

52:4B-11

12/29/87

LEGISLATIVE HISTORY CHECKLIST

**NJSA:** 52:4B-11, 2A:84A-22.13 (Crime victim counselors-- establish  
2A: 84A-22.16 privileged communication)

**LAWS OF:** 1987

**CHAPTER:** 169

**Bill No:** A1395/A3274

**Sponsor(s):** Doyle

**Date Introduced:** Pre-filed

**Committee:** **Assembly:** Judiciary

**Senate:** Judiciary

**Amended during passage:** No Assembly Committee Substitute enacted.

**Date of Passage:** **Assembly:** February 5, 1987

**Senate:** May 18, 1987

**Date of Approval:** July 8, 1987

**Following statements are attached if available:**

**Sponsor statement:** Yes

**Committee statement:** **Assembly** Yes

**Senate** Yes

**Fiscal Note:** No

**Veto Message:** No

**Message on Signing:** No

**Following were printed:**

**Reports:** Yes

**Hearings:** No

PR40.8: U.S. President's Task Force on Victims of Crime  
Final report . . . December, 1982.

V66/F49 Washington, D.C., 1982.  
(see especially pp. 17, 20-21)

Model statute, mentioned in sponsor's statement-- attached.

7-8-87

ASSEMBLY COMMITTEE SUBSTITUTE FOR  
**ASSEMBLY Nos. 1395 and 3274**

**STATE OF NEW JERSEY**

ADOPTED JANUARY 8, 1987

By Assemblyman DOYLE

AN ACT concerning the confidentiality of communications with victim counselors and amending P. L. 1971, c. 317, supplementing Title 2A of the New Jersey Statutes, and repealing P. L. 1983, c. 116.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
 2 *of New Jersey:*

1 1. Section 11 of P. L. 1971, c. 317 (C. 52:4B-11) is amended to  
 2 read as follows:

3 11. The board may order the payment of compensation in accor-  
 4 dance with the provisions of this act for personal injury or death  
 5 which resulted from:

6 (a) an attempt to prevent the commission of crime or to arrest  
 7 a suspected criminal or in aiding or attempting to aid a police  
 8 officer so to do, or

9 (b) the commission or attempt to commit any of the following  
 10 offenses:

11 1. *aggravated* assault **[constituting a high misdemeanor]**;

12 2. mayhem;

13 3. threats to do bodily harm;

14 4. lewd, indecent, or obscene acts;

15 5. indecent act with children;

16 6. kidnapping;

17 7. murder;

18 8. manslaughter;

19 9. rape;

20 10. any other crime involving violence *including domestic vio-*  
 21 *lence as defined by section 3 of P. L. 1981, c. 426 (C. 2C:25-3);*

22 11. *burglary.*

**EXPLANATION**—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.  
 Matter printed in italics *thus* is new matter.

1 2. (New section) The Legislature finds and declares that:  
2 a. The emotional and psychological injuries that are inflicted on  
3 victims of violence are often more serious than the physical injuries  
4 suffered;  
5 b. Counseling is often a successful treatment to ease the real and  
6 profound psychological trauma experienced by these victims and  
7 their families;  
8 c. In the counseling process, victims of violence openly discuss  
9 their emotional reactions to the crime. These reactions are often  
10 highly intertwined with their personal histories and psychological  
11 profile;  
12 d. Counseling of violence and victims is most successful when  
13 the victims are assured their thoughts and feelings will remain  
14 confidential and will not be disclosed without their permission; and  
15 e. Confidentiality should be accorded all victims of violence who  
16 require counseling whether or not they are able to afford the ser-  
17 vices of private psychiatrists or psychologists.  
18 Therefore, it is the public policy of this State to extend a testi-  
19 monial privilege encompassing the contents of communications with  
20 a victim counselor and to render immune from discovery or legal  
21 process the records of these communications maintained by the  
22 counselor.

1 3. (New section) As used in this act:  
2 a. "Act of violence" means the commission or attempt to commit  
3 any of the offenses set forth in subsection b. of section 11 of P. L.  
4 1971, c. 317 (C. 52:4B-11).  
5 b. "Confidential communication" means any information ex-  
6 changed between a victim and a victim counselor in private or in  
7 the presence of a third party who is necessary to facilitate com-  
8 munication or further the counseling process and which is dis-  
9 closed in the course of the counselor's treatment of the victim for  
10 any emotional or psychological condition resulting from an act of  
11 violence. It includes any advice, report or working paper given  
12 or made in the course of the consultation and all information  
13 received by the victim counselor in the course of that relationship.  
14 c. "Victim" means a person who consults a counselor for the  
15 purpose of securing advice, counseling or assistance concerning a  
16 mental, physical or emotional condition caused by an act of violence.  
17 d. "Victim counseling center" means any office, institution, or  
18 center offering assistance to victims and their families through  
19 crisis intervention, medical and legal accompaniment and follow-up  
20 counseling.

21 e. "Victim counselor" means a person engaged in any office,  
 22 institution or center defined as a victim counseling center by this  
 23 act, who has undergone 40 hours of training and is under the control  
 24 of a direct services supervisor of the center and who has a primary  
 25 function of rendering advice, counseling or assisting victims of  
 26 acts of violence.

1 4. (New section) Subject to Rule 37 of the Rules of Evidence, a  
 2 victim counselor has a privilege not to be examined as a witness  
 3 in any civil or criminal proceeding with regard to any confidential  
 4 communication. The privilege shall be claimed by the counselor  
 5 unless otherwise instructed by prior written consent of the victim.  
 6 When a victim is incompetent or deceased consent to disclosure  
 7 may be given by the guardian, executor or administrator except  
 8 when the guardian, executor or administrator is the defendant or  
 9 has a relationship with the victim such that he has an interest in  
 10 the outcome of the proceeding. The privilege may be knowingly  
 11 waived by a juvenile. In any instance where the juvenile is, in the  
 12 opinion of the judge, incapable of knowing consent, the parent or  
 13 guardian of the juvenile may waive the privilege on behalf of the  
 14 juvenile, provided that the parent or guardian is not the defendant  
 15 and does not have a relationship with the defendant such that he  
 16 has an interest in the outcome of the proceeding. A victim counselor  
 17 or a victim cannot be compelled to provide testimony in any civil  
 18 or criminal proceeding that would identify the name, address,  
 19 location, or telephone number of a domestic violence shelter or any  
 20 other facility that provided temporary emergency shelter to the  
 21 victim of the offense or transaction that is the subject of the pro-  
 22 ceeding unless the facility is a party to the proceeding.

