

**ALAMEDA COUNTY FAMILY JUSTICE CENTER  
CONFIDENTIAL COMMUNICATION  
and  
THE DOMESTIC VIOLENCE and SEXUAL ASSAULT SURVIVOR  
POLICY and PROTOCOL**

I, \_\_\_\_\_, understand that the highest priority of the Alameda County  
(name and position)

Family Justice Center (ACFJC) is the safety of the Client will be protected and will not knowingly be compromised by any personnel, professional, staff, volunteer or on-site person.

I. It is the highest priorities of the ACFJC that communications between the client and identified personnel will be protected and held confidential. Further, client information will be closely guarded, held confidential and protected by all means legally available to the ACFJC. To that end, within the Central Intake System, the client information shall be designated by assigned number and any specific information that links the client to that particular number will be maintained separately and stored remotely with limited access to specific individuals.

II. Each professional, personnel, and volunteers providing services for FJC clients, whether or not those services are provided on-site or off-site at the FJC shall sign and date the Written Acknowledgement of the "ACFJC Confidential Communications and the Domestic Violence and Sexual Assault Survivor Policy and Protocol." Said signed Acknowledgement will be retained at the ACFJC by the Executive Director and will stand as evidence that the signer has received training on the policy and protocol, understands the guiding principle of the ACFJC with respect to client safety and confidentiality, agrees to abide by said policy and protocol and assures commitment to adherence of the policy and protocol, as well as the guiding principle.

III. Each agency will be provided a locking file cabinet at the ACFJC. Any client records shall be retained in a locked filing cabinet for security purposes. It is the responsibility of the agency, or person providing the service and retaining any written record to lock said records in the locked filing cabinet when the person holding the records is not present for a significant period of time, such as in the evening when the ACFJC is closed.

IV. If any agency retains client information electronically, the electronic mode of retention (computer) shall be password protected, including „windows log on password protection“ and the „windows screen saver password protect“, with appropriate firewalls in place. The agency shall designate individual access pursuant to the agency policy. Any electronic mode of retention shall be turned off when the person holding the electronic records is not present for a significant period of time.

V. At the ACFJC, an explanation of the confidential communication protections shall be explained to all clients at the initial intake of the client to the ACFJC. Any consent by the client for disclosure of information, and/or authorization to release certain information shall be the product of informed consent. Thereafter, an explanation of the law will be reiterated to the victim/survivor when appropriate.

VI. The “victim” of the domestic violence, sexual assault, stalking (where legally applicable) or elder abuse shall be the holder of the privilege. Waiver of any privilege shall be in writing and only after full consent as stated above.

VII. At the ACFJC, clients can receive counseling and/or services from various professionals. Each professional will be responsible for ensuring that they are in compliance with the professional mandates that authorize them to hold protected communications.

VIII. All professionals shall take all steps to ensure that no protected communication shall be heard by or disclosed to a third party unless:

- the presence of the third party is in the interest of the client in consultation;
- those to whom disclosures are reasonably necessary for the transmission of the information
- an accomplishment of the purposes for which the professional is consulted.
- informed consent is given in writing by the client
- ordered to do so by a Court of Law

To the end, no person with legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim shall discuss client matters in public spaces, including hallways or open offices and/or conference rooms at the ACFJC.

IX. Necessary disclosure to any third party must be done in such a manner as to ensure no one other than the intended recipient has access to the information. Modes of communication of such information shall be done in person, telephonically or other equivalent medium producing no written copy, traditional fax to a controlled fax recipient. It is strongly urged that no confidential communication be disclosed or transferred electronically, such as through electronic mail, attachment to electronic mail or other mode unless appropriate safeguards are in place and appropriate encryption is created for such communications.

X. Each agency having legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim shall provide and maintain a separate fax line and machine. Said fax machine shall be located in such a manner so that only the sender shall control the fax and only the intended recipient shall receive the fax.

XI. Each agency having legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim shall submit a copy of the written policy to the Executive Director at the ACFJC ensuring compliance with the ACFJC Policy and Protocol with regard to client safety and confidential communications.

XII. No client will be publicly acknowledged without his or her express permission.

XIII. All questions regarding confidentiality will be directed by the person having legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim to the supervisor in compliance with their agency policy.

By signing this document, I acknowledge the policy and protocols regarding victim safety and

protection of confidential communications set forth at and by the ACFJC. I do hereby agree to abide by said policy and protocol. I understand that a knowing and voluntary violation of the confidentiality policy can jeopardize my working relationship at the ACFJC.

