

THE VICTIM'S RIGHT TO CONFIDENTIALITY

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I. INTRODUCTION TO THE LAW OF PRIVILEGE

A. Overview

The American judicial system is an adversarial system premised on seeking the truth. Discovering the truth about an event or occurrence requires disclosing facts relevant to that event or occurrence. Sometimes the facts to be disclosed stem from a conversation between two people. Usually, the contents of a conversation between two people that a court deems relevant must be disclosed during criminal prosecutions or civil trials. However, there are a few exceptions to this general rule.

In a few specific circumstances, the relationship between two people is so sacred that communications between them are considered "privileged" and therefore protected and excluded from being repeated in the trial process.¹ Husband/wife, attorney/client, doctor/patient, clergy/ parishioner and journalist/source are examples of the type of relationships in which privacy is essential and a privilege is recognized by the law.² There is no recognized privilege in Illinois between same sex partners or between parents and children.

Certain medical privileges have existed since the early 19th century when the physician-patient privilege first was recognized. However, privileges for mental health care have only been recognized since the 1950's. This protection is extended because of the highly personal and private nature of communications between a therapist and a client. A successful relationship between a therapist

and client is built on the trust and confidentiality essential for open and honest communication.

Sexual assault counselors have enjoyed “privileged” communications with clients only for the last two decades. A sexual assault victim may have feelings of guilt and self-blame that can be overcome through therapy with a counselor, and society has started to recognize the public policy advantages of protecting that relationship. If communications between a victim and her counselor are not protected by confidentiality, the victim may be afraid to fully communicate with her counselor, depriving her of the full benefits of counseling.

B. A National View

By 1981, fourteen states enacted statutes protecting the confidentiality of a rape victim's communications with her therapist.³ By the end of 1991, seven more states, including Illinois, passed similar protective laws.⁴ The protections, known as privileges, afforded by state statutes range from absolute privilege to qualified privilege,⁵ which means that counselors in some states never have to reveal information while counselors in other states may have to reveal information in certain situations.

Today, 24 states have laws specifically protecting communications between a sexual assault victim and an advocate or counselor.⁶ Another six states have broader statutes protecting communications between any crime victim and an advocate or counselor.⁷ An additional ten states have statutes protecting communications with domestic violence counselors or professional counselors.⁸ One more state protects communications with health care providers via case law.

These privileges vary dramatically in the degree of protection that they provide to the protected communications. Some statutes permit judicial review in the determination of whether communications will be released; others do not. Some limit the information that will be released; others do not. As described below, the law in Illinois provides one of the strongest protections available nationwide for communications between a sexual assault victim and her advocate or counselor.

C. The History of Privilege Law in Illinois

1. Qualified Privilege Under Mental Health Laws - Prior to 1982, communications between a sexual assault victim and a rape crisis counselor in Illinois were governed by the Mental Health and Developmental Disabilities Confidentiality Act. 740 ILCS 110/1 *et.seq.* This law protected the privacy of records kept by a mental health professional for any client receiving counseling. If any party to a lawsuit wanted access to a sexual assault victim's counseling records, that party would subpoena the records from the counselor. The counselor was required to give the requested records to a judge. The judge then would hold an *in camera* hearing (privately, in chambers) to determine whether the records were relevant to the case. If the judge found the information relevant to the case, the judge would order the counselor to give the records to the requesting party. The sexual assault victim's privilege was called a qualified privilege, because the material could in some instances be disclosed based on a judge's discretion.

2. Qualified Privilege for Rape Crisis Counselors - In 1982, Illinois passed its first statute specifically protecting communications between a sexual assault victim and a rape crisis counselor. The original statute, "Confidentiality of Statements Made to Rape Crisis Personnel," granted only a qualified privilege. Under the statute, someone could request a victim's rape crisis counseling records by alleging that the records were "necessary to the determination of any issue before the court," even though the victim had not given consent to release the documents. 735 ILCS 5/8-802.1. Like the privilege under the Mental Health and Developmental Disabilities Confidentiality Act, this privilege was qualified and limited the protection it provided to sexual assault victims. If, after review, a judge found the counseling records relevant to a case, the judge would order that the documents be given to the requesting party.

