given consent, and the counselor believes the disclosure is necessary to accomplish the desired result of counseling, or (4) the counselor has an obligation under the Child Abuse Reporting statute to report information transmitted in the confidential communication.</p>	<p>A counselor is a person who is employed or volunteers at a rape crisis center, has a minimum of 40 hours of training in counseling and assisting victims of sexual assault and is under the supervision of the director or designee of a rape crisis center.</p> <p>A confidential communication is information given to a sexual assault counselor by a victim and includes reports and working papers made in the course of the counseling relationship.</p>	
<p>Vermont</p> <p><i>Victim and crisis worker privilege</i> VT. STAT. ANN., tit. 12, § 1614 (1994)</p>	<p>The Vermont statute provides an absolute privilege if the victim does not consent to disclosure.</p>	<p>A victim receiving direct services from a crisis worker has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by the victim to the crisis worker, including any record made in the course of providing support, counseling or assistance to the victim. The crisis worker shall be presumed to have authority to claim the privilege but only on behalf of the victim.</p>	<p>A crisis worker means an employee or volunteer who provides direct services to victims of abuse or sexual assault for a domestic violence program or sexual assault crisis center program incorporated or organized for the purpose of providing assistance, counseling or support services, has undergone 20 hours of training, works under the direction of a supervisor of the program and is certified by the director of the program.</p> <p>A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of services to the victim or those reasonably necessary for the transmission of the communication.</p>	

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Virginia</p> <p>Washington</p> <p><i>Victims of Sexual Assault Act</i> <i>Records of rape crisis centers not available as part of discovery - Exceptions</i> WASH. REV. CODE § 70.125.065 (1994)</p>	<p>The Washington statute provides a qualified privilege.</p> <p><i>State v. Kalabosky</i>, 852 P.2d 1064 (Wash. 1993) (Court need not conduct <u>in camera</u> review of records of rape crisis center to determine whether they are discoverable under state statute absent a particularized factual showing by defendant that such records are likely to contain material relevant to defense)</p> <p><i>State v. Ahlfinger</i>, 749 P.2d 190 (Wash. 1988) (Defendant was not entitled to disclosure of rape crisis center report used by witness to refresh his memory where trial court had determined that report contained little information, none of which was inconsistent with testimony of witness or victim; because state amendment right to cross-examine witnesses is not absolute, and because state has legitimate interest in protecting privacy rights of rape victims, state may limit right of cross-examination of witnesses accordingly. Applying balancing test, court found that state's interest in victim's right of privacy is compelling when compared to minimal limitation placed on defendant's right of confrontation)</p>	<p>The records maintained by rape crisis centers shall not be made available to any defense attorney as part of discovery in a sexual assault case unless disclosure is ordered by the court.</p>	<p>A counselor is a victim advocate who has completed a training program either through a criminal justice training program or at the election of the rape crisis center, a training program to be designed and administered by the Washington association of prosecuting attorneys and Washington Coalition of sexual assault programs.</p>	<p>A defendant may have access to rape crisis records by filing a written pretrial motion accompanied by an affidavit setting forth the reasons for the discovery request. The court will review the rape crisis center's records <u>in camera</u> to determine whether the records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records to the defendant. The court will enter an order stating whether the records or any part of the records are discoverable and setting forth the basis for the court's findings.</p> <p>The statute does not state who holds the privilege.</p>
<p>West Virginia</p>				
<p>Wisconsin</p> <p>Wis. Stat. Ann. 905.04 (1995) (professional counselor - patient privilege)</p>	<p><i>State v. Spesse</i>, 528 N.W.2d 63 (Wis. 1995)</p> <p><i>State v. Shiffra</i>, 499 N.W.2d 719 (Wis. 1993) (When criminal defendant seeks access to privileged records, and makes preliminary showing that privileged information is material to defense, defendant is entitled to <u>in camera</u> inspection of records. If witness possessing the privilege refuses to consent to in camera inspection, trial court should suppress witness's testimony; defendant made required preliminary showing that access to psychiatric records may be necessary to fair determination of his guilt or innocence)</p>			