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Signature of Employee

Date

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Signature of Supervisor

Date

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Signature of Executive Director of ACFJC

Date

## DISCUSSION

The Alameda County Family Justice Center (ACFJC) will provide services to victims of domestic violence, sexual assault, elder family abuse and to children who witness or experience domestic violence. In California, domestic violence and sexual assault victims have the right to have certain protections of confidentiality under the law, including certain communications. They also have the honor of confidentiality where there is not necessarily applicable law, including identity confidentiality as a client and/or recipient of services at the ACFJC, should they so choose.

At what point and under what circumstances does the Domestic Violence and/or Sexual Assault Survivor, irrespective of age, have protected communication?

To answer the query, one must look at several issues: to whom the communication was made, under what circumstance the communication was made, what is the communication that was made. The pivotal question, therefore, is under what circumstances are the communications of the domestic violence and/or sexual assault victim protected. And, who holds the privilege of the confidential communication?

**POLICY POINT: At the ACFJC, an explanation of the confidential communication protections shall be explained to all clients at the initial intake of the client to the ACFJC. Any consent by the client for disclosure of information, and/or authorization to release certain information shall be the product of informed consent. Thereafter, an explanation of the law will be reiterated to the victim/survivor when appropriate.**

## HOLDER OF THE PRIVILEGE

The domestic violence/sexual assault victim, or the guardian of the victim who is a minor, holds the privilege of confidential communication. Under some circumstances, a minor may be the holder of the privilege. As holder of the privilege, the victim can refuse to disclose and can prevent the professional from disclosing the protected communication absent a mandate by a Court. Likewise, the holder of the privilege can waive that privilege enabling the professional to share or report information to third parties.

**POLICY POINT: The “victim” of the domestic violence, sexual assault, stalking (where legally applicable) or elder abuse shall be the holder of the privilege. Waiver of any privilege shall be in writing and only after full consent as stated above.**

## THE PROFESSIONALS

At the ACFJC, it is most likely that **protected communications** will occur between the domestic violence and/or sexual assault survivor and few of the professionals recognized under California law. Those professionals include attorneys, law clerks, law students, therapists and counselors, domestic violence and/or sexual assault counselors, victim-witness advocates, clergy and medical.

**POLICY POINT: At the ACFJC, clients can receive counseling and/or services from various professionals. Each professional will be responsible for ensuring that they are in compliance with the professional mandates that authorize them to hold protected communications.**

## **THE LAW**

The Evidence Code controls the types and methods of evidence that are admissible in Court. These laws also protect the communication between domestic violence, and sexual assault survivors and professionals.

Each Evidence Code section having to do with confidential communications define who falls within the definition of the “profession” for purposes of engaging in communications that are protected (see below for full text of statutes). However, where the Criminal Justice professionals are involved, the rules are significantly different and are discussed below. By way of example, a Civil Attorney, or Family Law Attorney will be covered under Evidence Code Sect. 954 et seq. However, a Deputy District Attorney, who is also an attorney, is not covered under the same Evidence Code Section. While the Civil or Family Law Attorney must keep communications confidential, the Deputy District Attorney is required by law to disclose to the defense any statements made by the victim of the crime and is always bound to disclose exculpatory evidence that is material.

Each section defines under what circumstances, to whom and what communications are protected. Likewise, each section also sets forth circumstances that might result in a penetration of the protection albeit under very limited and closely scrutinized circumstances. For instance:

- an **attorney** who is bound not to disclose a communication between herself and her client may be required to do so if the communication would enable or aid in the commission of a crime or fraud. Other circumstances are clearly set forth in Evidence Code Section 956-961;
- the **psychotherapist** is required by law to hold communications between herself and her client confidential, unless there is a mandatory duty to report child abuse as set forth under the law in Penal Code Sections 11161 et seq;
- a **domestic violence or sexual assault counselor** is empowered to hold communications confidential, unless ordered to do so by a Court or with the consent of the survivor.
- While they may be providing similar and often times identical services provided by a domestic violence or sexual assault counselor, a **victim-witness advocate**, who is part of the prosecution team, has the duty to disclose to the prosecution, statements made by the survivor and particularly any statements made that could be exculpatory to the defendant.

Although this Policy Paper will focus on the statement of law that governs communications between the sexual assault counselor and the victim, the domestic violence counselor and the victim as well as the victim-witness advocate and the victim, a brief articulation of the law regarding other professionals who have the obligation to hold communications confidential is in order.

The civil or family law attorney and their subordinates including law clerks and paralegals, are bound by the same professional rules as the attorney. Further, any representative of the attorney, such as an investigator, is bound to hold the communications confidential. The Evidence Code defines each

of the subordinates of a psychotherapist and clearly, all are bound by the same rules as the psychotherapist with respect to holding communications confidential and under what circumstances a communication must be disclosed.