This qualified privilege did not provide enough protection to sexual assault victims. Defense attorneys routinely would undertake "fishing expeditions" for rape crisis counselor's records, arguing they had the right to look for any information that might aid their client. Instead, they were really looking for personal information to improperly cast doubt on the character or credibility of the victim. Courts, often favoring a defendant's rights, would oblige, resulting in the release of personal and sometimes embarrassing information irrelevant to the case, further traumatizing a victim. Many times, the requested information could have

been found in medical records or police reports instead of in a therapist's notes.

Under this qualified privilege, a rape crisis counselor could not promise victims that their counseling records were completely confidential, and the possibility of disclosure had a chilling effect on counseling. Victims were deterred from seeking counseling or freely disclosing information for fear that the information would be released.

3. Absolute Privilege for Rape Crisis Counselors - In 1984, the legislature provided stronger protections for sexual assault victims by amending the "Confidentiality of Statements Made to Rape Crisis Personnel" statute. The statute now established an absolute privilege - in other words the victim is in charge of determining whether her records are released.

II. CONFIDENTIALITY OF STATEMENTS MADE TO RAPE CRISIS PERSONNEL

A. Overview

Today, the "Confidentiality of Statements Made to Rape Crisis Personnel" statute provides significant protection to communications between a victim and a rape crisis worker. 735 ILCS 5/8-802.1. Creating an absolute privilege for rape victims has provided victims with stronger protections and given victims more control over information about their lives. Now, victims can confide in counselors and advocates, knowing that they run little risk of having those communications disclosed publicly unless they consent to such disclosure.

A judge no longer reviews a sexual assault victim's records to determine their relevance to a case. Instead, when a victim's records are subpoenaed, she can assert the privilege and refuse to release them to anyone, including the judge.

A victim's records can be disclosed only with her consent. In fact, if a rape crisis counselor discloses confidential communications without a client's consent, the counselor can be charged with a misdemeanor criminal offense.

And, counselors benefit from these protections as well. In the past, faced with the prospect of being required to divulge private conversations with their clients, counselors sometimes have resorted to keeping two sets of records, or refusing to testify and being held in contempt of court.

In 1988, the Illinois Supreme Court held that the absolute privilege established in the statute, "Confidentiality of Statements Made to Rape Crisis Personnel," was constitutional.⁹ In 1993, the legislature amended the statute again to its present form, which broadened the privilege and clarified provisions of the law that deal with consent to disclosure.

B. Purpose

The Illinois legislature recognized the necessity of privacy for rape victims when it described the purpose of the statute:

Par. (a) Purpose. This Section is intended to protect victims of rape from public disclosure of statements they make in confidence to counselors of organizations established to help them. On or after July 1, 1984, "rape" means an act of forced sexual penetration or sexual conduct, as defined in Section 12-12 of the Criminal Code of 1961, as amended. Because of the fear and stigma that often results from those crimes, many victims hesitate to seek help even where it is available at no cost to them. As a result, they not only fail to receive needed medical care and emergency counseling, but may lack the psychological support necessary to report the crime and aid police in preventing future crimes.

C. Confidentiality Mandate

This paragraph of the legislation sets forth the absolute nature of the privilege of confidentiality for rape survivors by prohibiting disclosure of protected communications without the victim's consent. It also explains that protected communications are those between a victim and a rape crisis counselor. Finally, this paragraph states that *the victim* is the one who decides whether confidential communications with her counselor will be disclosed to anyone.

Par. (d) 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 representative of the victim as provided in subparagraph (e).

D. Definitions

1. Rape Crisis Counselor

Par. (b)(2) "Rape crisis counselor" means a person who is a psychologist, social worker, employee, or volunteer in any organization or association defined as a rape crisis organization under this Section who has undergone 40 hours of training and is under the control of a direct services supervisor of a rape crisis organization.