State	Summary	Privilege	Counselor / Communications	Limitations / Waiver
<p>Wyoming</p> <p><i>Confidential communications between family violence and sexual assault advocate and victim</i> WYO. STAT. § 1-12-116 (1995)</p>	<p>The Wyoming statute provides a semi-absolute privilege.</p>	<p>The Wyoming statute provides that a sexual assault advocate shall not testify at a civil, criminal legislative or administrative proceeding concerning a confidential communication made in the course of the counseling relationship.</p>	<p>An advocate is a family violence or sexual assault advocate who is employed by or volunteers services to any family violence and sexual assault program, is certified by the program as having undergone at least 40 hours of crisis advocacy training and whose work is directed and supervised under a family violence and sexual assault program.</p> <p>A confidential communication is information that is transmitted in confidence between a victim and an advocate and includes all information received and any report, working paper or document prepared by the advocate in the course of that relationship.</p>	<p>Evidence regarding a child in any judicial proceeding resulting from a report made pursuant to Title 14 shall not be excluded on the ground that it constitutes a privileged communication.</p> <p>The victim is the holder of the privilege.</p>
<p>District of Columbia</p> <p>D.C. CODE ANN. § 6-2001 et seq. (1994)</p>	<p>The District of Columbia statute provides a semi-absolute privilege. <i>In re T.M.</i>, 120 WLR 2541 (Super. Ct. 1992) (Where complainant sought counseling at rape crisis center not as result of generalized mental health condition, but rather specifically in connection with incident which formed basis for her petition, if records of her statements to center about incident as well as her sexual history, were subject to disclosure, there could be little doubt that her willingness to seek help from mental health professionals at center in future would have been chilled, and that others who have been victims of sexual offenses would be hesitant to go to center for help)</p>	<p>No mental health professional, mental health facility, data collector or employee or agent of a mental health professional, mental health facility or data collector shall disclose or permit the disclosure of mental health information to any person.</p>	<p>A mental health professional includes a rape crisis counselor or sexual abuse counselor who has undergone at least 40 hours of training and is under the supervision of a licensed social worker, nurse, psychiatrist, psychologist or psychotherapist.</p>	<p>The statute does not relieve counselors of the duty to report child abuse.</p>

**MODEL LEGISLATION
AND
SECTION-BY-SECTION ANALYSIS**

MODEL LEGISLATION

Absolute Privilege

Section 100 Findings and Purpose

The legislature and people of this State declare that the purpose of this Act is to extend to all victims of sexual assault and domestic violence a testimonial privilege encompassing the contents of confidential communications with a victim counselor and to render immune from discovery or legal process the records of such communications maintained by the victim counselor. 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. Because of the fear and stigma that often results from crimes of sexual assault or domestic violence and because of the risk of retaliatory violence by the perpetrator, many victims hesitate to seek help even where it is available at no cost to them. 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. As a result, victims may fail to receive needed vital care and counseling and thus, lack the support, resources, and information necessary to recover from the crime, to report the crime, to assist in the prosecution of the crime, to participate effectively in the justice system, to achieve legal protections and to prevent future crimes of sexual assault and domestic violence.

Section 101 Short Title

This Act shall be known and may be cited as the "Victim/ Victim Counselor Confidentiality Act."

Section 102 Definitions

As used in this Act the following words and phrases shall have the meanings given in this section:

- (A) "Confidential communication." Any information, whether written or spoken, which is transmitted between a victim of sexual assault or domestic violence 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. The term includes all information received by, and any advice, report, record, notes, correspondence, memoranda or working paper given or prepared by, such victim counselor or victim in the course of the relationship with the victim which contain opinions, theories or other information made while counseling the victim or that is based on the communication between the victim and the victim counselor.
- (B) "Domestic Violence."
[as defined by state law]
- (C) "Sexual Assault."
[as defined by state law, or an identification of specific crimes]
- (D) "Victim." A person who consults a victim counselor for the purpose of securing advice, counseling, information, support, or assistance in connection with the commission or

attempted commission (or alleged commission or alleged attempted commission) of sexual assault or domestic violence against the person.

- (E) "Victim Counseling Center." Any publicly or privately funded office, agency, center, shelter, or program whose primary purpose is to provide services to sexual assault or domestic violence victims, except those affiliated with a law enforcement agency or the office of a prosecutor.
- (F) "Victim Counselor." Any employee, consultant or supervised volunteer of a victim counseling center, as defined under this section, (1) who has successfully completed _____ hours of training; (2) who renders advice, counseling, information, support or assistance to victims of sexual assault or domestic violence; and (3) who is not affiliated with a law enforcement agency or prosecutor's office.

OPTION 1 Sections 103-105 re: Privilege, Scope and Waiver - Victim as Privilege Holder

Section 103 Privilege.