There will be limited medical services provided on-site. The Evidence Code protects communications between the health care provider, including a Physician Assistance, with limited circumstances under which the law requires disclosure. At the ACFJC, many of the medical examinations performed on-site will be forensic examinations consented to by the victim and authorized by law enforcement. The requisite forms to be completed become part of the police report. Including in the exam are statements of the victim/survivor are memorialized. As such, those statements are not protected as confidential communications.

### **SEXUAL ASSAULT & DOMESTIC VIOLENCE COUNSELORS & THE “VICTIM”**

As stated above, the Evidence Code specifically protects communications between the Sexual Assault (SA) or Domestic Violence (DV) Counselor and the “victim.” In that the rules are essentially identical, reference set forth below will pertain to both disciplines, which often involve the same professionals. Evidence Code Sections 1035 et seq., and 1037 et seq., articulate the rule regarding confidential communication between the SA/DV victim and the Domestic Violence Counselor.

To be applicable, the “victim” means a person who consults a sexual assault counselor for the purpose of securing advice or assistance concerning a mental, physical or emotional condition caused by a sexual assault. EC 1035.

The definition of the qualifying “Sexual Assault Victim Counselor” includes those persons who engage in any office, hospital, institution or center that qualifies as a Rape Crisis Center as defined in Penal Code Section 13837 so long as one of he or she meets the articulated requirements. Specifically, a person qualifies as a “Sexual Assault Victim Counselor” if he or she is

- working in or with a Rape Crisis Center and who is a psychotherapist;
- has a master’s degree in counseling or related field; or
- has one year of counseling experience, at least six months of which is in rape crisis counseling;
- has had 40 hours of Rape Crisis training and is supervised by one who qualifies as a counselor under the statute.

Not all communications between the sexual assault or domestic violence counselor and the victim are protected. Protected communications includes information that is transmitted between the victim and the sexual assault counselor in the course of their relationship. The information must be communicated in confidence by a means that, so far as the victim is aware, discloses the information to no third persons with limited exception. For instance, if the Survivor communicates with the sexual assault counselor AND the Police Officer or a friend is present, the communication ceases to be confidential. The types of communications that are protected include all information regarding the facts and circumstances of the sexual assault as well as all information regarding the victim’s prior or subsequent sexual conduct, and opinions regarding the victim’s prior or subsequent sexual conduct, and opinions regarding the victim’s sexual conduct or reputation in sexual matters.

**POLICY POINT: All professionals shall take all steps to ensure that no protected communication shall be heard by or disclosed to a third party unless:**

- **the presence of the third party is in the interest of the client in consultation;**
- **those to whom disclosures are reasonably necessary for the transmission of the information**
- **an accomplishment of the purposes for which the professional is consulted.**
- **informed consent is given in writing by the client**
- **ordered to do so by a Court of Law**

**To the end, no person with legal authority to hold privileged communications on behalf of a domestic violence or sexual assault victim shall discuss client matters in public spaces, including hallways or open offices and/or conference rooms at the ACFJC.**

As stated above, not all communications between the counselor and the victim are protected. As an extreme example of what is not protected communication: if during the course of the relationship, the Survivor admits the crime of homicide that is not connected to the sexual assault for which counseling is sought, the sexual assault counselor can be compelled to disclose the admission and the sexual assault counselor can disclose the communication on his or her own. The Survivor cannot prevent the sexual assault counselor from disclosing the admission. Likewise, the sexual assault counselor has no obligation to disclose the admission to the authorities, but can do so if he or she so chooses.

Further, the confidential communication is not absolute. The court can compel disclosure and override the claim of the privilege, if the Court determines that the probative value outweighs the effect on the Survivor and the treatment relationship. Essentially, the Court conducts an EC 352 analysis. When ruling on the claim of the privilege, the Court may require the counselor or the Survivor or both, to disclose the information in chambers and in camera (out of the presence of the other parties). Normally, if the counselor discloses the communication to a third person, the integrity of the privilege is broken and the privilege may no longer exist. However, if the counselor discloses the communication to the Court, in chambers and in camera, the privilege is not breached. Ultimately, if the Court rules that the privilege stands, then the counselor cannot disclose the information absent the authorization from the Survivor.

At all times, absent actual consent from the Survivor, the sexual assault victim counselor shall assert the privilege pursuant to Evidence Code Section 1036. That privilege cannot be breached by either the Prosecution or the defense and can only be executed by actual consent of the Survivor or by Court Order.