1 5. (New section) Nothing in this act shall be deemed to prevent  
 2 the disclosure to a defendant in a criminal action of statements or  
 3 information given by a victim to a county victim-witness coordina-  
 4 tor, where the disclosure of the statements or information is  
 5 required by the Constitution of this State or of the United States.

1 6. P. L. 1983, c. 116 (C. 2A:84A-22.11 et seq.) is repealed.

1 7. This act shall take effect immediately.

---

#### COURTS

Creates a testimonial privilege for victim counselors.

---

ASSEMBLY, No. 3274  
STATE OF NEW JERSEY

INTRODUCED OCTOBER 20, 1986

By Assemblymen ZIMMER, KAMIN and Girgenti

AN ACT concerning the confidentiality of communications with  
victim counselors and supplementing Title 2A of the New Jersey  
Statutes.

- 1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*
- 1 1. The Legislature finds and declares that:
- 2 a. The emotional and psychological injuries that are inflicted  
3 on victims of violence are often more serious than the physical  
4 injuries suffered;
- 5 b. Counseling is often a successful treatment to ease the real  
6 and profound psychological trauma experienced by these victims  
7 and their families;
- 8 c. In the counseling process, victims of violence openly discuss  
9 their emotional reactions to the crime. These reactions are often  
10 highly intertwined with their personal histories and psychological  
11 profile;
- 12 d. Counseling of violence and victims is most successful when  
13 the victims are assured their thoughts and feelings will remain  
14 confidential and will not be disclosed without their permission; and
- 15 e. Confidentiality should be accorded all victims of violence who  
16 require counseling whether or not they are able to afford the ser-  
17 vices of private psychiatrists or psychologists.
- 18 Therefore, it is the public policy of this State to extend a testi-  
19 monial privilege encompassing the contents of communications  
20 with a victim counselor and to render immune from discovery or

21 legal process the records of these communications maintained by  
22 the counselor.

1 2. As used in this act:

2 a. "Act of violence" means the commission or attempt to commit  
3 any of the offenses set forth in sub-section b. of section 11 of P. L.  
4 1971, c. 317 (C. 52:4B-11).

5 b. "Confidential communication" means any information ex-  
6 changed between a victim and a victim counselor in private or in  
7 the presence of a third party who is necessary to facilitate com-  
8 munication or further the counseling process and which is dis-  
9 closed in the course of the counselor's treatment of the victim for  
10 any emotional or psychological condition resulting from an act of  
11 violence. It includes any advice, report or working paper given  
12 or made in the course of the consultation and all information re-  
13 ceived by the victim counselor in the course of that relationship.

14 c. "Victim" means a person who consults a counselor for the  
15 purpose of securing advice, counseling or assistance concerning a  
16 mental, physical or emotional condition caused by an act of vio-  
17 lence.

18 d. "Victim counseling center" means any office, institution, or  
19 center offering assistance to victims and their families through  
20 crisis intervention, medical and legal accompaniment and follow-  
21 up counseling.

22 e. "Victim counselor" means a person engaged in any office,  
23 institution or center defined as a victim counseling center by this  
24 act, who has undergone 40 hours of training and is under the  
25 control of a direct services supervisor of the center and who has  
26 a primary function of rendering advice, counseling or assisting  
27 victims of acts of violence.

1 3. Subject to Rule 37 of the Rules of Evidence, a victim counselor  
2 has a privilege not to be examined as a witness in any civil or  
3 criminal proceeding with regard to any confidential communication.  
4 The privilege shall be claimed by the counselor unless otherwise  
5 instructed by prior written consent of the victim. When a victim  
6 is incompetent or deceased, consent to disclosure may be given  
7 by the guardian, executor or administrator. The privilege may  
8 be knowingly waived by a juvenile. In any instance where the  
9 juvenile is, in the opinion of the judge, incapable of knowing  
10 consent, the parent or guardian of the juvenile may waive the  
11 privilege on behalf of the juvenile, provided that the parent or  
12 guardian is not the defendant and does not have a relationship  
13 with the defendant such that he has an interest in the outcome of  
14 the proceeding.

1 4. This act shall take effect immediately.

A3274

STATEMENT

This bill creates a testimonial privilege for victim counselors. Presently, New Jersey extends this protection to sexual assault counselors.

This bill creates this same privilege for all counselors who assist victims of acts of violence. The draft is based in part on a model statute proposed by the U. S. Department of Justice in conjunction with the National Association of Attorneys General and the American Bar Association. The model statute was proposed to ensure that designated victim counseling is legally privileged and not subject to defense discovery or subpoena.

---

COURTS

Creates a testimonial privilege for victim counselors.

---

# ASSEMBLY, No. 1395

Introduced Pending Technical Review by Legislative Counsel  
PRE-FILED FOR INTRODUCTION IN THE 1986 SESSION

By Assemblyman DOYLE

# ASSEMBLY, No. 3853

# STATE OF NEW JERSEY

INTRODUCED JUNE 24, 1985

By Assemblyman FLYNN and Assemblywoman WALKER

AN ACT concerning confidential communications to victim counselors and supplementing Title 2A of the New Jersey Statutes.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. As used in this act:

2 a. "Confidential communication" means information transmitted  
3 between a victim and a victim counselor in the course of that  
4 relationship and in confidence by a means which, so far as the  
5 victim is aware, does not disclose the information to a third person  
6 other than those who are present to either further the interests  
7 of the victim or those to whom disclosure is reasonably necessary.  
8 The term includes all information received by the victim counselor  
9 in the course of that relationship.