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.

Section 104 Scope and Application

- (A) This Act does not relieve a victim counselor of any duty to report suspected child abuse or neglect as required by [state statute] or other legal duty to report a criminal or unlawful act.
- (B) A victim counselor may disclose confidential communications to the extent necessary to prevent future criminal or unlawful acts or to disclose the commission of, or intent to commit, perjury.
- (C) If a victim brings suit against a victim counselor or the victim counseling center at which the victim counselor was employed or served as a consultant or volunteer at the time of the counseling relationship, the victim counselor may disclose confidential communications with the victim to the extent that the court determines that they are relevant to the lawsuit.
- (D) The privilege afforded by this Act terminates upon the death of the victim.

Section 105 Waiver of Protection

- (A) A victim does not waive the protections afforded by this Act by testifying in court or other proceeding.
 - (1) 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 of section 103 be waived, to the extent they apply to that portion of the communication.

- (2) Any such disclosure ordered by the court or hearing officer shall apply only to the extent necessary to require any witness to respond to questions concerning the confidential communications that were disclosed and only to the extent that they are relevant to the facts and circumstances of the case.
- (B) A victim counselor cannot waive the protections afforded to a victim except as specified in this Act.
- (C) A victim may waive the privilege afforded by this Act in a signed writing prior to testimony or disclosure.]

OR

IOPTION 2 Sections 103-105 re: Privilege, Scope and Waiver- Victim and Counselor as Independent Privilege Holders

Section 103 Privilege.

A victim or victim counselor cannot be compelled to disclose confidential communications between a victim and a victim counselor through the giving of testimony or by other means, for any purpose in any criminal, civil, legislative, administrative, or other proceeding.

Section 104 Scope and Application

- (A) This Act does not relieve a victim counselor of any duty to report suspected child abuse, or neglect as required by [state statute], or other legal duty to report a criminal or unlawful act.
- (B) The privilege afforded by this Act terminates upon the death of the victim.

Section 105 Waiver of Protection

- (A) A victim does not waive the protections afforded by this Act by testifying in court or other proceeding.
- (1) 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 of section 103 be waived, to the extent they apply to that portion of the communication.
- (2) Any such disclosure ordered by the court or hearing officer shall apply only to the extent necessary to require any witness to respond to questions concerning the confidential communications that were disclosed and only to the extent that they are relevant to the facts and circumstances of the case.
- (B) A victim may waive the privilege afforded by this Act in a signed writing prior to testimony or disclosure.]

Section 106

Minor or Incapacitated Victim

A custodial guardian or guardian ad litem, who is not accused of the sexual assault or domestic violence at issue, may assert or waive, on behalf of a victim who is a minor or is incapacitated, the privilege afforded by this Act.

Qualified Privilege

Section 100 Findings and Purpose

The legislature and people of this State declare that the purpose of this Act is to extend to all victims of sexual assault and domestic violence a testimonial privilege encompassing the contents of confidential communications with a victim counselor and to render immune from discovery or legal process the records of such communications maintained by the victim counselor. 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. Because of the fear and stigma that often results from crimes of sexual assault or domestic violence and because of the risk of retaliatory violence by the perpetrator, many victims hesitate to seek help even where it is available at no cost to them. 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. As a result, victims may fail to receive needed vital care and counseling and thus, lack the support, resources, and information necessary to recover from the crime, to report the crime, to assist in the prosecution of the crime, to participate effectively in the justice system, to achieve legal protections, and to prevent future crimes of sexual assault and domestic violence. A qualified privilege recognizes a victim's need for confidentiality of communications made by a victim to a victim counselor and ensures the protection of such information while permitting disclosure in certain circumstances based on an adequate showing of the need for such disclosure.

Section 101 Short Title

This Act shall be known and may be cited as the "Victim/Victim Counselor Confidentiality Act."

Section 102 Definitions

As used in this Act the following words and phrases shall have the meanings given in this section:

- (A) "Confidential communication." Any information, whether written or spoken, which is transmitted between a victim of sexual assault or domestic violence 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. The term includes all information received by, and any advice, report, record, notes, correspondence, memoranda or working paper given or prepared by, such victim counselor or victim in the course of the relationship with the victim which contain opinions, theories or other information made while counseling the victim or that is based on the communication between the victim and the victim counselor.
- (B) "Domestic Violence." [as defined by state law]
- (C) "Sexual Assault." [as defined by state law, or an identification of specific crimes]
- (D) "Victim." A person who consults a victim counselor for the purpose of securing advice,

counseling, information, support, or assistance in connection with the commission or attempted commission (or alleged commission or alleged attempted commission) of sexual assault or domestic violence against the person.

