

## PITFALLS FOR THE UNWARY: HOW SEXUAL ASSAULT COUNSELOR-VICTIM PRIVILEGES MAY FALL SHORT OF THEIR INTENDED PROTECTIONS

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*In the wake of a sexual assault, a victim is faced with sensitive questions, grueling examinations, and life-altering decisions. To assist victims in dealing with such issues, many communities make sexual assault crisis counselors available. These counselors act as support persons for the victim as he or she deals with police, doctors, prosecutors, friends, and family. Because these counselors provide such valuable services, many state legislatures have enacted evidentiary privileges to protect information exchanged between counselor and victim.*

*This note explores sexual assault counselor-victim privileges and deals with the possibility that judicial interpretation of confidentiality and waiver may impair their efficacy. While the creation of counselor-victim privileges has encouraged victims to utilize counselors after a sexual assault, the privilege laws are ambiguous regarding the effect that interactions with third parties have on the confidential relationship between counselor and victim. As a result of this uncertainty, counselors may avoid accompanying the victim to meetings between the victim and police, prosecutors, or medical professionals.*

*This note will suggest that if courts interpret privilege statutes in a manner that disallows interactions with third parties, victims' access to important services will be restricted. This note will also assert that courts should not use attorney-client privilege case law to construe sexual assault counselor-victim privileges. Finally, this note will propose an alternative statute that would augment the victim's power to include third parties in the counseling process.*

### I. INTRODUCTION

Were you under the influence of drugs or alcohol when you were sexually assaulted? Would you mind talking to the police? If you help them, you might prevent this from happening to other people. Did you resist the attacker? Will you be able to pay for your visit here at the emergency room? Will you be able to sign over this evidence kit so the investigation can begin? Is there a possibility that you might get pregnant? Do you have a safe place to go tonight?

The questions above introduce a small sample of the issues a victim must face after being sexually assaulted. Some of the questions press the victim to make important and life-changing decisions. Some of the questions are phrased in such a way that might invite the victim to blame herself<sup>1</sup> for the assault. Some of the questions serve no other purpose than to invade the victim's privacy.

In order to help a victim of sexual assault through the difficult maze of medical, legal, and emotional problems that follow an assault, many communities have developed networks of trained sexual assault crisis counselors.<sup>2</sup> Sexual assault counselors often meet victims at the hospital or police station and stay by their side through the medical and legal procedures that follow.<sup>3</sup> In theory, the potentially intimidating interactions with hospital staff, police officers, friends, and family members who may revictimize sexual assault victims are mitigated by the presence of an advocate who continually reminds the victim of her options and ability to make her own choices.<sup>4</sup> The counselors also talk to significant others<sup>5</sup> about their reactions to the assault and ways they can be supportive.<sup>6</sup> Most communities also staff twenty-four hour crisis hotlines—to respond to the concerns of victims and significant others—hours, or even years, after the assault occurred.<sup>7</sup> Due to the value of services provided by sexual assault counselors, the legislatures in many states have created evidentiary privileges to protect the communications between sexual assault counselors and victims.<sup>8</sup>

This note addresses the evidentiary privilege between sexual assault counselors and victims and discusses how future judicial interpretation of confidentiality and waiver may undercut the effectiveness of the privilege in its protection of the therapeutic relationship. By enacting laws granting both absolute and qualified privileges, many state legislatures have demonstrated a desire to protect the privacy of victims so that they are

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1. Throughout this note, the feminine pronouns "she" and "her" should be read as referring to both male and female victims. Statistics show that the vast majority of reported sexual assaults are committed on women. A recent survey concluded that "[i]n 1999, nine out of every ten rape victims were female." See RAPE, ABUSE & INCEST NAT'L NETWORK, RAINN STATISTICS, at <http://www.rainn.org/statistics.html#womenarevictims> (last visited Oct. 29, 2001) (citing the 2000 National Crime Victimization Survey).

2. See FEMINIST MAJORITY FOUND., SEXUAL ASSAULT AND RAPE CRISIS RESOURCES LIST, at [http://www.feminist.org/911/resources\\_af.html](http://www.feminist.org/911/resources_af.html) (last visited Feb. 24, 2002); see also, e.g., ILLINOIS COALITION AGAINST SEXUAL ASSAULT, CRISIS CENTERS, at <http://www.icasa.org/crisisCenters.asp> (last visited Feb. 24, 2002) (providing a link to the sexual assault crisis centers in Illinois).

3. See ILLINOIS COALITION AGAINST SEXUAL ASSAULT, AFTER SEXUAL ASSAULT: A GUIDE TO ADVOCACY SERVICES 5-9 (1999) [hereinafter ICASA GUIDE TO SERVICES].

4. See GERALD BRYANT & PAUL CIREL, AN EXEMPLARY PROJECT: A COMMUNITY RESPONSE TO RAPE 2-4 (1977).

5. This term refers to family, friends, spouses, and partners who support the victim after the assault.

6. See ILLINOIS COALITION AGAINST SEXUAL ASSAULT, HOW CAN I HELP?: A GUIDE FOR FRIENDS AND FAMILY 2 (1984).

7. See FEMINIST MAJORITY FOUND., *supra* note 2.

8. See *infra* notes 52-54 and accompanying text.

more likely to seek needed services.<sup>9</sup> By upholding absolute privileges against constitutional challenges by criminal defendants, courts have also fostered the victim's ability to talk freely to counselors without fear that the counselors will be required to testify about the conversations.<sup>10</sup>

Despite both legislative and judicial commitment to the protection of the sexual assault counselor-victim relationship,<sup>11</sup> there is still a barrier between victims and their access to valuable services. The privilege laws are not clear about how interactions with third parties such as police officers, significant others, and prosecutors affect the confidential relationship between the victim and counselor. As a result, counselors must be conservative about providing certain valuable services when third parties are involved. In Illinois, for example, this has led counselors to avoid attending meetings between the victim and police officers or prosecutors.<sup>12</sup> Sadly, the services that place the privilege in jeopardy are the ones the legislature may have wanted to protect the most.

A third party's presence may also affect another testimonial privilege, the attorney-client privilege. One author says that "[t]his entire area . . . is fraught with peril. Certainly, in light of the conflicting rulings, the safest practice is to avoid the presence of third parties unless absolutely necessary."<sup>13</sup> If this advice applies to the sexual assault counselor-victim privilege and is heeded by sexual assault counselors, victims may be forced to face police officers, nurses, doctors, forensic examiners, prosecuting attorneys, partners, parents, and friends alone, without the benefit of the advocates specifically trained to intervene in these intimidating situations. Such an outcome may seem desirable from the perspective of a criminal defendant whose Sixth Amendment rights are encroached upon with every strengthening of the privilege, but victims, advocates, and the legislators who passed the privilege laws would likely disapprove of situations in which victims are left to face these intimidating situations without support.

This note describes the services that sexual assault counselors provide to victims, compares the sexual assault counselor-victim privilege to the attorney-client privilege, and suggests that courts will limit victims' access to needed services if they construe the privilege statutes in a way that prohibits interactions with third parties. More specifically, this note proposes that if courts construe statutory provisions regarding third parties by importing the law as it has developed around attorney-client privi-

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9. See, e.g., 735 ILL. COMP. STAT. ANN. § 5/8-802.1(a) (West 2000) (creating an absolute privilege in Illinois for communications between victims and trained sexual assault counselors); see also *infra* notes 52-56 and accompanying text.

10. See, e.g., *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988).

11. See *infra* notes 52-55, 72 and accompanying text.

12. See e-mail from Susan D. Chapman, Director, Rape Crisis Services, to Jennifer Bruno (Mar. 12, 2002) (on file with the University of Illinois Law Review).

13. EDNA SELAN EPSTEIN, AM. BAR ASS'N, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 131 (3d ed. 1997).

lege, they will frustrate the legislative purposes behind creation of the sexual assault counselor-victim privilege. Because many state legislatures have clearly attempted to increase sexual assault victims' access to services by protecting the communications that victims have with their counselors, judicial constructions of the privilege that undermine this purpose should be avoided.

Part II of this note describes the services that sexual assault counselors provide to victims, introduces the sexual assault counselor-victim privilege, and looks at how courts have construed confidentiality and waiver in regards to the attorney-client privilege. Part III predicts how privilege law may operate in three hypothetical scenarios that are common to the provision of rape crisis counseling. Part IV urges courts to avoid importing attorney-client privilege law to interpret the counseling privilege and proposes an alternative statute that would increase the victim's ability to include third parties in the counseling process.