The privilege is limited only to the relationship between a "rape crisis counselor" and a person who seeks services as a result of one of the identified sexual assault crimes. Under this law, a "rape crisis counselor" is an employee or volunteer of a rape crisis organization with 40 hours of training who is under control of a supervisor of rape crisis organization. In other words, in addition to counselors, 40-hour trained advocates and educators – paid and volunteer – would be covered by this privilege, in addition to the people who actually counsel a victim.

2. Rape Crisis Organization - To be protected by this privilege, a "rape crisis counselor" must be affiliated with a "rape crisis organization."

Par. (b)(1) "Rape crisis organization" means any organization or association the major purpose of which is providing information, counseling, and psychological support to victims of any or all of the crimes of aggravated criminal sexual assault, criminal sexual assault, sexual assault relations between siblings, criminal sexual abuse and aggravated criminal sexual abuse.

A rape crisis organization is any organization whose primary purpose is to assist and support victims of sexual assault and sexual abuse. This broad definition can include corporations, collectives and volunteer organizations. Note, however, the "major purpose" must be to provide information, counseling and psychological support. This definition clarifies that the priority in service must be in assisting the victim. Further, a rape crisis center must not take part in activities that conflict with its mission, including participating as an active player in the investigation.

3. Confidential Communication

Par. (b)(4) "Confidential communication" means any communication between a victim and a rape crisis counselor in the course of providing information, counseling, and advocacy. The term includes all records kept by the counselor or by the organization in the course of providing services to an alleged victim concerning the alleged victim and the services provided.

This provision protects any communication between a victim of sexual assault or sexual abuse and a rape crisis counselor in the course of providing assistance and support to the victim.

Protected communications include “any communication” made by the victim to the rape crisis counselor in connection with a counseling session in a confidential setting. This includes written records kept by the counselor concerning the victim and services she receives. Any notes or documentation made by the counselor regarding this relationship are also protected, including computer-based records and e-mails.

A confidential setting is a situation in which there is an expectation of privacy. Except as provided by the statute, this means that only the victim and the counselor are present during the communication. Exceptions to this requirement are discussed later in this chapter.

4. Victim - The privilege protects any communications a “victim” has with a “rape crisis counselor.”

Par. (b)(3) “Victim” means a person who is the subject of, or who seeks information, counseling, or advocacy services as a result of an aggravated criminal sexual assault, criminal sexual assault, sexual relations within families, criminal sexual abuse, aggravated criminal sexual abuse, sexual exploitation of a child, indecent solicitation of a child, public indecency, exploitation of a child, or an attempt to commit any of these offenses.

The definition of “victim” includes a person who seeks information, counseling or advocacy services as a result of the commission or attempt of one of the above crimes. This definition does not require that the person seeking services be the person against whom the crime was committed. In addition to the identified victim, this definition allows for protection of a parent or significant other who may also request and receive services as a result of a sexual assault. It also

includes participants in an education program presented by the rape crisis center.

E. Penalty for Improper Disclosure

Par. (f) Any rape crisis counselor who knowingly discloses any confidential communication in violation of this Act commits a Class C misdemeanor.

Except where otherwise provided by the law, any knowing disclosure by a rape crisis counselor of a "confidential communication" without a properly executed consent is chargeable as a Class C misdemeanor, punishable by a term of imprisonment for more than 30 days, a fine not to exceed \$500.00, or both.

F. Exceptions to Absolute Privilege

1. **Duty to Warn** - If a rape crisis counselor believes that failing to disclose confidential communications will result in serious bodily harm to someone, then the counselor should disclose the communications and will be immune from any liability.

Par. (e) A rape crisis counselor may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any rape crisis counselor or rape crisis organization participating in good faith in the disclosing of records and communications under this Act shall have immunity from any liability, civil, criminal, or otherwise that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this Section, the good faith of any rape crisis counselor or rape crisis organization who disclosed the confidential communication shall be presumed.

This paragraph gives counselors the right to disclose information without the victim's consent when there is a clear risk of serious bodily harm to the victim or to another person. For example, a counselor might

need to warn an appropriate official if a client is suicidal or reports that someone is trying to harm her. A counselor must evaluate each situation individually for risk of harm, including the specificity of the description by the client (e.g. is there a specific plan to inflict harm) and the immediacy of the danger described.