10 b. "Victim" means a person who consults a victim counselor for  
11 the purpose of securing advice, counseling or assistance concerning  
12 a mental, physical or emotional condition caused by the act or  
13 omission of any other person which is within the description of  
14 the offenses listed in section 11 of P. L. 1971, c. 317 (C. 52:4B-11).

15 c. "Victim counselor" means a person who provides counseling  
16 to victims pursuant to the counseling service established by sec-  
17 tion 2 of P. L. 1982, c. 192 (C. 52:4B-25) or a person engaged in  
18 any other office, institution, or center established for providing  
19 similar services, who has a primary function of rendering advice,  
20 counseling or assistance to victims of crime.

1 2. Subject to Rule 37 of the Rules of Evidence, a victim coun-  
2 selor has a privilege not to be examined as a witness in any civil



3 or criminal proceeding with regard to any confidential communica  
4 tion. The privilege shall be claimed by the counselor unless other-  
5 wise instructed by prior written consent of the victim. When a  
6 victim is incompetent or deceased, consent to disclosure may be  
7 given by the guardian, executor or administrator. The privilege  
8 may be knowingly waived by a juvenile. In any instance where  
9 the juvenile is, in the opinion of the judge, incapable of knowing  
10 consent, the parent or guardian of the juvenile may waive the  
11 privilege on behalf of the juvenile, provided that the parent or  
12 guardian is not the defendant and does not have a relationship  
13 with the defendant such that he has an interest in the outcome of  
14 the proceeding.

1 3. This act shall take effect on the 60th day after enactment.

---

#### STATEMENT

This bill creates a privilege for victim counselors not to be examined in civil or criminal proceedings without the victim's prior written consent.

A person seeking counseling as the result of a traumatic, violent experience is more apt to be open and trusting knowing that confidences will not be revealed to others. Presently, New Jersey extends this privilege to sexual assault counselors. N. J. S. A. 2A:84A-22.11 et seq.

The President's Task Force on Victims of Crime has recommended that designated victim counseling be legally privileged and not subject to defense discovery or subpoena.

---

ASSEMBLY JUDICIARY COMMITTEE  
STATEMENT TO  
ASSEMBLY COMMITTEE SUBSTITUTE  
FOR  
ASSEMBLY BILL NOS. 1395/3274  
Dated: January 8, 1987

The Assembly Judiciary Committee reports favorably an Assembly Committee Substitute for Assembly Bill Nos. 1395/3274.

A-1395 and A-3274 create a testimonial privilege for victim counselors. Presently, the same privilege is provided to sexual assault counselors pursuant to N.J.S.A. 2A:84A-22.11 et seq.

These bills protect the confidential communications between victims and counselors who assist victims of acts of violence and provide that these counselors may not be examined as a witness in any civil or criminal proceeding with respect to any confidential communications. This privilege shall be claimed by the counselor unless otherwise instructed by prior written consent of the victim. If the victim is incompetent or deceased the guardian, executor or administrator of the estate may provide consent unless the guardian, executor or administrator is the defendant or has a relationship with the victim such that he has an interest in the outcome of the proceeding.

SENATE JUDICIARY COMMITTEE  
STATEMENT TO  
ASSEMBLY COMMITTEE SUBSTITUTE FOR  
**ASSEMBLY Nos. 1395 and 3274**

---

**STATE OF NEW JERSEY**

---

DATED: MAY 4, 1987

The Senate Judiciary Committee reports favorably Assembly Committee Substitute for Assembly Bill Nos. 1395 and 3274.

This bill would create a testimonial privilege for crime victim counselors. The bill would protect the confidential communications between victims and counselors who assist victims of acts of violence by providing that these counselors may not be examined as witnesses in any civil or criminal proceeding with respect to any confidential communications. The privilege must be claimed by the counselor unless instructed in writing by the victim.

The following is a list of major provisions found in the bill:

1. An amendment to the statute governing the Violent Crimes Compensation Board to provide that victims of domestic violence and burglary are eligible for compensation from the board.
2. Language indicating that a victim counselor or a victim cannot be compelled to provide testimony that would identify the name or location of a domestic violence shelter or other facility which provided emergency shelter to a victim.
3. A section providing that nothing in this act shall be deemed to prevent disclosure to a defendant in a criminal case of information given by a victim to a county victim-witness coordinator if such disclosure is constitutionally required.
4. A findings section which states the rationale for creation of the victim counselors privilege.
5. Repeal of N. J. S. A. 2A:84A-22.11 et seq. which presently provides a privilege for sexual assault counselors as the broader proposed victim counselor privilege would also cover rape counselors.

From President's Task Force  
on Victims of Crime.  
Final Report, December 1982.

17

---

## Recommendations for Federal and State Action

1. Legislation should be proposed and enacted to ensure that addresses of victims and witnesses are not made public or available to the defense, absent a clear need as determined by the court.
  2. Legislation should be proposed and enacted to ensure that designated victim counseling is legally privileged and not subject to defense discovery or subpoena.
  3. Legislation should be proposed and enacted to ensure that hearsay is admissible and sufficient in preliminary hearings, so that victims need not testify in person.
  4. Legislation should be proposed and enacted to amend the bail laws to accomplish the following:
    - a. Allow courts to deny bail to persons found by clear and convincing evidence to present a danger to the community;
    - b. Give the prosecution the right to expedited appeal of adverse bail determinations, analogous to the right presently held by the defendant;
    - c. Codify existing case law defining the authority of the court to detain defendants as to whom no conditions of release are adequate to ensure appearance at trial;
    - d. Reverse, in the case of serious crimes, any standard that presumptively favors release of convicted persons awaiting sentence or appealing their convictions;
    - e. Require defendants to refrain from criminal activity as a mandatory condition of release; and
    - f. Provide penalties for failing to appear while released on bond or personal recognizance that are more closely proportionate to the penalties for the offense with which the defendant was originally charged.
  5. Legislation should be proposed and enacted to abolish the exclusionary rule as it applies to Fourth Amendment issues.
-