## II. BACKGROUND

This part first describes the services that sexual assault counselors commonly provide to victims. Next, testimonial privileges are discussed generally. Then, the sexual assault counselor-victim privilege is examined in detail. To facilitate the task of analyzing the different sexual assault counselor privilege statutes, this part divides them into three different categories. Finally, the attorney-client privilege is examined to predict how courts may interpret some of the terms in the statutes that created the sexual assault counselor privilege. The specific elements of the sexual assault counselor-victim privilege addressed in this note—confidentiality and waiver—have not yet received any judicial interpretation, so case law surrounding the attorney-client privilege supplies some insight into how courts might resolve future disputes over these elements.

### A. *How Sexual Assault Counselors Help Victims*

This part describes the role of rape crisis organizations and the services that rape crisis advocates provide to victims.<sup>14</sup> In the 1970s, the first rape crisis centers were established to provide support for victims and to change the public's perception about rape.<sup>15</sup> The centers were usually the result of many local individuals joining together, and they received

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14. Some of the sources cited in this part were written years ago when rape crisis organizations first began to appear in communities. Although some of their information about police procedures and sexual assault laws is outdated, they do provide useful insights into the theoretical framework behind rape crisis centers and their institutional goals.

15. See MARY P. KOSS & MARY R. HARVEY, *THE RAPE VICTIM: CLINICAL AND COMMUNITY INTERVENTIONS* 119 (2d ed. 1991).

funding from established organizations.<sup>16</sup> In Illinois, for example, the women who first began to provide services to sexual assault victims received aid from churches, synagogues, YWCAs, the National Organization for Women, and the American Association of University Women.<sup>17</sup>

The centers have historically performed many different tasks including managing crisis hotlines, offering counseling services, providing legal and medical advocacy, encouraging community action, and working for policy changes.<sup>18</sup> For victims of sexual assault, rape crisis centers provide general advocacy before, during, and after their interactions with the medical community, the legal community, and their own friends and family.<sup>19</sup>

The type of advocacy provided by sexual assault counselors is informed by a feminist theory of empowerment.<sup>20</sup> Authors Mary Koss and Mary Harvey described the feminist theory of empowerment and its role in victim counseling.

Feminists have viewed victim *empowerment* through the restoration of choice as a primary antidote to rape trauma. The emphasis on empowerment poses a challenge to traditional medical, mental health, and legal practices that too often exacerbate the trauma of rape by denying to victims the healing experience of informed choice. When practitioners “march on” with their work, implementing standard procedure without concern for the rape victim’s right to know and choose among alternative procedures, they reinforce her status as victim, ignore her capacity for survival, and undermine her recovery.<sup>21</sup>

In practice, this feminist perspective results in a kind of advocacy in which the advocate supports the victim as she makes her own decisions and reminds the victim that she has the option to refuse any treatment, questions, or help from others.

To provide such services, advocates often support the victim if she decides to talk to the police, have a medical exam, complete an evidence collection kit, or tell her family members, friends, or a significant other about the experience.<sup>22</sup> Some authors point out that rape crisis centers

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16. LISA BRODYAGA ET AL., RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 125 (1975). Sometimes agencies also received a combination of state and federal funding. In Polk County, Iowa, the Rape/Sexual Assault Care Center initially received its funding from the Iowa Crime Commission via the U.S. Department of Justice’s Law Enforcement Assistance Administration (LEAA). BRYANT & CIREL, *supra* note 4, at 24.

17. See ILLINOIS COALITION AGAINST SEXUAL ASSAULT, HISTORY, at <http://www.icasa.org/icasaHistory.asp> (last visited Feb. 24, 2002).

18. KOSS & HARVEY, *supra* note 15, at 119–20, 140; see also BRODYAGA ET AL., *supra* note 16, at 123 (listing the common goals of rape crisis centers).

19. See BRODYAGA ET AL., *supra* note 16, at 133.

20. KOSS & HARVEY, *supra* note 15, at 133–35; see also Euphemia B. Warren, Note, *She’s Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 CARDOZO L. REV. 141, 158 (1995).

21. KOSS & HARVEY, *supra* note 15, at 133.

22. See ICASA GUIDE TO SERVICES, *supra* note 3, at 6.

also “act as liaison between victim and law enforcement officials.”<sup>23</sup> In fact, there are many sources that encourage advocates to attend interviews between the victim and the police or prosecutors.<sup>24</sup>

If an advocate accompanies a victim to the hospital, the advocate explains and answers the victim’s questions about the medical exam, evidence collection, sexually transmitted diseases, pregnancy, and potential physical injury that may have resulted from the assault.<sup>25</sup> Advocates often encourage victims to report the crime to police and to cooperate with the investigation.<sup>26</sup> Most importantly, the advocate reminds the victim that she does not have to begin or to continue any interview or exam if she is uncomfortable.<sup>27</sup>

Before leaving a meeting with a victim in a hospital or police station, the advocate usually helps the victim determine her immediate needs with respect to safety, shelter, and support from significant others.<sup>28</sup> When requested by the victim, the advocate may call friends and family and support the victim as she tells her story to her significant others.<sup>29</sup>

If the victim chooses to assist in the prosecution of the assailant, counselors often answer questions about the legal process and help to prepare the victim for the emotional challenges of testifying and attending trial.<sup>30</sup> Counselors may even accompany the victim to trial.<sup>31</sup> Advocates also staff twenty-four-hour hotlines to talk to survivors of sexual assault whenever these survivors are troubled by the long-term symptoms

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23. Warren, *supra* note 20, at 158 (citing CONN. GEN. STAT. ANN. § 52-146(k)(a)(4) (West 1995); IOWA CODE ANN. § 236A.1(1)(c) (West 1995)).

24. KOSS & HARVEY, *supra* note 15, at 168 (“[I]t is recommended that a victim advocate be present whenever a rape victim is questioned by law-enforcement authorities.”); Doris Spaulding, *The Role of the Victim Advocate*, in RAPE AND SEXUAL ASSAULT: MANAGEMENT AND INTERVENTION 199, 208 (Carmen Germaine Warner ed., 1980) (“The victim often feels more comfortable at the interview with the district attorney if an advocate is available. . . . Occasionally a victim may request an advocate remain in the room during the interview. Although the district attorney may prefer a one-on-one situation, the advocate can remain available if needed.”); DEBRA WHITCOMB ET AL., STOP RAPE CRISIS CENTER: BATON ROUGE, LOUISIANA 25 (1979) (“The presence of the . . . counselor . . . contributes to a more comfortable and productive interview [with the police and prosecutor].”).

25. BRODYAGA, *supra* note 16, at 133; JAMES E. HENDRICKS & BRYAN BYERS, CRISIS INTERVENTION IN CRIMINAL JUSTICE / SOCIAL SERVICE 235 (1996) (“The rape victim/survivor will need medical services to diagnose and treat any injuries received during the rape, as well as to prevent venereal disease and unwanted pregnancy. In addition, physical evidence is also collected during the examination.”); Spaulding, *supra* note 24, at 201, 207 (“[T]he victim may feel more at ease by the presence of an advocate who can explain procedures and prepare the victim for each step.”).

26. BRODYAGA, *supra* note 16, at 134; *see also* HENDRICKS & BYERS, *supra* note 25, at 235–36 (“If the intervener is called before the victim/survivor decides whether or not to report the rape to the police, the intervener must help the victim/survivor understand the issues involved and provide sufficient information to the victim/survivor so that an informed decision can be made. It is imperative that the intervener not make the reporting decision on the victim’s/survivor’s behalf.”).

27. *See* KOSS & HARVEY, *supra* note 15, at 133–35.

28. ICASA GUIDE TO SERVICES, *supra* note 3, at 6.

29. *Id.*

30. *Id.* at 8.

31. *Id.*

of rape trauma syndrome.<sup>32</sup> Further, advocates help victims talk to their families and friends about the assault and their emotional and physical needs for support.<sup>33</sup> Some sources suggest that advocates may even tell family members or friends for the victim if she so requests.<sup>34</sup>

Unfortunately, some of the services listed above potentially threaten the sexual assault counselor-victim privilege.<sup>35</sup> These activities often involve disclosures of information to third parties and sharing of information between the victim and advocate with the intention that the information be disclosed to others. Such involvement with third parties may be construed by courts as breaches of confidentiality or waivers of the privilege.<sup>36</sup>

### B. Testimonial Privileges and the Role of the Fact Finder

The sexual assault crisis counselor privilege is one of many testimonial privileges. In order to understand the competing interests that courts must balance when dealing with testimonial privileges, this part will examine the tension that exists between recognizing testimonial privileges and engaging in thorough fact finding. Evidentiary privileges often prevent fact finders from receiving relevant, otherwise admissible evidence.<sup>37</sup> Because the exclusion of relevant information compromises the accuracy of judgments and verdicts, the practice must be justified by other interests that society values.<sup>38</sup> There are differing opinions regarding the justifications for particular privileges.<sup>39</sup> A common rationale for privileges is that they protect certain relationships that society deems valuable.<sup>40</sup>

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32. See *id.* at 3; see also ILLINOIS COALITION AGAINST SEXUAL ASSAULT, SEXUAL ASSAULT: WHAT DO I NEED TO KNOW? [hereinafter ICASA NEED TO KNOW]; RAPE, ABUSE & INCEST NAT'L NETWORK, COUNSELING CENTERS, at <http://www.rainn.org/counseling.html> (last visited Jan. 27, 2002).