- (E) "Victim Counseling Center." Any publicly or privately funded office, agency, center, shelter, or program whose primary purpose is to provide services to sexual assault or domestic violence victims, except those affiliated with a law enforcement agency or the office of a prosecutor.
- (F) "Victim Counselor." Any employee, consultant or supervised volunteer of a victim counseling center, as defined under this section, who (1) has successfully completed _____ hours of training; (2) who renders advice, counseling, information, support or assistance to victims of sexual assault or domestic violence; and (3) who is not affiliated with a law enforcement agency or prosecutor's office.

OPTION 1 Sections 103-105 re: Privilege, Scope and Waiver - Victim as Privilege Holder

Section 103 Privilege.

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 except as otherwise provided by this Act. Such confidential communication may be disclosed by a person other than the victim only with the prior written consent of the victim.

Section 104 Scope and Application

- (A) This Act does not relieve a victim counselor of any duty to report suspected child abuse or neglect as required by [state statute] or other legal duty to report a criminal or unlawful act.
- (B) A victim counselor may disclose confidential communications to the extent necessary to prevent future criminal or unlawful acts or to disclose the commission of, or intent to commit, perjury.
- (C) If a victim brings suit against a victim counselor or the victim counseling center at which the victim counselor was employed or served as a consultant or volunteer at the time of the counseling relationship, the victim counselor may disclose confidential communications with the victim to the extent that the court determines that they are relevant to the lawsuit.
- (D) The privilege afforded by this Act terminates upon the death of the victim.

Section 105 Waiver of Protection

- (A) A victim does not waive the protections afforded by this Act by testifying in court or other proceeding.
 - (1) 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 of section 103 be waived, to the extent they apply to that portion of the communication.

- (2) Any such disclosure ordered by the court or hearing officer shall apply only to the extent necessary to require any witness to respond to questions concerning the confidential communications that were disclosed and only to the extent that they are relevant to the facts and circumstances of the case.
- (B) A victim counselor cannot waive the protections afforded to a victim except as specified in this Act.
 - (C) A victim may waive the privilege afforded by this Act in a signed writing prior to testimony or disclosure.]

OR

OPTION 2 Sections 103-105 re: Privilege, Scope and Waiver - Victim and Victim Counselor as Independent Privilege Holders

Section 103 Privilege.

A victim or victim counselor cannot be compelled to disclose confidential communications between a victim and a victim counselor through the giving of testimony or by other means, for any purpose in any criminal, civil, legislative, administrative, or other proceeding, except as provided by this Act.

Section 104 Scope and Application

- (A) This Act does not relieve a victim counselor of any duty to report suspected child abuse or neglect as required by [state statute] or other legal duty to report a criminal or unlawful act.
- (B) The privilege afforded by this Act terminates upon the death of the victim.

Section 105 Waiver of Protection

- (A) A victim does not waive the protections afforded by this Act by testifying in court or other proceeding.
 - (1) 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 of section 103 be waived, to the extent they apply to that portion of the communication.
 - (2) Any such disclosure ordered by the court or hearing officer shall apply only to the extent necessary to require any witness to respond to questions concerning the confidential communications that were disclosed and only to the extent that they are relevant to the facts and circumstances of the case.
- (B) A victim may waive the privilege afforded by this Act in a signed writing prior to testimony or disclosure.]

Section 106 Confidential Communications Between a Victim and a Victim Counselor Shall Not be Disclosed - Exceptions

Confidential communications shall not be disclosed in a criminal, civil, administrative, legislative or other proceeding, except in conformity with the following standards and procedures:

- (A) The party seeking disclosure of the confidential communication must file a motion that sets forth specifically the issues on which disclosure is sought and enumerates the reasons why the party is seeking disclosure and why disclosure is necessary, accompanied by an affidavit or affidavits containing specific information which establishes that the confidential communication constitutes relevant and material evidence in the case.