*I was upset when I was asked about my new location where I lived, and when I had to give my children's names, the man who had caused these problems was sitting in the courtroom and I was telling him how he or someone else could find me.—a victim*

*This experience brought me closer to death than one could ever imagine, not only because of the gun, but because of the rape itself. I felt ashamed, and I thought I wanted to die. My heart felt like it was going to burst. Crying and talking with people I could trust helped to relieve the pressures. I needed to share feelings with people who would keep my secret for however long I needed them to.—a victim*

---

When victims or witnesses testify, they are frequently asked for their home address, sometimes by the prosecutor. Prosecutors should stop soliciting this sensitive information and should object to defense efforts to obtain it. Only when the defense is able to establish that the address is clearly relevant to credibility or to the facts of the case should the question be allowed.

**Executive and Legislative Recommendation 2:**  
**Legislation should be proposed and enacted to ensure that designated victim counseling is legally privileged and not subject to defense discovery or subpoena.**

A number of organizations and victim/witness units provide psychological crisis counseling to ease the real and profound psychological trauma of victimization. Since the development of rape crisis centers, the need for and benefits derived from counseling for rape victims has become well established. Testimony before the Task Force confirms that counseling is necessary for many violent crime victims as well as their families. Such counseling has proven extremely beneficial and should be strongly encouraged at all levels.

Although some centers have made psychiatrists or psychologists available, the vast majority of the work has been done by social workers, nurses, or by people who have been victims themselves. During the counseling process, victims speak of their fears and feelings arising from the crime; these reactions are often related to their personal history and psychological makeup.

Failure to extend confidentiality to crisis counseling incurs the risk of undermining the effectiveness of the counseling. Some victims who need this kind of help now fear to seek it. 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 opened to public scrutiny in a courtroom.

Statutes that were passed before the importance of victim counseling became recognized extend confidentiality only to counseling by psychologists and psychiatrists. These statutes protect only those who

---

---

can afford private treatment by these professionals; they do not shield the vast majority of victims.

At least one state has enacted a statute making rape victims' communications to counselors legally privileged.<sup>1</sup> While this is a step in the right direction, we believe that the privilege should encompass the counseling of all crime victims. Because of the responsibility of the prosecutor to afford discovery to the defendant, it is not contemplated that this counseling privilege extend to the prosecutor's office.

*It was a great relief to have someone to talk to, who would in no way pass onto others what I thought, felt, or did at that confusing time.—a victim*

**Executive and Legislative Recommendation 3:**

**Legislation should be proposed and enacted to ensure that hearsay is admissible and sufficient in preliminary hearings, so that victims need not testify in person.**

Victims of crime are frequently required to come to court time after time in connection with a single case. Separate appearances are often required for the initial charging of the case, preliminary hearing, and grand jury testimony, in addition to repeated appearances for pre-trial conferences and the trial itself. The penalty for the victim's failure to appear at any court proceeding is usually dismissal of the case.

Requiring the victim to appear and testify at a preliminary hearing is an enormous imposition that can be eliminated. A preliminary hearing, as used in this context, is an initial judicial examination into the facts and circumstances of a case to determine if sufficient evidence for further prosecution exists. It should not be a mini-trial, lasting hours, days, or even weeks, in which the victim has to relive his victimization. In some cases, the giving of such testimony is simply impossible within the time constraints imposed. Within a few days of the crime, some victims are still hospitalized or have been so traumatized that they are unable to speak about their experience. Because the victim cannot attend the hearing, it does not take place, and the defendant is often free to terrorize others.

It should be sufficient for this determination that the police officer or detective assigned to the case testify as to the facts, with the defendant possessing the right of cross-examination. The defendant's right to pre-trial discovery of the government's case outside the courtroom and pursuant to local rules would

---

## PRIVILEGED VICTIM/COUNSELOR COMMUNICATIONS

### President's Task Force Recommendation

Legislation should be proposed and enacted to ensure that designated victim counseling is legally privileged and not subject to defense discovery or subpoena.

### Proposed Legislation\*

#### SECTION 101. FINDINGS AND PURPOSE

A. The legislature and people of this State find and declare that:

1. The emotional and psychological injuries that are inflicted on victims of family violence and sexual assault are often more serious than the physical injuries suffered;
2. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families;
3. In the counseling process, victims of family violence and sexual assault openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;
4. Counseling of family violence and sexual assault victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and
5. Confidentiality should be accorded all victims of family violence and sexual assault who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.

B. Therefore, the legislature and people of this State declare the purpose of this Act is to extend to all victims of family violence and sexual assault a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of such communications maintained by the counselor.

---

\*Drafted with the assistance of the American Bar Association Criminal Justice Section Victim Witness Project.

SECTION 102. SHORT TITLE

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

SECTION 103. DEFINITIONS

As used in this Act, the following words and phrases shall have the meanings indicated, unless the context clearly indicates otherwise.

- A. Confidential Communication:  
Any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence.
- B. Family Violence:  
[As defined by state law.]
- C. Sexual Assault:  
[As defined by state law, or an enumeration of relevant crimes.]
- D. Victim:  
A person who consults a victim counselor for assistance in overcoming adverse emotional or psychological effects of a sexual assault or family violence.
- E. Victim Counseling:  
Assessment, diagnosis, and treatment to alleviate the adverse emotional or psychological impact of a sexual assault or family violence on the victim. Victim counseling includes, but is not limited to, crisis intervention.
- F. Victim Counseling Center:  
A private organization or unit of a government agency which has as one of its primary purposes the treatment of victims for any emotional or psychological condition resulting from a sexual assault or family violence.
- G. Victim Counselor:  
[Any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims who is not affiliated with a law enforcement agency or a prosecutor's office and who has successfully completed \_\_\_ hours of academic or other formal training or has had a minimum of \_\_\_ years of experience in providing victim counseling, and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence.]

or

[Any person not affiliated with a law enforcement agency or a prosecutor's office who meets such standards as may be set by the State for victim counselors.]