33. ICASA GUIDE TO SERVICES, *supra* note 3, at 3.

34. BRYANT & CIREL, *supra* note 4, at 40; KOSS & HARVEY, *supra* note 15, at 164 ("Many victims simply require the physical means to carry out the notification while some may want the provider to do it for them."); Spaulding, *supra* note 24, at 201 ("Some victims prefer that the advocate talk to their families or be with them when family members are told.").

35. See *infra* notes 147-70 and accompanying text.

36. *Id.*

37. See GRAHAM LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.1 (3d ed. 1996).

38. See *id.*

39. See generally Carolyn P. Courville, *Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution*, 35 HOUS. L. REV. 187 (1998) (discussing the different rationales for having testimonial privileges and pointing out the weaknesses of relying only on the most common utilitarian rationale).

40. Justifications of privileges that are based on a desire to protect certain relationships are utilitarian in nature and suggest that the legitimacy of the privilege depends upon its success in actually protecting the relationship. See *id.* at 197-98. The weakness of a utilitarian justification is that, if the privileges do not positively affect the relationship by either increasing access to needed services or increasing the quality of the services rendered, the privileges no longer justify the exclusion of relevant facts from cases. *Id.* Courville suggests that there are also constitutional justifications, at least for the psychotherapist-patient privilege, that are independent of the utilitarian grounds. *Id.* at 203. Courville argues that the Fourth Amendment, the Fifth Amendment, and the constitutionally guaranteed right

Federal Rule of Evidence 501, the only federal evidentiary rule governing privileges, is written in very general terms and allows common law principles to govern privileges.<sup>41</sup> When evaluating novel claims of privilege that have not yet been recognized at common law, courts weigh policy concerns and balance the public's need for the privilege against the cost of excluding the evidence.<sup>42</sup>

In addition to Federal Rule of Evidence 501, there are also a number of Supreme Court standards that outline different testimonial privileges.<sup>43</sup> These standards were proposed by the Supreme Court to be included with the Federal Rules of Evidence, but Congress struck them in favor of a general rule that allowed the individual privileges to be governed by common law.<sup>44</sup> The attorney-client privilege does appear as a Supreme Court standard.<sup>45</sup> There is no Supreme Court standard for the sexual assault counselor-victim privilege.<sup>46</sup>

States have their own laws with respect to testimonial privileges. Although the details of the privileges differ, all states recognize the attorney-client privilege.<sup>47</sup> Most states recognize the sexual assault counselor-victim privilege as well.<sup>48</sup>

### C. Sexual Assault Counselor-Victim Privilege

This part will begin to explore the contours of the sexual assault counselor-victim privilege and introduce the different elements that appear in state statutes.

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to privacy justify the privilege and are not as vulnerable to challenge. *See id.* at 203–14. The arguments are easily applicable to the sexual assault privilege as well.

41. FED. R. EVID. 501; 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02[1] (Joseph M. McLaughlin ed., 2d ed. 2001). Federal Rule of Evidence 501 says in part:

Except as otherwise required by the Constitution . . . or provided by Act of Congress or in rules prescribed by the Supreme Court . . . 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.

FED. R. EVID. 501.

42. 3 WEINSTEIN & BERGER, *supra* note 41, § 501.03. For two examples of cases in which federal courts applied a balancing test to evaluate a novel claim of privilege, see *United States v. Wilson*, 960 F.2d 48 (7th Cir. 1992), in which the court refused to grant unemployment records a privileged status because the public interest in obtaining accurate and complete reports did not outweigh the federal government's interest in enforcing the criminal laws, *id.* at 50–51, and *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the court recognized a psychotherapist-patient privilege because the public interest in promoting open communication between therapists and patients outweighed the possible evidentiary benefit of rejecting the privilege, *id.* at 9–13.

43. 3 WEINSTEIN & BERGER, *supra* note 41, § 501.02[1](c)(i).

44. *Id.* § 501.02[1].

45. *Id.* § 503.

46. *Id.* §§ 502–513.

47. 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 76.2 (John W. Strong ed., 5th ed. 1999).

48. *See infra* notes 52–53 and accompanying text.

### 1. *History and Purpose of the Privilege*

The sexual assault counselor-victim privilege is an evidentiary testimonial privilege created by many state legislatures.<sup>49</sup> This privilege is not, however, expressly recognized in the Federal Rules of Evidence and was not included with the testimonial privileges proposed by the Supreme Court committee that drafted the Federal Rules of Evidence.<sup>50</sup> Federal Rule of Evidence 501 is a general rule about testimonial privileges that allows courts to apply existing common law principles and also evaluate novel claims of privilege.<sup>51</sup> Therefore, the privilege could be recognized by federal courts even though it does not appear in the Federal Rules of Evidence.

As of February 2001, twenty-five states and the District of Columbia recognized an explicit privilege for victims of sexual assault and their trained counselors.<sup>52</sup> Arizona has a general privilege which protects crime victims and people who advocate on their behalf.<sup>53</sup> The Rhode Island legislature has not created a privilege, but its house of representatives issued an advisory opinion regarding the sexual assault counselor-victim privilege.<sup>54</sup>

Policymakers justify the sexual assault counselor-victim privilege by noting benefits it provides to individual victims of sexual assault and also to society as a whole.<sup>55</sup> Individual victims benefit because the likelihood that they will receive high quality counseling can be increased if confidentiality is protected.<sup>56</sup> Society benefits because victims who are supported by trained counselors are more likely to be able to cooperate in the prosecution of their aggressors.<sup>57</sup>

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49. *See id.*

50. 3 WEINSTEIN & BERGER, *supra* note 41, §§ 501–513.

51. FED. R. EVID. 501; 3 WEINSTEIN & BERGER, *supra* note 41, §§ 501.02[1], 501.03.

52. ALA. CODE §§ 15-23-40 to -46 (1995); ALASKA STAT. §§ 18.66.200 to .250 (Michie 2000); CAL. EVID. CODE § 1035.2 (West 1995); COLO. REV. STAT. ANN. § 13-90-107 (West 2001); CONN. GEN. STAT. ANN. § 52-146a (West 1991); FLA. STAT. ANN. § 90.5035 (West 1999); 735 ILL. COMP. STAT. ANN. § 5/8-802.1 (West 2000); IND. CODE ANN. §§ 35-37-6-1 to -11 (West 1991); IOWA CODE ANN. § 915.20A(2) (West 1994 & Supp. 2001); LA. CODE EVID. ANN. art. 510 (West 2000); ME. REV. STAT. ANN. tit. 16, § 53-A (West Supp. 2001); MASS. ANN. LAWS ch. 233, § 20J (Law. Co-op. 2000); MICH. COMP. LAWS ANN. § 600.2157(a) (West 2000); MINN. STAT. ANN. § 595.02(k) (West 2000); N.H. REV. STAT. ANN. §§ 173-C:1, :2, :5 (2001); N.J. STAT. ANN. § 2A:84A-22.15 (West 2000); N.M. STAT. ANN. §§ 31-25-1 to -6 (Michie 1978); N.Y. CRIM. PROC. LAW § 60.76 (McKinney Supp. 2001–2002); 42 PA. CONS. STAT. ANN. § 5945.1 (West 2000); UTAH CODE ANN. §§ 78-3c-1 to -4 (1996); VT. STAT. ANN. tit. 12, § 1614(b) (Supp. 2001); WASH. REV. CODE ANN. § 5.60.060 (West 2002); WYO. STAT. ANN. § 1-12-116(b) (Michie 2001); HAW. R. EVID. 505.5; KY. R. EVID. 506(d)(2).

53. ARIZ. REV. STAT. § 13-4430 (1994).

54. Advisory Opinion of the House of Representatives, 469 A.2d 1161 (R.I. 1983).

55. *See* U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS 17–21 (1995) [hereinafter DOJ MODEL LEGISLATION]; *see also* 735 ILL. COMP. STAT. ANN. § 5/8-802.1(a) (West 2000).

56. *See* DOJ MODEL LEGISLATION, *supra* note 55, at 14–17.

57. *See id.* at 21.