The same analysis holds in Domestic Violence cases and the confidential communications set forth in EC 1037 et seq.

To be applicable, the “victim” means a person who consults a domestic violence counselor and any information transmitted between the victim and the counselor. EC 1037.2. The definition of the qualifying “Domestic Violence Counselor” includes those persons who are employed by any

organization providing the programs specified in Section 18294 of the Welfare & Institution Code and who has received specialized training for counseling domestic violence victims and he or she meets the articulated requirements. Specifically, a person qualifies as a “Domestic Violence Counselor” if he or she is working in or with an organization as set forth above and who is

- a psychotherapist; OR,  
who has a master’s degree in counseling or a related field; OR
- has one year of counseling experience at least six months of which is in domestic violence counseling; OR
- has had 40 hours of domestic violence training and is supervised by one who qualifies as a “counselor” under the statute; OR
- works in the Victim-Witness Assistance Program and is supervised by one who qualifies as a “counselor” under the statute. EC 1037.1

As discussed above, not all communications are protected and privileged. Protected communications includes information that is transmitted between the victim and the domestic violence counselor in the course of their relationship. The information must be communicated in confidence by a means that, so far as the victim is aware, discloses the information to no third persons with limited exception. For instance, if the domestic violence victim communicates with the domestic violence counselor AND the Police Officer or a friend is present, the communication ceases to be confidential. Ordinarily, and under traditional law, disclosure of confidential communications to a third party breaches the privilege.

**POLICY POINT: Necessary disclosure to any third party must be done in such a manner as to ensure no one other than the intended recipient has access to the information. Modes of communication of such information shall be done in person, telephonically or other equivalent medium producing no written copy, traditional fax to a controlled fax recipient. It is strongly urged that no confidential communication be disclosed or transferred electronically, such as through electronic mail, attachment to electronic mail or other mode unless appropriate safeguards are in place and appropriate encryption is created for such communications.**

The statute allows the presence of a third party who is present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purpose for which the domestic violence counselor is consulted. This might include disclosure of information by the counselor to a shelter for the purpose of securing a safe location for the victim.

The types of communications that are protected include all information regarding the facts and circumstances of all incidents of domestic violence as well as all information regarding the children of the victim or abuser or the relationship of the victim with the abuser. As an extreme example of what is not protected communication: if during the course of the relationship, the victim admits participation in the crime of robbery that is not connected to incidents of domestic violence for which the counseling is sought, the domestic violence counselor can be compelled to disclose the admission and the domestic violence counselor can actually disclose the communication on his or her own. The victim cannot prevent the counselor from disclosing the admission. Likewise, the domestic violence counselor has no obligation to disclose the admission to the authorities, but can do so if he or she so chooses.



Further, the confidential communication is not absolute. The Court can compel disclosure and override the claim of the privilege, if the Court determines that the probative value outweighs the effect on the victim and the treatment relationship. Essentially, the Court conducts an EC 352 analysis. When ruling on the claim of the privilege, the Court may require the counselor or the victim or both, to disclose the information in chambers and in camera (out of the presence of the other parties). Normally, if the counselor discloses the communication to a third person, the integrity of the privilege is broken and the privilege may no longer exist. However, if the counselor discloses the communication to the Court, in chambers and in camera, the privilege is not breached. Ultimately, if the Court rules that the privilege stands, then the counselor cannot disclose the information absent the authorization from the victim.

At all times, absent actual consent from the victim, the domestic violence counselor shall assert the privilege pursuant to Evidence Code Section 1037. That privilege cannot be breached by either the Prosecution or the defense and can only be excused by actual consent of the victim or by Court Order.

As of January 1, 2003, Evidence Code Section 1037.8 requires a DV Counselor to inform (orally) a DV Victim of the limitations on confidentiality.

### **VICTIM-WITNESS ADVOCATES**

A Victim-Witness Advocate is defined by Penal Code Section 13835 et seq. Every county in California has a Victim-Witness Assistance Center (VWAC). There are essentially three types of Victim-Witness Assistance Centers: District Attorney based VWAC; Probation based VWAC; CBO based VWAC. Where the VWAC is located will dictate whether the Victim-Witness Advocate can hold communications confidential, even assuming the Victim-Witness Advocate does qualify as a sexual assault or domestic violence counselor under the law.