**SECTION 104. SCOPE AND APPLICATION**

[This Act shall not be construed to relieve victim counselors of any duty to report suspected child abuse or neglect required under \_\_\_\_\_ or any evidence that the victim is about to commit a crime.]

**SECTION 105. NO COMPULSORY DISCLOSURE OF COMMUNICATIONS**

- A. 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 cannot be compelled to give testimony or to produce records concerning confidential communications for any purpose in any criminal action, suit, or other judicial, legislative, or administrative proceeding.
- B. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

**SECTION 106. WAIVER**

- A. A victim does not waive the protections afforded by this Act by testifying in court about the crime.
  - 1. However, if the victim partially discloses the contents of a confidential communication in the course of testifying, then either party may request the court to rule that justice requires the protections of this Act be waived, to the extent they apply to that portion of the communication.
  - 2. Any waiver shall apply only to the extent necessary to require any witness to respond to counsel's questions concerning the confidential communication that are relevant to the facts and circumstances of the case.
- B. A victim counselor cannot waive the protections afforded to a victim under this Act. However, if a victim brings suit against a victim counselor or the agency, business, or organization in which the victim counselor was employed or served as a volunteer at the time of the counseling relationship and the suit alleges malpractice during the counseling relationship, the victim counselor may testify or produce records regarding confidential communications with the victim and is not liable for doing so.

C. Nothing in this Act shall be construed to limit any other testimonial privilege available to any person under the laws of this State.

## Commentary

The December 1982 Final Report of the President's Task Force on Victims of Crime recommended that legislation be enacted making designated victim counseling legally privileged and not subject to defense discovery or subpoena.

This legislation seeks to address this goal by creating a testimonial privilege for certain confidential communications between victims of sexual assault or family violence and their counselors. The privilege prevents either party in a criminal or civil case from compelling disclosure of the communications without the victim's consent.

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 family violence.

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 criminal proceedings. As pointed out by the President's Task Force on Victims of Crime, 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 may be subject to disclosure may avoid counseling altogether.

To further the truth-finding process, the general rule in American jurisprudence is that anyone called upon by either party in a case must testify as to any knowledge which may bear on the case. United States v. Nixon, 418 U.S. 683 (1974); United States v. Dionisio, 410 U.S. 1 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972). However, there are certain narrowly defined exceptions or "privileges" which exempt some information from this general rule. These include, for example, communications between attorneys and their clients, physicians and their patients, and priests and penitents.

John H. Wigmore, noted evidence scholar, has identified four elements necessary for establishing a privilege. These are: (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 society deems worthy of protecting; and (4) disclosure must injure the relationship more than it benefits the litigation. To determine the appropriateness of extending the testimonial privilege to the counselor-victim relationship, the relationship might therefore be examined in the light of these elements. See 8 Wigmore, Evidence section 2285 et. seq. (McNaughton Rev. 1961), and authorities cited therein.

Counselor-victim communications originate in confidence. Counseling generally takes place in private, one-on-one meetings between the counselor and victim. Some clients are informed that their communications will remain confidential; others assume such confidentiality.

Confidentiality is essential to the proper maintenance of the counselor-victim relationship. Counseling requires a trusting, supportive relationship to be effective, and confidentiality is an essential feature of this relationship. Without it, few victims would discuss fully sensitive and intimate matters essential for successful treatment.

The counselor-victim relationship is one society deems worthy of protection. At least 15 states already extend a privilege of confidentiality to sexual assault counselors and 6 to family violence counselors. Many states and local communities support counseling programs for crime victims. In addition to directly benefiting victims, these programs benefit society in terms of shorter-term welfare, disability, and unemployment payments to victims whose psychological injuries inhibit their return to a productive life. Other benefits result from increased victim participation and cooperation in reporting and prosecuting crime.

Disclosure injures the counselor-victim relationship more than it benefits litigation. On the one hand, the potential of disclosure is likely to deter victims from seeking assistance or from being as open with their counselors as effective counseling requires. The sense of betrayal of those victims who do undertake counseling and find their confidences subsequently disclosed by their counselors may negate or significantly set back their treatment. On the other hand, there is little relevant information which disclosure could produce. Much of the information counselors could provide would be hearsay and thus inadmissible as evidence. Moreover, since detailed factual information about the crime is generally not germane to the treatment process and is therefore not pursued during counseling, the counselor's knowledge about the facts and circumstances of the crime is likely to be incomplete and more reflective of the victim's fears than the realities of the situation. Finally, because the privilege only protects the communication of facts, but not the underlying facts, admissible evidence which the counselor could provide (e.g., independently observable facts) can usually be furnished by other witnesses. See Upjohn Co. v. United States, 449 U.S. 383 (1981).

Utilizing Dean Wigmore's test, therefore, considerable arguments can be made for protecting counselor-victim communications. In fact, in In the Matter of Pittsburgh Action Against Rape, 494 Pa. 15, 428 A.2d 126 (1981), the Supreme Court of Pennsylvania held that even absent a statutory privilege, rape crisis counselors have a testimonial privilege covering statements pertaining to the counseling function between the victim and the counselor. However, the opinion did not recognize as privileged verbatim statements of the complainant relating to facts of the rape, and provided for an in camera inspection of records by the trial court to determine specific information to be released. Finding this limited privilege too narrow, the Pennsylvania legislature responded by enacting 42 Pa. C.S.A. section 5945.1 to establish an absolute privilege, thereby eliminating the need for in camera inspections.

Other states have also found it advantageous to have a statutory privilege, rather than to rely on a judicially recognized privilege. (This is true even of states whose statutes provide only a limited privilege.) Whereas the judiciary must confine its

investigations to legal issues, the legislature is able to consider additional factors. Moreover, a legislative privilege removes the uncertainty surrounding a judge-made privilege. One court's extension of legal principles to a particular fact situation may not be found persuasive by other courts in different or even similar circumstances.