OPTION 1 Subsection B - SHOWING OF CONSTITUTIONAL VIOLATION

- (B) If the party seeking disclosure has complied with subsection (A), the court or hearing officer shall review the confidential communication in camera and out of the presence and hearing of all persons, except the victim, the victim counselor, and any other persons the victim is willing to have present, to determine whether a failure to disclose the confidential communication would violate a constitutional right of the person seeking disclosure.]

OR

OPTION 2 Subsection B - BALANCING TEST

- (B) If the party seeking disclosure has complied with subsection (A), the court or hearing officer shall review the confidential communication in camera and out of the presence and hearing of all persons, except the victim, the victim counselor, and any other persons the victim is willing to have present, to determine:
- (1) whether the confidential communication is relevant and material evidence in the case;
 - (2) whether the probative value of the confidential communication outweighs the victim's privacy interest in the confidentiality of such communication, the further trauma that may be inflicted upon the victim, and the adverse effect on the counseling relationship, the victim counseling community, and counseling services that would result from the disclosure of the confidential communication; and
 - (3) whether the information cannot be obtained by reasonable means from any other source;]

(C) In ruling on a motion, the court or hearing officer shall adhere to the following:

- (1) If the court or hearing officer determines under the standard set forth in subsection (B) on the basis of an in camera review under subsection (B) that the information is privileged and not subject to compelled disclosure, the information shall not be disclosed.
- (2) If the court or hearing officer determines under the standard set forth in subsection (B) on the basis of an in camera review under subsection (B) that certain information may be subject to disclosure, the court or hearing officer shall so inform the counsel for the parties and shall order a subsequent hearing out of the presence of the jury, if any, at which the counsel for the parties shall be allowed to examine the counselor regarding the confidential communication or review the confidential communication which may be subject to disclosure.

(D) At the conclusion of a hearing under subsection (C)(2), the court or hearing officer shall determine which information, if any, shall be disclosed and may enter an order describing the evidence which may be introduced by the moving party, prescribing the line of questioning which may be permitted, limiting the circulation of such information, and prohibiting the copying or other reproduction of any such information. The moving party may then offer evidence pursuant to the court or the hearing officer's order.

Section 107 Minor or Incapacitated Victim

A custodial guardian or guardian ad litem, who is not accused of the sexual assault or domestic violence at issue, may assert or waive, on behalf of a victim who is a minor or is incapacitated, the protections afforded by this Act.

SECTION BY SECTION ANALYSIS OF MODEL LEGISLATION

The model legislation regarding victim-counselor confidentiality in this report incorporates two sets of provisions: a set of provisions creating an absolute privilege for confidential communications between counselors and victims of sexual assault or domestic violence, and a set of provisions creating a qualified privilege for confidential communications between counselors and such victims.

The absolute privilege provisions provide the greatest possible degree of protection for confidential communications. These provisions incorporate sub-options for (1) giving the victim and the counselor independent authority to make decisions concerning disclosure of the contents of confidential communications (the "independent privilege holders" approach), or (2) vesting exclusive control over the disclosure of such information in the victim (the "victim as privilege holder" approach). The rationale and implications of these alternative approaches are more fully explained in the ensuing analysis.

The qualified privilege provisions may provide the greatest degree of protection for confidential communications that can be achieved in jurisdictions in which constitutional constraints preclude adoption of an absolute privilege. These provisions as well are drafted to incorporate alternative sub-options for the "independent privilege holders" and "victim as privilege holder" approaches. They also incorporate alternative options concerning the standard to be applied by the court or hearing officer in deciding whether information must be disclosed under a qualified privilege approach.

I. THE ABSOLUTE PRIVILEGE PROVISIONS

SEC. 100 -- FINDINGS AND PURPOSE

This section identifies the factual basis and objectives of the model legislation. The section states that the purpose of the legislation is to create a privilege encompassing the contents of confidential communications between victims of sexual assault and domestic violence and victim counselors. In the absence of such a privilege, the reluctance of victims to seek counseling, confide openly to their counselors, and explore legal and social remedies fully will be aggravated. When this occurs, victims may lack the psychological support and information necessary to recover from the crime, to report the crime, to assist in prosecution and effectively participate in the justice system, and to achieve legal protection and prevent future crimes.

SEC. 101 -- SHORT TITLE

This section designates the model Act as the "Victim/Victim Counselor Confidentiality Act."

SEC. 102 -- DEFINITIONS

This section provides definitions for key terms used in the model legislation.