The sexual assault counselor-victim privilege protects victims from in-court disclosure of the private conversations they have with their counselors.<sup>58</sup> Without the privacy provided by privilege statutes, victims are less likely to seek counseling.<sup>59</sup> Because victims of sexual assault often suffer long-term effects from the traumatic experience, including various symptoms of post-traumatic stress disorder,<sup>60</sup> many victims benefit from some amount of counseling.<sup>61</sup> The success of counseling largely depends on how trusting and open the victim and counselor can be with one another.<sup>62</sup> The trust and openness depend, in part, upon whether the counselor can assure victims that their communications will remain confidential.<sup>63</sup>

The sexual assault counselor-victim privilege helps to alleviate economic inequities among victims. More affluent victims are able to seek counseling from private psychotherapists who can promise a high level of confidentiality because they are covered by a testimonial privilege.<sup>64</sup> Victims who, for various reasons, cannot access psychotherapists often seek treatment from counselors at rape crisis centers.<sup>65</sup> The sexual assault counselor-victim privilege ensures that victims who seek treatment from sexual assault counselors have access to the same assurances of confidentiality as those who go to high-priced psychotherapists. Thus, extending the privilege to sexual assault counselors helps to increase the likelihood that all victims, especially less affluent victims, enjoy the benefits that follow from strong protections of privacy.

Society benefits from the privilege because, when victims decide to report their assaults to the police and to cooperate in the ensuing prosecutions, counselors can support them without fear they will be called to testify about the private conversations. One study suggests that “the vic-

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58. See *supra* note 52.

59. Bonnie J. Campbell, *Preface* to DOJ MODEL LEGISLATION, *supra* note 55.

60. PATRICIA A. RESICK & MONICA K. SCHNICKE, COGNITIVE PROCESSING THERAPY FOR RAPE VICTIMS: A TREATMENT MANUAL 4 (1993) (“[T]he most frequently observed disorder that develops as a result of a sexual assault is post-traumatic stress disorder.”). The name given by counselors to the kind of post-traumatic stress disorder recognized in rape victims is called rape trauma syndrome. See HENDRICKS & BYERS, *supra* note 25, at 232. Rape trauma syndrome is recognized to have various stages, although researchers differ in opinion as to how many stages exist. *Id.* at 230. In general, the victim experiences a state of shock immediately following the assault. *Id.* The next phase is a false readjustment phase in which the victim succumbs to societal pressure to return to a normal life. *Id.* at 231–32. At this time, victims often experience physical and emotional symptoms such as nightmares, anxiety, headaches, dizziness, sexual dysfunction, and flashbacks of the assault. *Id.* Victims may also pass through a stage where they feel angry. *Id.* at 233. Once a victim can finally integrate the assault into her life and personality, she will enter a resolution phase. *Id.*

61. See HENDRICKS & BYERS, *supra* note 25, at 229–34; see also BRODYAGA, *supra* note 16, at 134 (“Although there is consensus that immediate crisis intervention counseling is needed, there is confusion and ambivalence among both professionals and paraprofessionals about the degree of emotional support and counseling required to facilitate a victim’s adjustment or to prevent the development of psychological or behavioral problems resulting from the rape.”).

62. See DOJ MODEL LEGISLATION, *supra* note 55, at 17–18.

63. See *id.*

64. *Id.* at 15.

65. *Id.*

tim's/survivor's perceived social support for reporting the rape is an important determinant of whether or not the police will be notified of the rape."<sup>66</sup> So, victims who have the support of counselors may be more inclined to use the legal system.

In Illinois, the privilege statute explicitly reveals the legislature's belief that the victim's privacy is essential to her access to needed services.

This Section is intended to protect victims of rape from public disclosure of statements they make in confidence to counselors or 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 the police in preventing future crimes.<sup>67</sup>

The legislature is thus demonstrating a concern for both the personal benefits to victims that counseling can provide as well as the benefits to society that follow from supported victims cooperating in the prosecutions of their perpetrators.

## 2. *Scope of the Privilege*

Many state legislatures have granted privileged status to the communications between sexual assault counselors and victims.<sup>68</sup> In some states the privilege is absolute and, in others, the privilege is qualified.<sup>69</sup>

This note will not fully analyze the debate over whether privilege should be absolute or qualified.<sup>70</sup> The following discussion is intended

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66. HENDRICKS & BYERS, *supra* note 25, at 226 (citing S. Feldman-Summers & C. Ashworth, *Factors Related to Intentions to Report Rape*, 37 J. SOC. ISSUES 4, 53-70 (1981)).

67. See 735 ILL. COMP. STAT. ANN. § 5/8-802.1(a) (West 2000).

68. See DOJ MODEL LEGISLATION, *supra* note 55, at 4 n.5.

69. See, e.g., 735 ILL. COMP. STAT. ANN. § 5/8-802.1(d) (setting forth absolute privilege); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994) (finding that privilege is qualified).

70. The debates over the proper scope of the sexual assault counselor-victim privilege and the constitutionality of an absolute privilege have received attention in a number of cases and law review publications, but the federal constitutional issues have not yet been resolved by the Supreme Court.

In Illinois, the state's highest court addressed the issue of whether an absolute privilege denies a criminal defendant his federal Sixth or Fourteenth Amendment rights in *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988). In that case, the defendant argued that the absolute privilege granted to sexual assault victims and counselors concerning their confidential communications violated his right to due process and his right to confront witnesses against him in the criminal proceeding. *Id.* at 88. He argued that when the court denied him the ability to discover testimony and records from the rape crisis counselor, he was denied his right to compulsory process and his right to confront his accuser. *Id.* at 88-89. The court held that because the defendant made only a general request for documents and testimony without alleging that discovery of the confidential information would yield impeaching information, and because the defendant had access to other statements by the victim, the absolute privilege would remain. *Id.* at 91-92. The question of whether the absolute privilege would become qualified in a factually different situation, perhaps one in which the defendant did not have access to other statements made by the victim, or when the defendant did allege specific pieces of impeaching evidence that he expected to find in the records or testimony, is left open.

One author argues that qualified privileges are sufficient to protect the counseling relationship and also ensure that the defendant fully enjoys his or her constitutional rights. Warren, *supra* note 20, at

only to summarize some of the issues in the debate. The existence of privileges, especially absolute privileges, evidences a strong legislative intent to fully protect the rape crisis counselor-victim relationship.

a. Absolute Privilege

Fourteen states and the District of Columbia have enacted laws that effectively grant absolute or nearly absolute privilege to communications between sexual assault counselors and victims.<sup>71</sup> The courts are often called upon to determine whether such a privilege violates a defendant's Sixth Amendment or due process rights.<sup>72</sup> In Illinois and other states, courts have upheld the privilege against such constitutional challenges.<sup>73</sup> The following language from the Illinois statute is an example of an absolute privilege that was upheld by the state's highest court.<sup>74</sup>

Confidentiality. Except as provided in this Act, 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 as provided in subparagraph (c).<sup>75</sup>

The statute contains no qualifying language and does not have any provision which tells a court to conduct balancing tests or in camera hearings.<sup>76</sup>

b. Qualified Privilege

Nine state legislatures have enacted laws that courts have interpreted to grant a qualified privilege to communications between sexual assault counselors and victims.<sup>77</sup> New Hampshire grants a qualified privi-

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149. She proposes that when a defendant makes a showing that the requested information might be helpful to the defense's case, the court should order an in camera review of the material. *Id.* She argues that although society does have an interest in protecting the relationship between rape crisis counselors and victims, this interest conflicts with, and must yield to, "society's interest in achieving the fair administration of justice" and the defendant's interest in a "constitutionally-based right to discover exculpatory evidence." *Id.* at 177, 179. She posits that an absolute privilege "renders meaningless the defendant's constitutional rights." *Id.* at 179. Addressing the argument that absolute privileges are essential to ensure effective counseling for victims, Warren suggests that in camera inspections that look specifically for evidence of bias and factual inconsistencies do not significantly contradict the purpose and justification of the rape crisis privilege. *Id.* at 187 (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974), and *Foggy*, 521 N.E.2d at 97 (Simon, J., dissenting)). For another note in support of a qualified privilege, see Adrienne Kotowski, Note, "How Confidential Is This Conversation Anyway?": Discoverability of Exculpatory Materials in Sexual Assault Litigation, 3 SUFFOLK J. TRIAL & APP. ADVOC. 65 (1998).

71. See DOJ MODEL LEGISLATION, *supra* note 55, at 4 n.5.

72. See *In re Robert H.*, 509 A.2d 475, 482 (Conn. 1986); *Foggy*, 521 N.E.2d at 88; *Commonwealth v. Bishop*, 617 N.E.2d 990, 994 (Mass. 1993); *Stanaway*, 521 N.W.2d at 564.