A Victim-Witness Advocate as defined in Penal Code Section 13835.2 can qualify as a “Sexual Assault Counselor” or “Domestic Violence Counselor” if he or she works in a Victim-Witness Center and is a psychotherapist; or, who has a master’s degree in counseling or a related field; or has one year of counseling experience at least six months of which is in rape crisis counseling. The Victim-Witness Advocate who qualifies as a sexual assault or domestic violence counselor must have completed the minimum training for a sexual assault or domestic violence counselor and be supervised by an individual who qualifies as a counselor. Evidence Code Sections 1035.2(b)(1)(2), 1037.1(b)(2). As such, a Victim-Witness Advocate who does not work in a District Attorney’s Office or Sheriff’s Department, may qualify as a “domestic violence Counselor” for purposes of protecting confidential communications.

While some communications may be protected, the Criminal Justice rules set forth in the United States and California constitutions as well as caselaw development beginning with ***Brady v. Maryland***, (1963) 373 US 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194, override the statutory scheme of the Evidence Code and the sexual assault or domestic violence counselor privilege. In other words, the District Attorney or Sheriff based Victim-Witness Advocate has an obligation to disclose victim information to the Prosecutor, even if qualified as a sexual assault or domestic violence counselor under the law. And, the Prosecutor has a duty to disclose to the defense, any information that is material, relevant and exculpatory to the defense.

The analysis of confidentiality within the Criminal Justice System begins with a review of the rules of discovery that binds the Prosecution. The duty of the Prosecutor to disclose material, exculpatory evidence within the constructive or actual possession of the Prosecution is generally what separates the sexual assault or domestic violence counselor from the victim-witness advocate who is legally considered to be part of the “prosecution team.” Within the parameters of the Criminal Justice System, a defendant is guaranteed due process of the law, which includes the right to a fair trial. However, mainly through the efforts of the California District Attorneys Association, as well as of active Prosecutors and Victim Advocates, the defendant’s right to a fair trial is no longer at the expense of the crime victim. For instance, the defense attorney cannot disclose to the defendant the address or telephone number of the victim (PC 1054.2); the sexual assault and domestic violence victim has the right to have support persons in Court while she testifies, even if that person is also a witness (PC 868.5, 868.8); the Court does not have automatic contempt power over the domestic violence victim and does not have any contempt power over the sexual assault victim who refuses to answer questions in court (CCP 1219).

The Prosecution has a constitutional duty to disclose all exculpatory evidence to the defendants in criminal cases. In *Brady v. Maryland*, the United States Supreme Court declared “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” In *United States v. Agurs* (1976) 427 US 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392, the Supreme Court ruled that the Prosecutor has a duty to volunteer exculpatory evidence even without a request from the defense. The California Supreme Court has followed suit holding the absolute duty of the Prosecution to voluntarily disclose exculpatory evidence to the defense. (See *In re Ferguson* (1971) 5 Cal.3d 525; *People v. Rutherford* (1975) 14 Cal.3d 399; Penal Code Section 1054).

The *Brady* rule applies to evidence that is **favorable and material** to the defendant. The types of evidence to which the *Brady* rules apply include statements (either oral or written) made by the sexual assault or domestic violence victim. Evidence tends to **exculpate** a defendant if it is evidence that is directly opposed to the guilt of the defendant, evidence that undermines the credibility of a prosecution witness or evidence that supports the testimony of a defense witness. Evidence is **material** if it is relevant, which has been defined as “evidence...having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action” and there is a reasonable probability that the evidence, if disclosed, would affect the outcome of the proceeding. (EC 210; *People v. Roberts* (1992) 2 Cal.4<sup>th</sup> 271). The Courts have held that evidence affecting the credibility of the crime victim is material, relevant and potentially exculpatory. In this context, statements made by the domestic violence victim that may be inconsistent with other statements or that affect the credibility of the victim, are deemed material, relevant and potentially exculpatory.

The duty of the Prosecutor extends to all exculpatory evidence within the **actual or constructive possession** of the Prosecution. Actual possession is self-explanatory. If the Prosecutor receives the information or the information is within the prosecution files or offices, the Prosecutor is deemed to have actual possession of the evidence. If the material, exculpatory evidence is contained in the files of an agency over which the prosecutor has authority, such as the police agency involved in the investigation of the case, the prosecutor is deemed to be in constructive possession of the evidence and the duty to disclose applies. The *Brady* rule only applies to material, exculpatory evidence that is within the actual or constructive possession of the Prosecution. Significantly, the State Prosecutor does not have authority over Federal Agencies and other agencies, such as the Probation Department, the Internal Revenue Service, State Child

Protective Agencies, the Department of Corrections or other State Agencies including the Victims' Compensation and Restitution Board, the County Hospital or clinic records, the local Rape Crisis Center nor the Domestic Violence Shelter. (See *McGuire v. Superior Court* (1993) 12 Cal.App.4<sup>th</sup> 1685; *United States v. Lochmondy* (1989) 890 F.2d 817; *United States v. Dunn* (1988) 851 F.2d 1099; *United States v. Aichele* (1991 CA9 Cal) 941 F.2d. 761; *People v. Webb* (1993) 6 Cal.4<sup>th</sup> 494, respectively.)