In most circumstances in which a counselor must make a warning, the counselor should notify local law enforcement authorities and the person who is the subject of the threat. The fact that the warning was made should be documented thoroughly in the client's file.

This section of the law also protects a counselor from criminal or civil liability for a "good faith" disclosure. The law presumes that a disclosure is made in good faith. No therapist to date has ever been held liable in Illinois for making a disclosure under duty to warn provisions.

2. Reporting Child Sexual Abuse - When the victim is a minor, child protective statutes override the protection of confidentiality. Rape crisis workers are required to report child abuse and child sexual abuse to the Illinois Department of Child and Family Services under the Abused and Neglected Child Reporting Act (ANCRA). 325 ILCS 5/1 *et seq.* For more information on mandated reporting, see Chapter 6 of this manual.
3. Reporting Elder Abuse - Rape crisis center employees and volunteers also are required to report elder abuse under the Elder Abuse and Neglect Act. 320 ILCS 20/1 *et seq.* Although centers may not serve a large number of elderly clients, intervention in an instance of elder abuse can provide seniors with critical assistance in escaping an abusive situation. To report

elder abuse, a rape crisis worker should call the Illinois Department on Aging, Elder Abuse and Neglect Program, Senior Helpline at 1-800-252-8966. On evenings and weekends, crisis workers should call 1-800-279-0400.

G. Waiver of Privilege - Statutory Provisions

1. Introduction - The "Confidentiality of Statements Made to Rape Crisis Personnel" statute was amended in 1993 to add the "waiver of privilege" paragraphs. Waiver means that the victim gives up or relinquishes her privilege to keep information confidential. The law clarifies when a privilege is waived, who has the power to waive the privilege and under what circumstances the privilege of confidentiality can be waived. When a victim no longer wants the rape crisis privilege to protect her relationship with her counselor, or the counselor or client acts in a manner that negates that privilege as discussed below, the victim has waived her privilege. In doing so, she will release the contents of her confidential communications with her counselor.

Despite having an absolute privilege to keep information confidential, occasionally a victim will choose to release her records or ask her counselor to testify at a hearing or trial. Ultimately, the victim makes the decision whether to waive this privilege. But counselors (and advocates, educators and, sometimes, center directors) play an important role in ensuring the victim is fully informed and understands the consequences involved in waiving her privilege to confidentiality.

2. Circumstances in Which a Victim Might Waive Her Privilege - A victim may choose to waive her privilege in any kind of legal case -- a criminal case, a civil case against her perpetrator, or a civil matter such as a divorce or a custody lawsuit. But once she waives this privilege, she has waived it forever. A victim generally considers waiving confidentiality in a legal case when she, in conjunction with a lawyer, believes that the testimony of the rape crisis counselor (either verbal or through records) will reinforce the victim's position in the case.

A victim also may consider waiving her privilege to allow a rape crisis counselor or advocate to talk to another professional with whom the victim is working, such as a medical doctor. In this situation, a victim usually considers waiving confidentiality to allow her service providers to communicate with each other to coordinate services. Advocates should stress to a victim that, once a victim chooses to waive her privilege of confidentiality, she loses it forever.

3. Waiver of Privilege by a Person 12 Years Old or Older

Par. (c)(4) A minor victim 12 years of age or older may knowingly waive the privilege established in this Section. When a minor is, in the opinion of the Court, incapable of knowingly waiving the privilege, the parent or guardian of the minor may waive the privilege on behalf of the minor, unless the parent or guardian has been charged with a violent crime against the victim or otherwise has any interest adverse to that of the minor with respect to the waiver of the privilege.

This section gives 12-year-olds and teenagers the right to decide whether their confidential communications with a rape crisis counselor will be disclosed.

4. Inspection of Records and 'Waiver of Privilege' For Victims Under 12

Years Old - The rape crisis privilege identifies who may review a victim's rape crisis counseling records and who can waive the privilege for minor victims under 12 years old.