## SECTION 101. FINDINGS AND PURPOSE

A. The legislature and people of this State find and declare that:

1. The emotional and psychological injuries that are inflicted on victims of family violence and sexual assault are often more serious than the physical injuries suffered;
2. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families;
3. In the counseling process, victims of family violence and sexual assault openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;
4. Counseling of family violence and sexual assault victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and
5. Confidentiality should be accorded all victims of family violence and sexual assault who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.

B. Therefore, the legislature and people of this State declare the purpose of this Act is to extend to all victims of family violence and sexual assault a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of such communications maintained by the counselor.

This section provides guidance to courts which may have occasion to interpret the legislature's intent in enacting this legislation.

Sexual assault and family violence can have a devastating impact on victims, inflicting both physical injuries and psychological trauma. Many victims of these crimes experience a series of symptoms known as "post-traumatic stress." Counseling is a very effective treatment for these symptoms and their underlying causes. However, for counseling to be truly effective, victims need assurance that their discussions with their counselors will remain confidential unless they authorize disclosure. Confidentiality provides a foundation for trust, thus encouraging open, uninhibited discussions. There may also be a therapeutic value to empowering victims to decide whether or not what

has transpired during their counseling sessions can be disclosed. Victims who feel that the crime has demonstrated their lack of control over their lives may benefit from the opportunity to reassert such control.

Some victims who can afford to do so may seek counseling from private psychiatrists and psychologists privileged under other statutes. However, despite their academic training, these individuals may not be as effective in dealing with crime-induced problems as victim counselors who specialize in this field. Even more important, most victims are unable to afford their services. The legislation, therefore, greatly increases access to privileged victim counselors by all victims regardless of their economic status. See, Scarneas, "Rape Victim-Rape Crisis Counselor Communications: A New Testimonial Privilege," 81 Dickinson Law Review 539 (1981); Slovenko, "Psychotherapy and Confidentiality," 24 Cleveland State Law Review 375 (1975); Note, "Testimonial Privileges and The Student Counselor Relationship In Secondary Schools," 50 Iowa Law Review 1323 (1971); In the Matter of Pittsburgh Action Against Rape, 494 Pa. 15, 428 A.2d 126 (1981), (See especially Larsen, J. dissenting).

#### SECTION 102. SHORT TITLE

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

#### SECTION 103. DEFINITIONS

As used in this Act, the following words and phrases shall have the meanings indicated, unless the context clearly indicates otherwise.

The definitions section is one of the most important sections in any statute that establishes a new privilege. Many of the substantive issues surrounding the legislation are resolved by the definitions.

- A. Confidential Communication:  
Any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence.
- B. Family Violence:  
[As defined by state law.]
- C. Sexual Assault:  
[As defined by state law, or an enumeration of relevant crimes.]
- D. Victim:  
A person who consults a victim counselor for assistance in overcoming adverse emotional or psychological effects of a sexual assault or family violence.

- E. **Victim Counseling:**  
Assessment, diagnosis, and treatment to alleviate the adverse emotional or psychological impact of a sexual assault or family violence on the victim. Victim counseling includes, but is not limited to, crisis intervention.
- F. **Victim Counseling Center:**  
A private organization or unit of a government agency which has as one of its primary purposes the treatment of victims for any emotional or psychological condition resulting from a sexual assault or family violence.
- G. **Victim Counselor:**  
[Any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims who is not affiliated with a law enforcement agency or a prosecutor's office and who has successfully completed \_\_\_ hours of academic or other formal training or has had a minimum of \_\_\_ years of experience in providing victim counseling, and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence.]

or

[Any person not affiliated with a law enforcement agency or a prosecutor's office who meets such standards as may be set by the State for victim counselors.]

### Confidential Communication

This definition recognizes as privileged any communications between a victim and a victim counselor made in confidence in the course of a counseling relationship for counseling purposes. The definition sets forth six objective elements necessary for the privilege: (1) an exchange of information, (2) between a victim (3) and a counselor (4) not affiliated with a law enforcement agency, (5) in private or in the presence of a third party who is present to facilitate communication or to further the counseling process, and (6) in the course of counseling the victim. The elements pertaining to the victim and victim counselor are discussed under the separate definitions of those terms.

A communication is any transmission or conveyance of information. See In re Walsh, 623 F.2d 489 (7th Cir.), cert. denied 449 U.S. 994 (1980), Gulf Oil Corp. v. Harris, 425 P.2d 957 (Okla. 1967). Information can be conveyed by any manner of medium, including speech, writing, and physical gesture. In a counseling setting, body language and other non-spoken forms of expression are frequently relied on by counselors for insight into a victim's true feelings.

The broad definition of communication does not, however, protect all facts about the victim nor all communications between the victim and the counselor. As is the rule with other privileges, "independently observable" facts of which non-privileged persons are aware or can easily become aware are not protected. These are objective manifestations never intended to be conveyed exclusively to the counselor nor intended to form the basis for treatment. For example, the fact that the victim's arm is in a cast and sling is an independently observable fact, presumably known to persons other than the counselor. The legislation does not exempt counselor testimony about such facts.

Communications made in the presence of third parties are similarly unprotected (unless the third party is present to facilitate the counselor/victim communications or to further the counseling relationship). As with the "independently observable" facts discussed above, they fail to meet Dean Wigmore's first requirement of a privileged communication, i.e., they do not originate in confidence. Hence, there is no reason for excusing the counselor from testifying about them on the basis that such testimony would breach the confidentiality required for the treatment of the victim.

### Family Violence and Sexual Assault

A number of states have recently amended their statutes to include definitions of sexual assault and domestic or family violence. Rather than provide additional definitions of these terms, the proposed legislation suggests that states which have them use existing generic definitions. Those states which do not can enumerate relevant existing crimes—for example, sexual assault might include such offenses as rape, deviate assault, incest, indecent liberties with children, and attempts to commit such crimes.