The Prosecutor must also have actual or constructive knowledge of the material, exculpatory evidence. However, the duty to search reasonably accessible files, including its own files or those files of the Office, including the Victim-Witness Division that is within the District Attorney's Office, does exist. To determine if statements made by the victim to a Victim-Witness Advocate must be disclosed to the Prosecution, one needs to look at whether the Prosecution has any authority over the agency for whom the Victim-Witness Advocate works.

Every County has a local comprehensive center for victim and witness assistance, the Victim-Witness Agency, empowered under **Penal Code Section 13835**. The Board of Supervisors for each County has selected the agency to receive the State Victim-Witness funds pursuant to **PC 13835.2**. Those Victim-Witness Agencies located within the District Attorney's Office and Sheriff's Department is deemed part of the Prosecution Team. The Prosecutor is deemed to have possession of any and all information held by the Victim-Witness Advocate who works within the District Attorney's Office or Sheriff's Department of the particular county. By virtue of the employment, and that the services provided are at the direction and/or request of the Prosecution or law enforcement involved in the case, the Victim-Witness Advocate must disclose to the Prosecutor and information that he or she receives from the victim. It is the duty of the Prosecutor to determine if the information is discoverable under ***Brady***.

However, the Prosecution has no automatic authority over Community-based Victim-Witness Agencies in spite of the fact that all victim and witness assistance services within the Criminal Justice System are provided by the CBO-based Victim-Witness Agency. The same can be said about the relationship between the Prosecution and Probation-based Victim-Witness programs.

Probation files and records are Court records. *McGuire v. Superior Court* (1993) 12 Cal.App.4<sup>th</sup> 1685, 1687. As such, the District Attorney does not have automatic authority over Probation-based Victim-Witness Programs.

The question becomes: is there ever a time when a Probation-based or Community-based Victim-Witness Program is obligated to disclose statements of the victim to the Prosecution under ***Brady***. The answer lies in the structure and specific relationship established between the District Attorney's Office and the Victim-Witness Agency. If the Victim-Witness Program agrees to assist the District Attorney's Office in either the investigation or preparation of the Survivor for trial, then there is a tacit understanding and legal interpretation that the Victim-Witness Advocate is part of the Prosecution Team. As part of the Prosecution Team, ***Brady*** is the controlling law over the California Constitution, any statutory scheme, including the privilege of confidential communication and the enabling legislation for Victim-Witness Assistance. Consider the following scenario: if the Probation-based or CBO-based Victim-Witness Agency assists in the investigation or preparation of the victim for the case, they are defacto part of the Prosecution Team. As such, any exculpatory, material statements made by the victim to the Victim-Witness Advocate must be disclosed to the Prosecution. That is so even if the Advocate qualifies as a sexual assault or domestic violence victim counselor and the legal foundational criteria for the confidential communication exists. ***Brady*** overrides every other statutory scheme.

If, on the other hand, the Probation-based or CBO-based Victim-Witness Agency is fulfilling the mandate set forth in PC 13835 et seq., and not specifically assisting in the investigation of the case nor the preparation of the Survivor for the case, there is no defacto conclusion that the Victim-Witness Advocate is part of the Prosecution Team, ergo, no requirement or authority to disclose statements made by the victim to the Victim-Witness Advocate. In fact, if the Advocate qualifies as a sexual assault or domestic violence victim counselor, the circumstances under which the communication was made include the specific communication and meet the statutory criteria, the Victim-Witness Advocate may be prevented from disclosing the communication absent Court Order.

**POLICY POINT: An advocate who qualifies as a sexual assault or domestic violence counselor and who works for one of the non-profit partners, shall be alert and sensitive to the separation of the Advocate from Law Enforcement and/or the Prosecution so as not to become a defacto member of the “prosecution team.” The Advocate will be vigilant in protecting the circumstances under which a sexual assault or domestic violence victim communicates in order to protect those communications that fall within the statutory definition.**

Just because the Victim-Witness Advocate is involved with the prosecution does not automatically make the Advocate part of the prosecution Team. **PC 13835.4 and PC 13835.5** set forth the services to be provided by the Victim-Witness Assistance Program. By virtue of these statutes, it is the norm that in a sexual assault or domestic violence case, there will be a Victim Advocate, whether from a non-profit CBO or from a Victim- Witness Agency, present when the victim is present. Neither physical presence of the Advocate, advocacy on behalf of the victim by the Advocate nor support of the victim during the Criminal Justice process makes the Victim Advocate automatically part of the Prosecution Team. However, an Operational Agreement, which includes assisting in the preparation of the victims for the case, may change the independent status of the Victim Advocate. Any Operational Agreement must clearly set forth the independence of the Victim Advocate from the “prosecution team” so as to uphold the integrity of the protected communications.