73. See *Foggy*, 521 N.E.2d at 92; *Commonwealth v. Wilson*, 602 A.2d 1290, 1296 (Pa. 1992).

74. See *Foggy*, 521 N.E.2d at 92.

75. 735 ILL. COMP. STAT. ANN. § 5/8-802.1(d) (West 2000).

76. See *id.*

77. See DOJ MODEL LEGISLATION, *supra* note 55, at 30 app. 1; see, e.g., LA. CODE EVID. ANN. art. 510 (West 2002).

lege and places the burden of proof on the defendant to state specific reasons for a request for confidential information.<sup>78</sup> The defendant also must show that there is a “substantial likelihood that favorable and admissible information would be obtained through discovery or testimony.”<sup>79</sup> The defendant must further show that:

(a) The probative value of the information, in the context of the particular case, outweighs its prejudicial effect on the victim’s emotional or physical recovery, privacy, or relationship with the counselor or the rape crisis or domestic violence center.

(b) That the information sought is unavailable from any other source.

(c) That 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.<sup>80</sup>

The language of this statute demonstrates a clear legislative intent to put limits on the privilege to protect the defendant’s access to particular materials. Unlike the Illinois statute, it contemplates circumstances in which the defendant will gain access to the confidential information.

In three states, the legislatures attempted to grant absolute privileges, but the state courts decided to place qualifications on the privileges in order to preserve defendants’ Sixth Amendment rights.<sup>81</sup> The three states are Connecticut, Massachusetts, and Michigan.<sup>82</sup> The language of the Michigan statute, for example, appears to grant an absolute privilege, but the Michigan Supreme Court has determined that nothing more than a qualified privilege is constitutional.<sup>83</sup>

The relevant text of that statute does not contain any qualifying language in its description of the scope of the privilege.

[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.*<sup>84</sup>

Despite the lack of any qualifying language in the statute, the state’s highest court found that the privilege must be a qualified one.<sup>85</sup> In *People v. Stanaway*, the court held if a defendant shows by a reasonable probability that the discovery will yield evidence necessary to his de-

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78. See N.H. REV. STAT. ANN. § 173-C:5 (1999).

79. *Id.*

80. *Id.*

81. See DOJ MODEL LEGISLATION, *supra* note 55, app. 2.

82. *Id.*

83. See MICH. COMP. LAWS ANN. § 600.2157a (West 2000); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994).

84. MICH. COMP. LAWS ANN. § 600.2157a(2) (emphasis added).

85. See *Stanaway*, 521 N.W.2d at 562.

fense, then an in camera review must be held.<sup>86</sup> The court based its decision on the concern for the defendant's right to discover exculpatory information.<sup>87</sup> It reasoned that its decision properly balanced the legislature's intent to protect the victim's confidentiality and the defendant's interest in obtaining exculpatory evidence.<sup>88</sup> The United States Supreme Court has not yet addressed the issue of whether an absolute privilege violates a defendant's rights.

### 3. *Statutory Language Addressing Confidentiality and Waiver*

Although the statutes creating the sexual assault counselor-victim privilege are similar, their slight differences in language may lead to different judicial interpretations of confidentiality and waiver. This part introduces some of the common statutory language explicitly addressing confidentiality and waiver. Because a detailed analysis of every difference in the statutes is beyond the scope of this note, this part categorizes the statutes into three types based on their language addressing confidentiality and waiver.<sup>89</sup>

#### a. Type I—Minimal Legislative Guidance

Some privilege statutes provide no guidance about how third parties affect the privilege. An example of such a statute comes from Wyoming. "An advocate shall not testify concerning a confidential communication made by a victim in the course of that relationship . . ."<sup>90</sup> The statute further defines a confidential communication as "information transmitted in confidence between a victim and an advocate in the course of that relationship and includes all information received by, and any report, working paper or document prepared by the advocate in the course of that relationship . . ."<sup>91</sup> There is no further instruction about confidentiality or third parties. This statute leaves the job of interpretation entirely to the courts.<sup>92</sup>

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86. *Id.*

87. *Id.* at 569.

88. *Id.* at 562.

89. One interesting statute that does not fit well into the chosen classification system but is noteworthy for its peculiarity is Pennsylvania's privilege statute. The Pennsylvania statute is unique because its language actually appears to extend coverage to any third party who is present. The statute says, "No coparticipant 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." 42 PA. CONS. STAT. ANN. § 5945.1(b) (West 2000).

90. WYO. STAT. ANN. § 1-12-116(b)(i) (Michie 2001).

91. *Id.* § 1-12-116(a)(ii).

92. Two other statutes that are virtually identical to Wyoming's are Colorado's and Washington's privilege statutes. Colorado's says, "A victim's advocate shall not be examined as to any communication made to such victim's advocate by . . . a victim of sexual assault . . ." COLO. REV. STAT. ANN. § 13-90-107(1)(k)(I) (West 1997). The statute makes no reference to third parties. Washington's statute says, "A sexual assault advocate may not, without the consent of the victim, be examined as to any communication

b. Type II—Language Focusing on General Provision of Services

Some of the privilege statutes focus on the provision of services in defining confidential communications.<sup>93</sup> Within this category are differences with respect to how closely related or necessary the communication must be to the counseling to become a confidential communication.

The Vermont statute includes a flexible definition of the confidentiality requirement. It says that “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.*”<sup>94</sup> This statute contemplates disclosures to third parties and recognizes that some disclosures are a natural part of the provision of services.<sup>95</sup> The Indiana privilege statute exemplifies one with slightly more restrictive language.<sup>96</sup> It allows disclosures to third parties who are “*necessary to . . . further the counseling process.*”<sup>97</sup>

c. Type III—Language Focusing on the Victim’s Interests

The third type of waiver provision allows disclosures to third parties when the individuals to whom disclosures have been made or the disclosures themselves will further the interests of the victim. The Illinois statute states, “The confidential nature of the communication is not waived by: the presence of a third person who *further expresses the interests of the victim.*”<sup>98</sup> The language referring to the interests of the victim is vague and may or may not allow disclosures to police officers, medical professionals, prosecutors, and other third parties who have specific objectives with respect to their interactions with the victim.<sup>99</sup>

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made by the victim to the sexual assault advocate.” WASH. REV. CODE ANN. § 5.60.060(7) (West Supp. 2002). There is no further instruction to counselors regarding how confidentiality is established, how waivers occur, or how the presence of third parties affects this privilege.

93. The Utah privilege statute is one that focuses on the provision of services. It says, “The confidential communication between a victim and a sexual assault counselor is available to a third person only when . . . the *counselor believes the disclosure is necessary to accomplish the desired result of counseling . . .*” UTAH CODE ANN. § 78-3c-4(3) (1996) (emphasis added). The unique attribute of this statute is that the language places the discretion regarding third parties with the counselor. Although it is unclear how courts will interpret this language, it seems to favor allowing many third parties to participate in counseling without affecting the victim-counselor privilege.

94. VT. STAT. ANN. tit. 12, § 1614(a)(2) (Supp. 2001) (emphasis added).

95. In Part III.B, this statute will be applied to three hypothetical situations to test its flexibility. See *infra* notes 160–65 and accompanying text.

96. IND. CODE ANN. § 35-37-6-1 (1998).

97. *Id.* (emphasis added).

98. 735 ILL. COMP. STAT. ANN. § 5/8-802.1 (West 2000) (emphasis added).

99. There are many other statutes that have language similar to the Illinois statute allowing disclosures which further the interests of the victim. See, e.g., FLA. STAT. ANN. § 90.5035(1)(d)(1) (West 1999) (“persons present to further the interest of the victim in the . . . interview”); MICH. COMP. LAWS ANN. § 600.2157a (West 2000) (“information transmitted between a victim and a sexual assault . . . counselor, or between a victim or sexual assault . . . counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault . . . counselor”). The Illinois statute will be used in the analysis part to evaluate three hypothetical situations.

#### D. Attorney-Client Privilege

Because there are few cases interpreting the sexual assault counselor-victim privilege statutes, this note looks at case law analyzing the attorney-client privilege to predict how courts might shape the counseling privilege.<sup>100</sup> As noted above, the statutory provisions regarding confidentiality and waiver of the counseling privilege are either vague or entirely absent from the statutes,<sup>101</sup> so courts will likely look to decisions interpreting other privileges for guidance.