The definitions in the statute relate to the reasons victims seek counseling, rather than to the charges against the defendant. A victim's perception of an assault, not the state's decision on how to pursue the criminal case, determines the need for counseling. A victim who seeks counseling in connection with a sexual assault or family violence should therefore be able to assert the privilege regardless of whether or not the charges ultimately brought against the defendant include sexual assault or family violence. For example, a prosecutor's decision that the evidence of an attempted sexual assault is insufficient to warrant prosecution of that particular crime should not preclude the victim who has sought psychological counseling from asserting the privilege in proceedings on related assault charges. Similarly, the severity of the charged offense from the state's point of view may bear no relationship to the trauma caused the victim. Whether a charge is a misdemeanor or a felony should therefore be irrelevant to the right of a victim who has consulted a counselor to assert the privilege.

### Victim

The proposed legislation pertains only to victims of sexual assault and family violence. However, legislators may wish to consider extending their state's statute to other victims as well. Burglary, for example, is increasingly being viewed as a violent crime because of its inherent dangers and the devastating emotional impact it often has on victims regardless of actual physical injury.

Communications between counselors and indirect or secondary victims (e.g., the spouse of a rape victim) are only protected insofar as they are made in the presence of the direct victim and for the purpose of furthering the treatment of the direct victim. (Testimony about communications which take place between the indirect victim and the victim counselor outside the presence of the victim will almost always be inadmissible under the hearsay rules; thus, not extending the protections of this legislation to such communications is unlikely to discourage them or impair their effectiveness.)



## Victim Counseling

The emotional reaction of a victim to crime has been described as a normal response to an abnormal situation. Victim counseling is the process whereby the adverse effects of that normal response on the victim's future life are identified and treatment to ameliorate them is provided.

## Victim Counseling Center

A victim counseling center is an organization or unit of a larger institution which in whole or in part provides psychological counseling for victims. Rape crisis centers, victim service centers, or rape trauma teams in large, urban hospitals are among the types of organizations intended to be covered by the definition.

## Victim Counselor

Traditionally, individuals with whom communications are privileged (e.g., attorneys, psychiatrists, physicians, priests) have been easily identified in terms of their academic or professional qualifications. To date, there are no comparable widely recognized objective standards by which to identify individuals as victim counselors. Persons who counsel victims range from trained psychiatrists, psychologists, and social workers to "peer" counselors (victims who—at least initially—rely primarily upon their personal experience with victimization in counseling other victims). Some jurisdictions which have adopted a sexual assault counselor privilege and/or a domestic violence counselor privilege do specify certain qualifications, primarily consisting of hours of training in certain areas (California, Connecticut, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, Pennsylvania, Utah, and Wyoming).

It is not the function of this proposed legislation to identify specific qualifications appropriate to designate individuals as qualified victim counselors. Nevertheless, it is necessary that those individuals to whom the counselor-victim privilege applies be identified either statutorily or administratively; otherwise, any relative, friend, or even stranger who seeks to advise the victim may later attempt to assert the privilege on behalf of the victim. Obviously, this would defeat the purpose of the legislation, which is to protect (designated) victim counseling by qualified counselors.

The proposed legislation distinguishes between victim counselors who are affiliated with victim counseling organizations and those not affiliated with such organizations. Depending on the circumstances in their own states with respect to the need for counselors, the availability of various types of counselors, and the availability of counseling centers, legislators may wish to include one or both of these. (Enactment of any provision for state agency action may also require amendment of other legislation pertaining to the duties and responsibilities of that agency.) Whether one or both provisions are enacted, the legislation will require persons who hold themselves out as counselors under the act to have taken the necessary affirmative action to be designated victim counselors prior to establishing counseling relationships for which the privilege is claimed.

Individuals affiliated with law enforcement agencies are not considered victim counselors for the purpose of this act, regardless of their responsibilities. This is not because victims counseled, for example, by a prosecutor-based victim/witness project are less likely than any other victims to wish confidentiality. However, information available to the government must be disclosed to the defense upon request if the information is favorable to the accused. (Brady v. Maryland, 373 U.S. 83 (1963); Jencks v. United States, 353 U.S. 657 (1957).) As a practical matter, this requirement would render meaningless a confidentiality statute applied to counseling programs affiliated with law enforcement. Even were information in a given case not specifically requested by the defense, the possibility that it might be would make it impossible for the counselor to ensure confidentiality.

#### SECTION 104. SCOPE AND APPLICATION

[This Act shall not be construed to relieve victim counselors of any duty to report suspected child abuse or neglect required under \_\_\_\_ or any evidence that the victim is about to commit a crime.]

One of the two express limitations of the proposed legislation involves compliance with child abuse reporting laws. The legislation defers to existing state laws requiring reports regarding suspected or known incidents of child abuse. In the course of their treatment of the victim, counselors may learn about abuse of children by the victim or others. Counselors may find reporting such information an ethical dilemma since it was revealed in confidence. Nevertheless, unless explicitly stated otherwise, public policy should not be construed as placing victim counseling above child protection, and the reporting laws should prevail.

The second express limitation of the proposed legislation involves information which a victim provides to a victim counselor concerning the victim's intention to commit a crime. Thus a victim counselor who does not report such information may be just as guilty of misprision of felony as any other citizen who fails to report similar evidence. In this respect, the legislation varies somewhat from attorney-client confidentiality statutes which track the ABA Model Rules of Professional Conduct. These rules provide only two instances where the attorney "may" reveal information without the consent of the client. One of these is when the revelation is necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." (ABA Model Rules of Professional Conduct, Rule 1.6(b)(1).) Attorney revelations about all other anticipated crimes of their clients is implicitly prohibited by the rules. In the victim/counselor context, statutory protection of information about likely future crimes is not justifiable. Refraining from disclosing victims' intended criminal acts is not essential to treating them for psychological problems associated with their past victimization. Moreover, facilitating victims' victimization of others will only result in more victims--hardly the purpose of this proposed legislation.