Par. (c)(2) The confidential nature of counseling records is not waived when: the victim inspects the records; or in the case of a minor child less than 12 years of age, a parent or guardian whose interests are not adverse to the minor inspects the records; or in the case of a minor victim 12 years or older, a parent or guardian whose interests are not adverse to the minor inspects the records with the victim's consent.

If a victim is under 12-years-old, the victim or non-offending parent or guardian can examine rape crisis records without jeopardizing the victim's privilege to keep the information confidential. The privilege is also preserved when a victim who is a minor at least 12-years-old or older consents to allow a non-offending parent to review the records.

For a victim under 12, a parent or guardian whose interests are not adverse to the victim can waive confidentiality.

5. Deceased or Incompetent Victims - The law also identifies who can waive the privilege in cases where the victim is deceased or incompetent.

Par. (c)(3) When a victim is deceased or has been adjudged incompetent by a court of competent jurisdiction, the victim's guardian or the executor or administrator of the victim's estate may waive the privilege established by this Section, unless the guardian, executor, or administrator has an interest adverse to the victim.

6. O.K. Third Parties Do Not Constitute Waiver - Ordinarily,

communications between a victim and a rape crisis counselor are confidential only if no one else is present. The statute defines three

exceptions when a third person (referred to as an O.K. Third Party) may be involved in the communication between the victim and the counselor without jeopardizing the victim's privilege.

Par. (c)(1) Waiver of privilege. The confidential nature of the communication is not waived by: the presence of a third person who further expresses the interests of the victim at the time of the communication; group counseling; or disclosure to a third person with the consent of the victim when reasonably necessary to accomplish the purpose for which the counselor is consulted.

First, "the presence of a third person who further expresses the interests of the victim at the time of the communication" does not waive the victim's privilege. For example, this provision allows rape crisis counselors to communicate through a translator, interpreter or with the parent or guardian of a child.¹⁰

Second, the statute protects communications during group counseling, despite the presence of other group members.

Third, a rape crisis counselor may speak with an outside party to provide necessary rape crisis services if the victim consents. This allows a counselor to assist the victim in filing crime victim compensation forms, or in correcting a hospital billing error without the risk of violating the victim's confidentiality rights.

Under separate provisions in the Mental Health and Developmental Disabilities Confidentiality Act, a counselor also may disclose information concerning the victim to other counselors, colleagues and supervisors for the purpose of consultation without violating confidentiality.¹¹

The permission to allow a third party to be present during confidential communications between a victim and a rape crisis counselor does not include criminal justice personnel because they are *not* persons focused solely on the best interests of the victim. Law enforcement officers and prosecutors can be important allies to a victim and to rape crisis centers but their primary goal is apprehension of the criminal, rather than victim support.

The advocate's presence during the police/prosecutor interviews constitutes a waiver of the privilege. In contacts with police or State's Attorneys, the counselor/advocate cannot refer to her communications with the victim.

H. Waiver of Privilege - Methods

While the vast majority of sexual assault victims desire to keep their contacts with a rape crisis center confidential, there will be occasions when the victim may choose to consent to release of information. The rape crisis privilege can be waived in two ways.

1. Written Consent to Disclose - Under the privilege statute, if a victim consents to waive the privilege, it must be an informed consent done in writing; a victim cannot consent to waive the privilege verbally. Therefore, the victim who chooses to disclose her confidential communications must sign a form, discussed below, regarding consent to release the information. Informed consent means that the victim knows completely the consequences of her decision to waive the privilege,

including which information will be released and to whom it will be released.

Before authorizing consent, a victim has the right to – and should – review all records pertaining to her case. The rape crisis counselor should discuss with the victim the advantages and disadvantages of disclosure of records, noting any specific documented communications and stating the potential consequences of disclosure. In some cases, it may be to the victim's benefit to disclose the information. In all cases, the scope and ramifications of disclosure should be made clear to the best of the advocate's knowledge.

2. Consent to Release Forms - In 1975, the American Psychiatric Association made these recommendations regarding consent to release forms. The authorization should:

- be written;
- signed and dated;
- state that the provider is authorized to disclose information;
- state specifically what information will be disclosed;
- state specifically who will receive the information;
- state specifically the purpose for which information is disclosed; and
- state specifically the expiration date of the consent, which should not exceed one year.