The attorney-client privilege is a well-recognized testimonial privilege that appears in the Federal Rules of Evidence as a standard proposed by the Supreme Court committee but not adopted by the legislature.<sup>102</sup> The attorney-client privilege is recognized in all fifty states.<sup>103</sup>

As mentioned above, testimonial privileges require clear policy objectives to justify the resulting exclusion of evidence from fact finders.<sup>104</sup> The policy justification for the attorney-client privilege is that people will not seek the advice of attorneys if the attorneys may be forced to reveal their private communications.<sup>105</sup> The privilege is designed to allow both the client and the attorney to speak freely on sensitive matters and thus give the attorney more information upon which to base her advice.<sup>106</sup> Succinctly stated, "the attorney-client privilege promotes the attorney-client relationship, and, indirectly, the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys."<sup>107</sup>

Courts and scholars list the elements of the attorney-client privilege in different ways. One often-cited formulation of the elements originated with Dean Wigmore. He proposed four necessary elements for the privilege to exist:

- (1) The communication must originate in an *expectation* that it will not be disclosed.
- (2) The element of *confidentiality* must be essential to the full and satisfactory maintenance of the relationship between the parties.
- (3) The *relationship* must be one that, in the opinion of the community, ought to be carefully *fostered*.
- (4) The *injury* that would inure to the relationship by the disclosure of the communications must be *greater* than the *benefit* that would

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100. The only cases that this author has been able to find are cases assessing the constitutionality of privilege statutes. Some of these have already been discussed *supra* in note 73. This author has not found any cases construing the confidentiality or waiver terms of any sexual assault counselor-victim privilege statutes.

101. See *supra* notes 89–99 and accompanying text.

102. 3 WEINSTEIN & BERGER, *supra* note 41, § 503.02.

103. 1 BROUN ET AL., *supra* note 47, at 316.

104. See *supra* notes 37–42 and accompanying text.

105. EPSTEIN, *supra* note 13, at 3.

106. *Id.* at 3–4.

107. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991).

be gained for the correct disposal of litigation by virtue of the disclosure.<sup>108</sup>

The Restatement of Law Third: The Law Governing Lawyers § 68 states the requirements in a slightly different way.<sup>109</sup> The one important element for this note is the confidentiality requirement. The Restatement says that the communication must originate in confidence. “A communication is in confidence . . . if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person . . . .”<sup>110</sup>

The confidentiality requirement has been interpreted by authorities in different ways.<sup>111</sup> This note focuses specifically on how the confidentiality requirement is affected by communications made in the presence of third parties, or subsequently repeated to third parties.

The concept of waiver is closely related to, but distinct from, the confidentiality requirement. When privileged information is later disclosed to third parties, the later disclosure may constitute a waiver.<sup>112</sup> A waiver of a privilege occurs after a privilege has correctly been established.<sup>113</sup> It is distinct from the situation in which a privilege is never established due to a lack of confidentiality.

Disclosure of the privileged communication to third persons *at the time* of the communication may prevent the creation of the privilege, because the necessary element of confidentiality will be found lacking.

Disclosure to third persons *after* the making of an otherwise privileged communication may constitute a waiver of the privilege.

The effect of no confidentiality or waiver is the same: there is no privilege because disclosure was intended or in fact occurred.<sup>114</sup> Although courts often fail to keep these two concepts distinct, it is useful to analyze them separately.

Both the confidentiality requirement and waiver may be affected by disclosures to third parties who are not privileged themselves and who are not permissible third parties.<sup>115</sup> In this note, the term “permissible third parties” refers to third parties to whom disclosures will not destroy privileges. Defining which individuals are permissible third parties and which are not is the focus of the remainder of this note. The important questions to ask about third parties are twofold: (1) what disclosures are

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108. EPSTEIN, *supra* note 13, at 4.

109. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (The privilege requires: “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purposes of obtaining or providing legal assistance for the client.”).

110. *Id.* § 71.

111. See *infra* notes 117–28 and accompanying text.

112. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79.

113. *Id.* § 79 cmt. a.

114. EPSTEIN, *supra* note 13, at 158.

115. 3 WEINSTEIN & BERGER, *supra* note 41, § 503.15[3].

permissible; and (2) what disclosures will destroy the privilege. One reason the answers to these questions are not clear-cut is that courts and scholars do not seem to be in agreement about whether to focus on the privacy of the actual communication or the privacy of the underlying facts communicated.<sup>116</sup>

A common description of the confidentiality requirement is that the parties must reasonably expect that the communication will not be heard by or revealed to anyone outside the attorney-client relationship.<sup>117</sup> In other words, at the time the communication is made, the parties must intend for the communication itself to remain confidential.<sup>118</sup> This description of the confidentiality requirement focuses on the communication and the details surrounding it. It does not focus on the underlying facts that are communicated. In fact, scholars even explicitly say that “the matter communicated need not itself be secret” in order for the confidentiality requirement to be met.<sup>119</sup>

However, some courts and scholars do focus on the private nature of the underlying facts when talking about confidentiality.<sup>120</sup> Sources say that if the parties expect that the information exchanged will later be shared with third parties, that information is not confidential and is not protected by the attorney-client privilege.<sup>121</sup> The rationale behind this interpretation is that if the client is comfortable sharing the information with other people, the attorney-client privilege is not necessary to encourage the client to reveal the information.<sup>122</sup> If the client is willing to reveal the information to nonprivileged individuals, the justification for the attorney-client privilege and resulting exclusion of evidence is irrelevant.

An overview of a fact pattern and court decision will demonstrate how a court evaluates the confidentiality requirement of the attorney-client privilege. The case involves a client making a disclosure to an attorney for preparation of a document that will be shared with the public.<sup>123</sup>

In *United States v. Tellier*,<sup>124</sup> a client sought advice from his attorney regarding a proposed business venture.<sup>125</sup> The attorney warned against the venture and prepared a detailed letter explaining its dangers and pos-

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116. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. b.

117. See *id.* § 71 cmts. a–c.

118. 3 WEINSTEIN & BERGER, *supra* note 41, § 503.15.

119. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 cmt. b.

120. See, e.g., *United States v. Evans*, 113 F.3d 1457, 1462 (7th Cir. 1997); *United States v. Palmer*, 536 F.2d 1278, 1281 (9th Cir. 1976); 3 WEINSTEIN & BERGER, *supra* note 41, § 503.15.

121. *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992); 3 WEINSTEIN & BERGER, *supra* note 41, § 503.15(2); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 cmt. d.

122. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 cmt. b.

123. *United States v. Tellier*, 255 F.2d 441 (2d Cir. 1958).

124. *Id.*

125. *Id.* at 446–48.

sible illegality.<sup>126</sup> The attorney wrote the letter for the client and two others involved in the business scheme.<sup>127</sup> The court found that, because the information exchanged between the attorney and client was intended to be disclosed to third parties, the communication was not made in confidence.<sup>128</sup>

When the initial communication does meet the confidentiality requirement, any later disclosure is governed by the concept of waiver.<sup>129</sup> The most common interpretation of waiver focuses on the communication itself and not the facts underlying the communication.<sup>130</sup> In *United States v. O'Malley*, Judge Bauer explains that "a client does not waive his attorney-client privilege 'merely by disclosing a subject which he had discussed with his attorney.' In order to waive the privilege, the client must disclose the communication with the attorney itself."<sup>131</sup> *United States v. Plache*<sup>132</sup> demonstrates how a party may waive attorney-client privilege under this construction of waiver that focuses on the communication. In *Plache*, the client was called before a grand jury where he testified about advice he obtained from his attorney.<sup>133</sup> Specifically, he told the grand jury, "I found an attorney. . . . I met him several times and he expressed concern about [the client's questionable business practices]."<sup>134</sup> The court found that the client waived his attorney-client privilege when he made this disclosure to the grand jury.<sup>135</sup> The statement recounted what his attorney said to him.<sup>136</sup> This is a disclosure that reveals more than just underlying facts in a communication, but rather information about the communication itself.

A minority approach to waiver focuses on the underlying facts exchanged in the communication. Some authors and courts suggest that any disclosure to a third party of the facts communicated to the attorney

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126. *Id.* at 447.

127. *Id.*

128. *Id.* at 448 ("[W]here, as here, information is given and it is agreed that it is to be transmitted to a third party, then not only the specific information, but the more detailed circumstances relating to it are subject to disclosure."). Some other cases further describe how courts interpret the confidentiality requirement. In *United States v. Bohannon*, 628 F. Supp. 1026 (D. Conn. 1985), the court found that the information a client gave to an attorney for the preparation of a tax return was not privileged. *Id.* at 1029. In *In Re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984), the court extensively discussed confidentiality and reviewed a line of cases supporting its interpretation of the confidentiality requirement. The court decided that no attorney-client privilege could attach to communications between an attorney and client when the attorney was supposed to use the information to prepare a prospectus. *Id.* at 1358. Because the information was intended for public disclosure, the requisite expectation of confidentiality was lacking. The fact that the prospectus was never disseminated did not change the court's interpretation because it was focusing on the intentions of the parties at the time of the communication. *Id.*

129. *See, e.g.*, 3 WEINSTEIN & BERGER, *supra* note 41, § 511.01.

130. *See, e.g.*, EPSTEIN, *supra* note 13, at 158.