"Confidential communication" is defined to include any information, whether written or spoken, which is transmitted between a victim of sexual assault or domestic violence 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. The definition also encompasses all records, reports, and documents, regardless of form, that are generated in the course of the counseling relationship and contain opinions, theories, or other information made while counseling the victim or that are based on the communication between the victim and the counselor.

"Domestic violence" is to be defined as provided by the law of the particular state. Likewise, "sexual assault" is to be defined as provided by state law, or through an identification of specific state offenses.

"Victim" is defined as a person who consults a counselor for the purpose of securing advice, counseling, information, support, or assistance in connection with the commission or attempted commission (or alleged commission or attempted commission) of sexual assault or domestic violence against the person. This definition addresses the reason the person seeks counseling rather than the charges against a defendant. A victim who seeks counseling in connection with (actual or alleged) sexual assault or domestic violence should be able to assert the privilege whether or not the state brings a prosecution.

"Victim counseling center" is defined to include any type of publicly or privately funded entity whose primary purpose is to provide services to sexual assault or domestic violence victims. However, entities affiliated with law enforcement agencies and prosecutors' offices are excluded because of the constitutional requirements relating to disclosure by the prosecution of exculpatory evidence to the defendant in criminal cases.

"Victim counselor" is defined to include any employee, consultant, or supervised volunteer of a victim counseling center who (1) has successfully completed the amount of training required for such counselors by state law, (2) provides advice, counseling, information, support, or assistance to victims of sexual assault or domestic violence, and (3) is not affiliated with a law enforcement agency or prosecutor's office.

SEC. 103-05 -- OPTION 1 -- PRIVILEGE, SCOPE, AND WAIVER (VICTIM AS PRIVILEGE HOLDER)

Under this option, sections 103-05 establish an absolute privilege with the victim as the sole privilege holder. The counselor would be prohibited from disclosing the contents of confidential communications without the consent of the victim, subject to certain narrow exceptions set out in the legislation.

Section 103 in this option provides that the victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications in any proceeding. Disclosure of such information by a person other than the victim would require the prior written consent of the victim.

Section 104 provides, in part, that the Act does not trump any duty to report suspected child abuse or neglect as required by state law or other legal duties to report criminal or unlawful acts, and that the privilege terminates if the victim dies. It further specifies that a victim counselor may disclose confidential communications to the extent necessary to prevent future criminal or unlawful acts, to disclose the commission or intended commission of perjury, or to meet a lawsuit brought by the victim against the counselor or victim counseling center.

Section 105 provides that the victim does not waive the privilege by testifying. However, in cases where the victim intentionally partially discloses the contents of a confidential communication in the course of testifying, the court or hearing officer would have the authority, as justice requires, to waive the protections of section 103 in relation to the disclosed portion of the communication. Any such disclosure would apply only to the extent necessary to have witnesses respond to questions concerning the confidential communications that were disclosed and only to the extent relevant to the facts and circumstances of the case. The section further provides that a victim may waive the privilege in a signed writing prior to testimony or disclosure and includes a specific provision that the victim counselor cannot waive the protections afforded to the victim except as specified in the Act.

SEC. 103-05 -- OPTION 2 -- PRIVILEGE, SCOPE, AND WAIVER (VICTIM AND COUNSELOR AS INDEPENDENT PRIVILEGE HOLDERS)

Under this option, sections 103-05 establish an absolute privilege with the victim and counselor as "independent privilege holders." In other words, neither the counselor nor the victim can be required to disclose confidential communications, but each is legally free to do so. This means, in particular, that the victim does not have the legal authority to prevent the counselor from making such disclosures.

This approach obviates the need to identify and enumerate specific circumstances in which the counselor is justified in making disclosures despite a general requirement of confidentiality -- such as situations in which the victim discloses to the counselor the intention to commit a serious crime, or in which the counselor becomes aware that the victim has committed perjury, or in which disclosure is necessary for reasons of self-defense because the victim is suing the counselor.

Because the counselor has discretion to make disclosures under this approach, there is no need to specify or define the contours of such exceptions as legal standards. At the same time, this approach may not carry any unacceptable cost to the integrity of the counseling relationship, because the counselor can honestly assure the victim that no one can compel the counselor to disclose matters confided in the course of the counseling relationship.

Section 103 provides specifically that neither the victim nor the victim counselor can be compelled to disclose confidential communications for any purpose in any type of proceeding.

Section 104 provides that the model Act does not trump any duty to report suspected child abuse or neglect as required by state law or other legal duties to report criminal or unlawful acts. It further provides that the privilege terminates if the victim dies.