The counselor also should indicate in writing that the victim was informed of her rights under the confidentiality statute and that she chose to waive her privilege and have the information disclosed. Illinois

substantially has adopted these recommendations into the Mental Health and Developmental Disabilities Confidentiality Act. For a comprehensive explanation of written waivers, refer to ICASA's Handbook of Policies and Procedures: Safeguarding Confidentiality in Rape Crisis Services.

3. When Victim or Counselor Conduct Operates to Waive the Privilege of Confidentiality - A victim's conduct, or the conduct of a rape crisis employee or volunteer, also can operate to waive the victim's rights of confidentiality. Waiver by conduct can occur in three ways: (1) when the victim talks with the counselor in the presence of a bystander who is not protected by the privilege; (2) when the counselor repeats confidential communications that she had with the victim to a person not protected by the privilege; or (3) when the victim discloses the confidential communications of her discussions with a rape crisis counselor to a third party (for example, if the victim tells the police officer, "I told my counselor I couldn't get a good look at his face.").

Although the statute does permit a counselor to communicate in the presence of a third person who is there to assist the victim, a counselor should not discuss the case with a third party unless it is necessary to further the victim's interest and only when the victim specifically consents in writing prior to any disclosure.

III. ASSERTING THE VICTIM'S RIGHT TO CONFIDENTIALITY

A. Overview

Illinois law provides that a sexual assault victim has control of the privilege that protects her confidentiality at the rape crisis center, but the rape

crisis counselor is responsible for asserting the sexual assault survivor's rights. Under the law, unless an exception applies, only the victim or her designee can consent to waive her right to confidentiality. Thus, in most cases the center will respond to a request for information by asserting the victim's right to confidentiality.

B. Responding to a Request For Information

1. Subpoena - Usually a request for information about a victim will come in the form of a subpoena from an attorney. There are two kinds of subpoenas in Illinois: a subpoena ad testificandum requires the counselor or advocate to testify in person and a subpoena duces tecum requires that records be produced for examination. A single subpoena may include both a request for records and testimony of the counselor.

A subpoena may request that all records for a particular client be delivered to a specific address or that the counselor or advocate arrive at court with the records on a specific date. "All records" refers to everything that has been documented at the rape crisis center regarding services provided to that victim.

2. Being Served - Procedures - A subpoena may be served by mail or in person. Once the center receives a subpoena, staff should check to see whether any release has already been signed with regard to the information requested in the subpoenas. If a release exists, the center should respond to the subpoena accordingly. If no release exists, staff from the center should contact the victim to determine whether the victim wants to release the confidential information demanded in the subpoena.

3. Responding to a Subpoena

a. **Consent to Disclose**

If the victim consents to disclosure of records or to testimony by a rape crisis counselor or advocate, the consent must be in writing. When responding to a subpoena for testimony, the counselor or advocate must appear to answer questions at the time and place designated on the subpoena. When responding to a subpoena duces tecum, the counselor should make a copy of the victim's records and deliver them at the place and time designated. Illinois does not require the submission of original records; copies are permissible. Advocates should retain a copy of all materials turned over to law enforcement officials. After a client signs a consent to release information, confidentiality has been waived for all information a rape crisis center has about a client, even if only a portion of a client's records are released or a counselor testifies to only limited information about the client.

b. **Refusal to Disclose**

Usually, the victim does not wish to give up her confidentiality. In these cases, the rape crisis center will invoke the privilege not to disclose the confidential communications.