131. 786 F.2d 786, 794 (7th Cir. 1986).

132. 913 F.2d 1375 (9th Cir. 1990).

133. *Id.* at 1379-80.

134. *Id.* at 1380.

135. *Id.*

136. *See id.*

should result in a waiver of the privilege. Professor Epstein says that voluntary disclosures to nonprivileged individuals will constitute a waiver: A party cannot “pick and choose to whom—or what—one will disclose, lifting the privilege veil when it suits that party and lowering it again as the party will.”<sup>137</sup> In dicta, one court said, “Patently, a voluntary disclosure of information which is inconsistent with the confidential nature of the attorney client [sic] relationship waives the privilege.”<sup>138</sup> One author even stated, “In general, it is inferred that, if a client makes the same statement to a third person as the client made to his or her attorney, the communication to counsel was not intended as a confidential disclosure.”<sup>139</sup> A Minnesota court explained that “when the holder of a privilege destroys the confidentiality of information by disclosure, the information loses its privileged character.”<sup>140</sup>

Clearly, the law surrounding confidentiality and waiver is far from simple and may even be quite confusing. This is so because scholars and courts do not agree about whether to focus on how private communications are kept, or on how private the communicated facts are.<sup>141</sup> A few generalizations derived from the information above will aid in the application of attorney-client privilege law to the sexual assault counselor-victim privilege. First, when an attorney and client communicate about privileged information, their intentions about the nature of that communication determine whether the confidentiality requirement is met.<sup>142</sup> Specifically, if they intend for the communication and all of its contents to remain confidential, the confidentiality requirement is clearly met.<sup>143</sup> If, however, the purpose of the communication is to prepare for future disclosures to third parties, the confidentiality requirement may not be met and the privilege never established.<sup>144</sup> Second, after a privilege is correctly established, future disclosures to third parties that reveal details about the communication itself waive the privilege.<sup>145</sup> If, however, the future disclosures only reveal the underlying facts exchanged in the communication, and nothing about the communication itself, the privilege probably remains intact.<sup>146</sup>

### III. ANALYSIS

This part will explore three hypothetical situations that may occur as counselors provide advocacy services to victims. Each of the three

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137. EPSTEIN, *supra* note 13, at 163.

138. *Allread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993).

139. 3 WEINSTEIN & BERGER, *supra* note 41, § 503.15[2].

140. *State v. Gore*, 451 N.W.2d 313, 318–19 (Minn. 1990).

141. *See supra* notes 116–40 and accompanying text.

142. *See supra* notes 117–28 and accompanying text.

143. *See supra* notes 117–18 and accompanying text.

144. *See supra* notes 121–22 and accompanying text.

145. *See supra* notes 129–40 and accompanying text.

146. *See supra* notes 130–36 and accompanying text.

types of privilege statutes will be analyzed to see how courts might treat the hypothetical situations. When appropriate, attorney-client privilege law will supplement the analysis to fill in gaps left by the statutes.

Hypothetical 1—Interview with a prosecutor or police officer

The victim recounts the details of her assault and the events leading up to it with a police officer or prosecutor. At the victim's request, her counselor sits in on the entire interview.<sup>147</sup>

Hypothetical 2—Intending to tell others

The victim wants to tell her partner about the assault, but she is not sure how to do it. She asks her counselor for help. The two practice talking about the details of the assault so that the victim feels more prepared and can decide in advance how to tell the story.

Hypothetical 3—Revealing the communication

A victim calls the twenty-four hour hotline and tells the counselor that she has been having nightmares and trouble sleeping and that she has been short tempered with her friends lately. The counselor tells her that all of those experiences are normal symptoms that follow the trauma of a sexual assault. Later, the victim is talking to one of her friends and she tells her, "I'm sorry I have been so irritable. My counselor told me that it's probably part of the post-traumatic stress of the assault."

A. *The Fitness of the Privilege Under Type I Statutes*

Type I statutes contain minimal legislative guidance about confidentiality or waiver.<sup>148</sup> These statutes generally require confidentiality and contemplate waivers, but do not adequately define these terms.<sup>149</sup> Because these statutes provide little guidance, courts would likely look to attorney-client privilege law when interpreting them.<sup>150</sup>

1. *Interview with a Police Officer or Prosecutor*

This hypothetical interview involves the presence of a third party during a confidential communication, so it calls into question whether the confidentiality requirement is satisfied.<sup>151</sup> The general formulation of the attorney-client privilege confidentiality requirement is that the parties must reasonably expect that the communication will not be revealed

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147. For facts to indicate that this is a typical scenario, see *supra* notes 22–29 and accompanying text.

148. See *supra* notes 90–92 and accompanying text.

149. See *id.*

150. In *People v. Foggy*, the court said, "In our opinion, the confidential relationship required in the counselor/victim setting is akin to that of the attorney/client." 500 N.E.2d 1026, 1031 (Ill. App. Ct. 1986). This language illustrates that courts draw analogies between the different testimonial privileges when there is no controlling case law on point.

151. See *supra* note 13 and accompanying text.

to third parties.<sup>152</sup> In this situation, the parties could not reasonably expect confidentiality because a third party is clearly privy to the communications. Therefore, if courts imported the law of attorney-client privilege to fill in the gap left by the Type I statutes, counselors could not accompany victims into interviews with officers or prosecutors.

This seemingly reasonable interpretation would be inappropriate because it would frustrate one of the purposes behind the privilege statutes—the attempt to increase victims’ support for reporting their assaults and cooperating in the ensuing prosecutions. The purpose behind the privilege statutes was to increase support for victims so that they could cooperate in the prosecution of their perpetrators.<sup>153</sup> If counselors must avoid attending interviews with police officers or prosecutors so that the privilege is not waived, victims will lack support for these crucial yet intimidating interviews.

## 2. *Intending to Tell Others*

The second hypothetical involves the confidentiality requirement as well because, at the time of the communication, the victim is conveying information that she intends to tell other people. The victim in the second hypothetical intends to reveal underlying facts from the communication and not details about the communication itself.

As explained above, under the law of attorney-client privilege, some sources suggest that if a party intends to reveal the underlying facts of the communication, confidentiality is never established.<sup>154</sup> Applying such an interpretation to the sexual-assault-counselor privilege would have devastating effects on counseling. It would require that the counselor be the victim’s sole confidante—the one person she talks to about her assault. This would significantly frustrate the counseling and recovery process as recovery involves a reintegration with the community, not isolation from sources of social support.<sup>155</sup> Considering that one of the purposes of the counseling privilege is to increase the quality of counseling services for victims, such an interpretation would frustrate the intentions of the statutes.

More commonly, authorities interpret attorney-client privilege confidentiality in a slightly different way. They say the confidentiality requirement is met if the parties expect that no one else will learn about their communications.<sup>156</sup> This interpretation focuses on the privacy of the communication rather than the underlying facts.<sup>157</sup> Because in this

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152. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 (2000).

153. See 735 ILL. COMP. STAT. ANN. § 5/8-802.2(2) (West 2000); see also *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988).

154. See *supra* notes 121–22 and accompanying text.

155. See KOSS & HARVEY, *supra* note 15, at 213.

156. See *supra* notes 117–19 and accompanying text.

157. See 1 BROUN ET AL., *supra* note 47, at 345–46.

hypothetical the victim intends to reveal the underlying facts from the communication but she does not intend to tell people about her counseling sessions, confidentiality will be established. Such an interpretation is more in accord with the purposes of the privilege because it allows the victim to talk to the counselor in anticipation of later confiding in her family and friends.

### 3. *Revealing the Communication*

In the third hypothetical, the victim actually tells other people information about the confidential communications. Assuming the initial communication met the requirements to become privileged, this hypothetical involves a potential waiver of the privilege. As explained above, the dominating interpretation of waiver of the attorney-client privilege focuses on details about the communication.<sup>158</sup> In the third hypothetical, the victim tells her friend about the confidential communication when she prefaces her comments with the phrase “my counselor told me.” Under the law of attorney-client privilege, this would likely constitute a waiver.<sup>159</sup> Again, if such an interpretation of waiver were applied to the counseling privilege, it would inhibit an important aspect of counseling. One of the main services that counselors provide is passing on a wealth of information to victims. It is unreasonable to expect that victims will not pass this information on to other people in the way described in this hypothetical. If this kind of behavior waives the privilege, victims will probably waive the privilege more often than not.

Thus, if courts use attorney-client privilege to interpret Type I statutes, the effectiveness of the counseling privilege will be seriously undermined. By behaving in natural ways in common counseling situations, the parties can regularly jeopardize the privilege. It is unreasonable to expect victims to keep the valuable information they learn from their counselors to themselves. It is also unreasonable to have a privilege that is so easily waived in the normal course of counseling activity. If courts interpreted such disclosures to waive the sexual assault counselor-victim privilege, the privilege would rarely remain intact and would provide very minimal benefits to victims.