While confidentiality laws which apply at all times are to be distinguished from evidentiary privileges which apply only in connection with formal legal proceedings, clearly, even in the attorney-client situation, the evidentiary privilege does not extend to communications between attorneys and their clients when the clients' purpose is to

obtain advice in furtherance of a future intended crime or fraud (See McCormick on Evidence, section 95). This of course would also be true in the victim-counselor situation should victims seek such advice from their counselors.

#### SECTION 105. NO COMPULSORY DISCLOSURE OF COMMUNICATIONS

- A. 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 cannot be compelled to give testimony or to produce records concerning confidential communications for any purpose in any criminal action, suit, or other judicial, legislative, or administrative proceeding.
- B. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

This section establishes two actual privileges—one to protect confidential communications between the victim and the victim counselor; the other to protect identifying information about victim counseling centers. The subsection (A) privilege attaches solely to the victim, and may be invoked or waived solely by the victim. See In re Grand Jury Proceedings, Detroit, Michigan, August 1977, 434 F. Supp. 648 (E.D. Mich. 1977 aff'd per curiam 570 F.2d 562 (6th Cir. 1978)). In the case of a minor victim, the privilege may be invoked by a person in a responsible adult position. Where there is no clearly established responsible adult custodian, either party may request the court to appoint a guardian ad litem to protect the victim's interests. The privilege applies in both civil and criminal proceedings.

To invoke the privilege, a victim must affirmatively assert it and establish a proper foundation for it. See In re Walsh, *supra.*, p. 6, and United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973) holding that failure to raise a timely assertion of a privilege constitutes a waiver of the privilege. As with other privileges, this may be done through a simple voir dire of the victim.

Subsection (B) defines the limited extent to which the legislation creates a privilege for victim counselors. It permits victim counselors to keep confidential the location of safehouses or shelters for victims or information which may be used to discern their location. Generally, these are battered wife or incest shelters intended to be inaccessible to the perpetrator. This privilege can be likened to a privilege which protects trade secrets or matters of national security. It is disclosure of the information itself—rather than of a communication—which may not be compelled. Information about the location of shelters in most instances is of little value to a criminal prosecution, so allowing counselors to refuse to disclose it will not seriously injure most criminal litigation. However, where the information is made a material fact of litigation, its disclosure may be compelled.

**SECTION 106. WAIVER**

- A. A victim does not waive the protections afforded by this Act by testifying in court about the crime.
1. However, if the victim partially discloses the contents of a confidential communication in the course of testifying, then either party may request the court to rule that justice requires the protections of this Act be waived, to the extent they apply to that portion of the communication.
  2. Any waiver shall apply only to the extent necessary to require any witness to respond to counsel's questions concerning the confidential communication that are relevant to the facts and circumstances of the case.
- B. A victim counselor cannot waive the protections afforded to a victim under this Act. However, if a victim brings suit against a victim counselor or the agency, business, or organization in which the victim counselor was employed or served as a volunteer at the time of the counseling relationship and the suit alleges malpractice during the counseling relationship, the victim counselor may testify or produce records regarding confidential communications with the victim and is not liable for doing so.
- C. Nothing in this Act shall be construed to limit any other testimonial privilege available to any person under the laws of this State.

The purpose of subsection (A) is severalfold: to encourage victims and witnesses to cooperate by providing information about the facts and circumstances of the case; to encourage victims to seek counseling by protecting the confidentiality of their communications with their counselors; and to prevent victims from selectively testifying—i.e., from testifying about certain confidential communications, and then asserting the privilege as a basis for refusing to disclose additional, related confidential information which might bear on the truth or relevance of the already-disclosed information.

Since the primary privilege established by this legislation attaches to the victim, the victim is the only person who may waive the privilege. See 8 Wigmore, Evidence section 2321 (McNaughton Rev. 1961); In re Walsh, supra., p. 6. Waiver may be either express or implied. An express waiver is an affirmative assertion to forego the benefit of the privilege. An implied waiver is an intentional or unintentional disclosure of all or part of a confidential communication made by the victim, usually while the victim is testifying. An implied waiver may also arise from a failure to assert the privilege. (See United States v. Gurtner, supra.) Implied waivers are necessary to protect against incomplete or selective testimony by victims and their counselors.

This section adopts the standard rule that a victim's testimony about the facts and circumstances of the case does not automatically or necessarily constitute a waiver of the privilege even where the subject of the testimony was the subject of a counselor/victim privileged communication. As noted earlier, the communications, not

the facts, are protected. See also 8 Wigmore, Evidence section 2327 (McNaughton Rev. 1961). However, if the victim provides partial information about a confidential communication, he may be required to provide additional information discussed in the communication. For example, on the one hand, were a victim questioned as to whether or not the assailant used a gun during the commission of the crime, the victim could not claim the privilege even if the fact of a weapon was discussed in a counseling relationship, since the question relates specifically to the facts and circumstances of the crime. Thus by answering the question, the victim does not imply a waiver concerning discussions with the counselor about the presence or absence of a gun. On the other hand, if the victim were asked if he told his counselor the assailant had a gun, the privilege could be claimed since the question relates to the broader issue of the counselor-victim relationship. Thus, if the victim fails to claim the privilege and instead answers the question, the court, upon application of either party, must decide whether or not justice requires the privilege be considered waived in whole or in part. If waiver is found to be total, the court may require the victim or the victim counselor to respond to all questions about the facts and circumstances of the case discussed during the counseling relationship; if partial, it may require response only to facts and circumstances relating to specific facts (e.g., to the absence or presence of a gun). In no event, however, may the court require disclosure of information not directly related to the facts and circumstances of the crime.

By precluding the victim counselor from waiving the privilege, subsection (B) makes clear that the privilege belongs to the victim and not to the counselor. Nevertheless, if the victim initiates a civil action against the counselor or the counselor's employer, the counselor may for defense purposes disclose information which he or she would otherwise not be free to disclose.

Subsection (C) provides that the counselor-victim privilege should not be construed as limiting any other privilege which may be available to the victim (e.g., attorney-client, physician-patient, priest-penitent).