A representative of the rape crisis center can contact the party requesting the records/testimony stating that the requested information is protected by the confidentiality statute. Some attorneys are not aware of the statute and, when informed, may

withdraw their request for records and/or testimony. In the conversation with the State's Attorney, the advocate should cite the statute, Confidentiality of Statements Made to Rape Crisis Personnel, 735 ILCS 5/8-802.1. All rape crisis centers should develop a relationship with a local attorney who can represent the center in responding to subpoenas, either for no charge (*pro bono*) or for a very low fee. This attorney can contact the attorney who is requesting protected documents to request that s/he withdraw the subpoena. One advantage of an attorney making this call is that s/he may have a professional rapport with the attorney who served the subpoena. This can make the discussion regarding the subpoena easier. For additional information on responding to a request for client conformation, see ICASA's Pro Bono Attorney Referral Packet.

c. **Motion to Quash**

If the attorney who requested information refuses to withdraw the subpoena, the center's attorney or the victim's attorney (if she has one) must file a Motion to Quash the Subpoena. After the Motion to Quash is filed, a hearing is set. The person who wishes to establish the confidentiality of records and/or testimony must prove in court that the relationship is privileged, and therefore all communications between the people identified are privileged. The hearing will establish that:

- the counselor is a rape crisis counselor as defined under the law;
- the organization is one that constitutes a rape crisis center as defined under the law;
- the communications were made in confidence with the expectation of privacy; and
- no consent to release the confidential communications has been given by the victim.

If these facts are established, the judge should prohibit disclosure as required under the confidentiality statute. However, note that the judge may not do this.

d. **Failure to Respond Or Comply**

If the judge orders a release of information over the victim's objection, the order is nonetheless effective unless the judge agrees to "stay" the order pending an appeal to the appellate court. If the judge does not grant a "stay," and the center refuses to comply, the counselor can be held in contempt of court, which may result in the counselor being fined or jailed or both. Once a contempt sentence is entered, the conviction becomes appealable and can be examined by an appellate court.

e. **Motion for a Protective Order**

If the court determines that the records are not protected by the statute, the court may nonetheless enter a protective order on motion of any party or witness limiting disclosure of the records or limiting the testimony. The court may even provide

limits on further disclosure of materials contained in the records by any party.¹²

IV. CONFIDENTIALITY AND CHILD VICTIMS

A. Historical View

Historically, minors have been subject to the authority and control of their parents or guardians. In 1899, the first juvenile court in the nation was created in Chicago and officials began to view children as more than the “property” of their parents. In the early 1900's, the mental health field began to examine the issue of child abuse. Sexual abuse of children was documented as early as the 6th century B.C., but has been the subject of much research only in the last two decades.

Until the 1960's, minors' legal rights generally were not recognized, based on the theory that children were incapable of making informed decisions.¹³ Especially in the case of adolescents, many of whom might qualify as mature minors, this assumption is invalid. Children must be protected from sexual abuse or exploitation. They also can and should be able to make decisions that help them recover from sexual abuse.

B. Preserving Confidentiality With Minors

Sexual assault centers provide services to victims who are minors. Rape crisis counselors provide guidance and support to alleviate the feelings of shame, humiliation and embarrassment often triggered by a sexual assault.

Confidentiality is central to this relationship between counselors and victims who are minors. However, in the case of a minor, overlapping legal rules complicate the ability of the rape crisis counselor to provide confidential services.

Depending on the age of the child, parents may be called upon to consent to

services for the child and/or to decide whether information should be released.

When both parents have custody, each parent has a duty and a right to control the care and custody of the child.¹⁴ If a parent has filed for divorce, a court may have granted legal custody to one parent. In such a case, that parent has the right to consent to the care and treatment of the minor child. When parents are in the process of divorce, it is especially important to ascertain whether one or both parents have the right to consent to services for the child.¹⁵ It is appropriate for the parent to affirm in writing that s/he has legal authority to consent to counseling on behalf of the child.

In Illinois, a victim of sexual abuse over the age of 12 has the right to consent to a limited amount of counseling.¹⁶ Further, some adolescents may be considered "mature,"¹⁷ and an "emancipated" minor can consent on an equal basis as an adult.¹⁸ For contacts and services beyond those granted to the minor, the rape crisis counselor must obtain consent of a parent or legal guardian.