#### B. *The Fitness of the Privilege Under Type II Statutes*

Type II statutes give more guidance as to how the confidentiality requirement operates.<sup>160</sup> They allow disclosures to third parties based on the necessity of the disclosure to the provision of counseling services.<sup>161</sup> The Vermont statute is typical. It says that “a communication is ‘confi-

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158. See *supra* notes 131–35 and accompanying text.

159. See *id.*

160. See *supra* notes 93–97 and accompanying text.

161. See *id.*

dential' 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*."<sup>162</sup> The statute leaves courts to determine whether the legislature was contemplating counseling services or all services the victim may need. A very broad interpretation would encompass any third parties such as a cab driver called to take the victim home from the hospital, a locksmith called to change her locks, and a number of other people who provide important services to victims.

1. *Interview with a Prosecutor or Police Officer*

In the interview hypothetical, the disclosures are made to the police officer and prosecutor in order to report and attempt to prosecute the crime. Courts may find that the interviews taken by these public officials are the types of services contemplated by the legislature. Support for such an interpretation can be found in the justifications behind the privilege.<sup>163</sup> Because the privilege was designed to foster higher reporting and prosecution rates for sexual assaults,<sup>164</sup> an interpretation of the privilege which allows the counselor to support the victim during these interviews would further that goal.<sup>165</sup>

On the other hand, courts may recognize a need to strictly construe the privilege and increase the fact finder's access to relevant information. If so, courts could interpret the term "services" as referring only to crisis counseling services. Such a construction of Type II privilege statutes would require the counselor to avoid attending interviews between the victim and police or prosecutors.

2 and 3. *Intending to Tell Others and Revealing the Communication*

The second and third hypothetical situations can be treated together for an analysis of Type II statutes because they both involve actual or contemplated disclosures to victims' significant others. The question courts will be required to decide is whether disclosures to significant others are in furtherance of the rendition of services to the victim. The term "services" is awkward to describe the emotional support that partners, family, and friends often provide to victims. If the court construed the

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162. VT. STAT. ANN. tit. 12, § 1614 (2001) (emphasis added).

163. See *supra* notes 55–66 and accompanying text.

164. See *supra* notes 55–56 and accompanying text.

165. There is some support for the assertion that the rates of reports and prosecutions rise as victims have access to more counseling services. See BRYANT & CIREL, *supra* note 4, at 7 (noting an increase in reports and charges filed since the establishment of a rape crisis center); WHITCOMB ET AL., *supra* note 24, at 1 (“[T]he lack of support from the community, and the low priority given rape cases by police and prosecutors alienate victims and discourage many from even reporting assaults.”); *id.* at 34 (reporting a rise in reports of rape after the establishment of a rape crisis center in the community but acknowledging that confounding variables make it difficult to fully attribute the increase to the center).

term “services” to refer to counseling services, it could reasonably interpret the support of friends and family as a counseling service. If a court wanted to strictly construe the privilege, however, the language is flexible enough to say that disclosures to significant others do not further counseling services. Thus, such disclosures destroy the privilege.

Thus, under Type II statutes, the courts have a great deal of flexibility in either broadening or restricting the privilege. Because the language is open to varied interpretations, it is difficult to predict what behavior will jeopardize the privilege. Such concerns naturally lead to a conservative approach to counseling in order to minimize the chances that the privilege will be destroyed.

### C. *The Fitness of the Privilege Under Type III Statutes*

Type III privilege statutes focus on whether the disclosure is made to a person who furthers the interests of the victim.<sup>166</sup> Because all three hypothetical situations raise the same issues under Type III statutes, they will be treated together in this part.

The language from the Illinois statute is typical of Type III statutes. “The confidential nature of the communication is not waived by: the presence of a third person who *further expresses the interests of the victim.*”<sup>167</sup> This language requires courts to look at whether the third party is expressing the interests of the victim at the time of the communication. The language is extremely vague and the statutes give no guidance about what interests of the victim the legislature contemplated or how to evaluate whether a particular person was furthering them.

Part of the reason rape crisis centers were established was that family members, friends, police officers, and prosecutors often behaved in ways that revictimized the victim of the sexual assault.<sup>168</sup> They were not furthering the interests of the victim because of their own misconceptions or insecurities.<sup>169</sup> However, there are many police officers and prosecutors who have been specially trained to deal with rape victims and provide excellent services to them.<sup>170</sup> Despite changes in criminal laws and increased public awareness about sexual assault, it is conceivable that some family members, friends, police officers, and prosecutors still hold many of the misconceptions about rape that lead to mistreatment of victims. Under Type III statutes, courts may be required to engage in fact finding about the training and attitudes of the police officers and prosecutors before determining whether they were expressing the interests of the victim at the time of the communication. The same sort of factual in-

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166. See *supra* notes 98–99 and accompanying text.

167. 735 ILL. COMP. STAT. ANN. § 5/8-802.1 (West 2000) (emphasis added).

168. See KOSS & HARVEY, *supra* note 15, at 118–19.

169. See *id.* at 118.

170. HENDRICKS & BYERS, *supra* note 25, at 246–47.

quiries might also be required to determine whether victims' significant others were expressing the interests of the victim.

One part of the analysis that may be unique to police officers and prosecutors is that even the most compassionate have their own interests to pursue when they conduct interviews. These objectives, such as facilitating a speedy apprehension of the perpetrator or obtaining a complete account of the facts or physical evidence to build a strong case, may prevent officers or prosecutors from technically expressing the interests of the victim.

Thus, victims and counselors operating under Type III statutes will likely act conservatively. They cannot be sure which third parties courts will determine to be expressing the interests of the victim. And, even if in one case a judge deems a police officer to be a permissible third party, in another case a disclosure to a police officer might constitute a waiver because that particular police officer was not expressing the interests of the victim. If courts engaged in messy fact-based analyses to evaluate which parties in a case are permissible third parties, the treatment of any single disclosure would be difficult to predict.

#### IV. RESOLUTION

This note proposes that courts should use caution when interpreting the sexual assault counselor-victim privilege statutes. When statutes are vague, as most are, a hasty application of attorney-client privilege law could undermine the privilege and seriously frustrate both of its main purposes. Interpretations which limit interactions with police officers and prosecutors would frustrate the intent of the legislature to provide support for victims as they report the crimes and cooperate with the prosecution. Limitations on the ability of the victim and counselor to incorporate family and friends in the counseling process would frustrate the legislative intent to increase victims' access to high-quality counseling.

The language of the Utah statute provides a model for a privilege which is more in accord with the usual provision of services. It says, "The confidential communication between a victim and a sexual assault counselor is available to a third person only when . . . the *counselor believes the disclosure is necessary to accomplish the desired result of counseling . . .*"<sup>171</sup> Although this language seems similar to Type II privileges, focusing on the service provided, it is unique because it places the discretion with the counselor. If the counselor believes that disclosure to the third person is necessary to accomplish the desired result of counseling, the disclosure is allowed.

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171. UTAH CODE ANN. § 78-3c-4(3) (1996) (emphasis added).

This statute would be even more in accord with the feminist philosophy of many rape crisis centers if the discretion were placed with the victim. The victim could safely decide to bring people into confidential communications and tell third parties about confidential communications without fear that the privilege would be destroyed. In addition, to increase the flexibility of the statute, the term “necessary” could be replaced with “in furtherance of” to preclude debates over how useful the third party has to be to fall under the statute. Because such a statute would seriously limit the chances that any disclosures would waive the privilege, adding a requirement that the victim’s belief be reasonable preserves some of the court’s ability to review the disclosures.

With the suggested changes, the statute would read: “The confidential communication between a victim and a sexual assault counselor is available to a third person only when the *victim reasonably believes* the disclosure is in *furtherance of* the desired result of counseling.” Therefore, if the victim had a reasonable belief that a counselor’s presence at a police interview would further the counseling process, that would be permissible. If a victim reasonably believed that disclosing the contents of conversations or details about her conversations with her counselor would further the counseling process, such disclosures would be permissible. The suggested statute might be a guide to legislators in the remaining twenty-four states if they decide to create a privilege.

## V. CONCLUSION

Statutes that protect the communications between sexual assault counselors and victims demonstrate progress in the movement to end sexual violence. Unfortunately, the legislatures created vague statutes open to varied judicial interpretation. The statutes are vague enough to allow courts to practically eliminate the privileges and thus undermine the attempts of legislators to increase victims’ access to services. Courts should take care when interpreting the statutes to look closely at the types of services that counselors provide to victims and avoid interpreting the statutes in ways that wholly undermine the legislative intent behind the statutes.