Section 105 provides that the victim does not waive the privilege by testifying and is generally as described earlier.

SECTION 106 -- MINOR OR INCAPACITATED VICTIM

This section provides that a guardian who is not accused of the sexual assault or domestic violence at issue may assert or waive the privilege created by the Act on behalf of a minor or incapacitated victim.

II. THE QUALIFIED PRIVILEGE PROVISIONS

SECTIONS 100-03 -- FINDINGS AND PURPOSE, SHORT TITLE, DEFINITIONS

These sections identify the factual basis and objectives of the model legislation, designate the Act as the "Victim/Victim Counselor Confidentiality Act," and define key terms used in the Act. They are generally the same as the corresponding sections in the absolute privilege provisions (described above).

SECTIONS 103-05 -- PRIVILEGE, SCOPE, WAIVER

These sections establish a qualified privilege for confidential communications, and identify certain limitations of scope and conditions for waiver of the privilege. They are essentially the same as the corresponding sections in the absolute privilege provisions, except that they recognize that disclosure will be allowed in certain circumstances "as . . . provided by this Act" -- referring to the qualified nature of the privilege created by the provisions in this part, as spelled out in section 106 (see discussion below).

SECTION 106 -- CONFIDENTIAL COMMUNICATIONS SHALL NOT BE DISCLOSED-EXCEPTIONS

This section provides that confidential communications generally shall not be disclosed in a proceeding, but specifies standards and procedures for disclosing such communications in certain circumstances, notwithstanding a lack of consent by the victim. This defines the "qualified" nature of the privilege created by these provisions, and distinguishes them from the absolute privilege statute discussed earlier.

Subsection (A) prescribes threshold conditions that a party must meet before the court or hearing officer will review confidential communications to determine whether they should be disclosed. The party seeking disclosure must file a motion setting forth specifically the issues on which disclosure is sought and enumerating the reasons why the party is seeking disclosure and why disclosure is necessary. The motion must be accompanied by an affidavit or affidavits containing specific information which establishes that the confidential communication constitutes relevant and material evidence in the case.

Subsection (B) directs the court or hearing officer to review the confidential communication in camera -- with participation limited to the victim, victim counselor, and other persons the victim is willing to have present -- if the party seeking disclosure has made the showing of materiality and satisfied the other conditions set out in subsection (A). The model legislation provides two options concerning the standard to be applied in this review:

Under the first option, the court or hearing officer would review the confidential communication to determine whether a failure to disclose it would violate a constitutional right of the person seeking disclosure. Under this standard, the possibility of admission would generally be limited to circumstances in which the confidential communication is of such consequence to an accurate decision of the case that a failure to admit it would render the proceeding fundamentally unfair and constitute a denial of due process.

Under the second option, the court or hearing officer would engage in a determination involving a balancing of interests. To support admission, the court or hearing officer would have to verify that the confidential communication is relevant and material evidence, and that the information cannot be obtained by reasonable means from any other source. The court or hearing officer would also have to determine that the probative value of the confidential communication outweighs the victim's privacy interest, the further trauma that may be inflicted on the victim, and the adverse effect on the counseling relationship, the counseling community, and counseling services resulting from disclosure of the communication.

Subsection (C) governs further procedure following an in camera review under subsection (B). If the court or hearing officer determined under the standard of subsection (B) on the basis of the in camera review that the information is privileged, then it would not be admitted and there would be no further process relating to that information. However, if the court or hearing officer determined under the standard of subsection (B) on the basis of the in camera review that certain information may be subject to disclosure, then a hearing would be required at which counsel for the parties would be provided access to the information. This provides a further safeguard against the unwarranted disclosure of confidential communications, by ensuring that such disclosure will not occur without affording counsel for the parties an opportunity to address the question whether admission is required under the standard of subsection (B).

Subsection (D) provides that after a hearing under subsection (C), the court or hearing officer would determine which information, if any, shall be disclosed. The court or hearing officer would be authorized to enter an order describing the evidence which may be introduced, describing the line of questioning which may be permitted, limiting circulation of the information, and prohibiting its copying or reproduction.

SECTION 107 -- MINOR OR INCAPACITATED VICTIM

This section, relating to assertion or waiver of the privilege on behalf of a minor or incapacitated victim by a guardian, is the same as the corresponding section (section 106) in the absolute privilege provisions.