Even when a parent consents to counseling on behalf of a minor, the child client will have an expectation of privacy and may resist any disclosure of information to a parent. Adolescents, especially, have privacy concerns that may legitimately lead to less disclosure of information to parents. For minor clients under the age of 12, a parent can access the child's records and talk to the child's counselor - with or without the child's consent.¹⁹ A minor aged 12 or older has the power to determine who accesses her records. In short, a child 12-years-old or older can deny her parents access to her records.²⁰

Sexual assault advocates and counselors should explain the issue of client confidentiality to a minor client and her parent or guardian. Both the minor and

the parent should be clearly informed about disclosure that will occur with parents. For example, both the parent and child should be told at the initial session that a rape crisis counselor who is a mandated reporter will make a child sexual abuse report to DCFS to protect the minor from further risk of harm. Once they understand the need to maintain confidentiality for the child, parents often consent to services for the minor. Generally, a rape crisis counselor and an adolescent client will develop a rapport that can lead to the minor sharing appropriate disclosures with the parent at an appropriate time.

ENDNOTES

¹ The two common law privileges are husband/wife and attorney/client; see, Zimmer v. Zimmer, 298 Ill. 586, 132 N.E.2d 216 (1921) and People v. Adam, 51 Ill.2d 46, 280 N.E.2d 205 (1972).

² Id. See also 735 ILCS 5/8-802 (physician-patient), 735 ILCS 5/8-803 (clergy/parishioner) and 735 ILCS 5/8-901 (reporter-source).

³ Marks, Lynn A., *Protecting Confidentiality: A Legal Manual for Battered Women's Programs*, National Center on Women and Family Law, Inc., New York NY, p.135 (1986).

⁴ *National Victim Center Legislative Database*, NVC, Arlington VA (1993).

⁵ By 1985, Illinois (Ill.Rev.Stat., Ch. 110, sec. 8-802.1 (1985)), Pennsylvania (42 Pa.Cons.Stat.Ann., sec. 5945.1 (Purdon 1982)), Florida (Fla.Stat., sec. 90.5035 (Supp. 1985)), New Jersey (N.J.Stat.Ann., sec. 2A:84A-22.11, 2A:84A2--12 (West Supp.)) and Massachusetts (Mass.Gen.Laws Ann., Ch. 233, sec. 20J (West Supp. 1985)) granted absolute confidentiality to rape victims; *supra note 7 at 138*.

⁶ Julie Kunce Field, "Confidential Communications Between Sexual Assault Counselor and Domestic Violence Counselor and Clients: A State By State Summary," Pennsylvania Coalition Against Domestic Violence/Battered Women's Justice Project (Forthcoming).

⁷ Id.

⁸ Id.

⁹ People v. Foggy, 121 Ill.2d 337, 521 N.E.2d 86, 118 Ill.Dec. 18, *cert. denied*, 108 S.Ct. 2044 (1988).

¹⁰ The use of an interpreter does not waive any privilege in Illinois. 735 ILCS 5/8-911.

¹¹ 740 ILCS 110/96(1).

¹² IL S.Ct. Rule 201(c)(1).

¹³ Horowitz, Robert and Howard Davidson, *Legal Rights of Children*, Shepard/McGraw Hill, Colorado Springs CO (1984).

¹⁴ See, In Re Wheat, 68 Ill.App.3d 471, 386 N.E.2d 278 (1979) citing Wisconsin v. Yoder, 406 U.S. 205 (1972) and 59 Am.Jur.2d *Parent and Child* 8-24 (1971).

¹⁵ See Dymek v. Nyquist, 128 Ill.App.3d 859, 469 N.E.2d 659 (1st Dist. 1984).

¹⁶ 405 ILCS 5/3-501.

¹⁷ A mature minor is one who is 16 years of age or over and under the age of 18 years who has demonstrated the ability and capability to manage his own affairs and to live wholly or partially independent of his parents or guardian; Emancipation of Mature Minors Act, 750 ILCS 30/3-2.

¹⁸ In Illinois, a minor is emancipated, i.e. free of parental control, by marriage, enlistment in the military or judicial

order; Juvenile Court Act, 705 ILCS 405/1-3(7).

¹⁹ Confidentiality of Statements Made to Rape Crisis Personnel, 735 ILCS 5/8-802.1(c)(2).

²⁰ Id.