In those instances where the Victim-Witness Programs are not based in the District Attorney’s Offices, a determination should be made as to the relationship between the District Attorney’s Office and the Victim-Witness Program, including any Operational Agreements executed as part of the grant funds to the Victim-Witness Program. By understanding that relationship, the further determination can be made as to whether a communication from the sexual assault or domestic violence victim to the Advocate is “confidential communication” and not within the bounds of **Brady**. This must be reviewed on a case-by-case basis.

The Prosecutor is not obligated to discover items that are not in its actual or constructive possession. It stands to reason that absent a specifically articulated relationship between the CBO or Probation-based Victim-Witness Agency, the Prosecution does not have actual or constructive possession of evidence or information held by them. As such, there is no obligation on the part of the CBO or Probation-based Victim-Witness Advocate to disclose statements made by the domestic violence victim to the Prosecutor. And, there is no duty, nor right, on the part of the Prosecution to search the files of the CBO or Probation-based Victim-Witness Agency to determine if there is any material, exculpatory evidence that must be disclosed to the defense. One obvious caveat is if the Probation Department is also the investigative agency, it then becomes part of the Prosecution Team and **Brady** rules of disclosure apply.

Where the Victim-Witness Agency is within the District Attorney's Office, the duty to search reasonably accessible files does not literally mean the Prosecutor must physically examine the files of the Victim-Witness Advocate. The same is true of evidence that comes into the possession of the investigating Police Agency. Following suit, evidence in the form of statements made by the domestic violence victim to the Victim-Witness Advocate is deemed to be in possession of the Prosecutor. Under **Brady**, only exculpatory evidence that is material must be disclosed. However, since the ethical obligation lies with the Prosecutor and **Brady** violations can result in a report against the Prosecutor to the State Bar of California, it is the Prosecutor who should determine what is material and exculpatory. As such, there should be an established procedure by which evidence that comes into the possession of the Victim-Witness Advocate is communicated to the Prosecutor.

To review, no statements made by the sexual assault or domestic violence victim that are in the possession of the DA-based Victim-Witness Advocate, the investigating agency or the Prosecutor are confidential and protected. There exists an affirmative duty to disclose those statements. Statements made by the sexual assault or domestic violence victim that are in the possession of the Probation-based and CBO-based Victim-Witness Advocate may not be confidential and protected. Nevertheless, there is no duty to disclose those statements to the Prosecution or the investigating agency.

## **MANDATORY REPORTING**

California law articulates circumstances under which certain individuals have an affirmative obligation to report certain conduct to law enforcement. In the context of sexual assault and/or domestic violence of an adult, only the medical provider, who provides medical services for the victim as a result of the domestic violence, has the duty to notify the police of the crime. There are other circumstances when the medical provider has a duty to report conduct they reasonably suspect even if they are not providing medical treatment for injuries.

Penal Code Section 11160 et seq., sets forth the law regarding mandatory reporting when there is a reasonable suspicion that a child is the victim of sexual or physical abuse, or neglect. Those laws include an articulation of what must be reported, who is a mandated reporter and how the report must be made. Generally speaking, professionals providing services at the ACFJC, who will fall within the definition of a mandated reporter, will include medical providers, those with responsibilities of caring for or supervising children, psychotherapists and other related persons licensed to provide counseling, school educators, such as outreach educators from the domestic violence or sexual assault non-profit agencies, law enforcement and other allied professionals who are mandated reporters by virtue of a professional license or by employment.

A professional who has the obligation and authority to hold communications confidential may also be a mandated reporter. If that professional reasonably suspects child physical abuse, child sexual abuse or child neglect, the duty to report to law enforcement and the local child protective service agency overrides the protection of confidential communication. Volunteers are not mandated reporters but agencies utilizing volunteers are encouraged to provide training to identify and report child abuse and neglect.

Elder abuse must also be reported. Welfare and Institutions Code Section 15600-30. The purpose of elder abuse reporting requirements is to encourage the reporting of suspected cases of abuse, collect data to aid the state in establishing adequate aid to the victims and grant protection to persons reporting the abuse. Welfare and Institutions Code Section 15601. The rules governing

the reporting of child abuse are similar if not identical to the rules governing the reporting of elder abuse.

## EVIDENCE CODE SECTIONS

**912.** (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by **Section 954 (lawyer-client privilege)**, 980 (privilege for confidential marital communications), 994 (physician-patient privilege), **1014 (psychotherapist- patient privilege)**, 1033 (privilege of penitent), 1034 (privilege of clergyman), **1035.8 (sexual assault counselor-victim privilege)**, or **1037.5 (domestic violence counselor-victim privilege)** is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.

## ATTORNEY

**950.** As used in this article, "lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

**951.** As used in this article, "client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator who consults the lawyer in behalf of the incompetent.

**952.** As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and

includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

**953.** As used in this article, "holder of the privilege" means:

- (a) The client when he has no guardian or conservator.
- (b) A guardian or conservator of the client when the client has a guardian or conservator.
- (c) The personal representative of the client if the client is dead.
- (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

**954.** Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure. The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

**955.** The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.

**956.** There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

**956.5.** There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

**957.** There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

**958.** There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

**959.** There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document.

**960.** There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

**961.** There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

**962.** Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

## **PSYCHOTHERAPIST**

**1010.** As used in this article, "**psychotherapist**" means a person who is, or is reasonably believed by the patient to be:

(a) A person authorized to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry.

(b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

(c) A person licensed as a clinical social worker under Article 4 (commencing with Section 4996) of Chapter 14 of Division 2 of the Business and Professions Code, when he or she is engaged in applied psychotherapy of a non-medical nature.

(d) A person who is serving as a school psychologist and holds a credential authorizing that service issued by the state.

(e) A person licensed as a marriage and family therapist under Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.

(f) A person registered as a psychological assistant who is under the supervision of a licensed psychologist or board certified psychiatrist as required by Section 2913 of the Business and Professions Code, or a person registered as a marriage and family therapist intern who is under the supervision of a licensed marriage and family therapist, a licensed clinical social worker, a licensed psychologist, or a licensed physician certified in psychiatry, as specified in Section 4980.44 of the Business and Professions Code.

(g) A person registered as an associate clinical social worker who is under the supervision of a licensed clinical social worker, a licensed psychologist, or a board certified psychiatrist as required by Section 4996.20 or 4996.21 of the Business and Professions Code.

(h) A person exempt from the Psychology Licensing Law pursuant to subdivision (d) of Section 2909 of the Business and Professions Code who is under the supervision of a licensed psychologist or board certified psychiatrist.

(i) A psychological intern as defined in Section 2911 of the Business and Professions Code who is under the supervision of a licensed psychologist or board certified psychiatrist.

(j) A trainee, as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code, who is fulfilling his or her supervised practicum required by subdivision (b) of Section 4980.40 of the Business and Professions Code and is supervised by a licensed psychologist, board certified psychiatrist, a licensed clinical social worker, or a licensed marriage and family therapist.



(k) A person licensed as a registered nurse pursuant to Chapter 6 (commencing with Section 2700) of Division 2 of the Business and Professions Code, who possesses a master's degree in psychiatric-mental health nursing and is listed as a psychiatric-mental health nurse by the Board of Registered Nursing.

(l) An advanced practice registered nurse who is certified as a clinical nurse specialist pursuant to Article 9 (commencing with Section 2838) of Chapter 6 of Division 2 of the Business and Professions Code and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing.

(m) A person rendering mental health treatment or counseling services as authorized pursuant to Section 6924 of the Family Code.

**1010.5.** A communication between a patient and an educational psychologist, licensed under Article 5 (commencing with Section 4986) of Chapter 13 of Division 2 of the Business and Professions Code, shall be privileged to the same extent, and subject to the same limitations, as a communication between a patient and a psychotherapist described in subdivisions (c), (d), and (e) of Section 1010.

**1011.** As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.

**1012.** As used in this article, "**confidential communication between patient and psychotherapist**" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

**1013.** As used in this article, "holder of the privilege" means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.

**1014.** Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

- (a) The holder of the privilege.
- (b) A person who is authorized to claim the privilege by the holder of the privilege.
- (c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code, a marriage and family therapy corporation as defined in Article 6 (commencing with Section 4987.5) of Chapter 13 of Division 2 of the Business and

Professions Code, or a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 4998) of Chapter 14 of Division 2 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between those patients and psychotherapists employed by those corporations to render services to those patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

**1015.** The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

**1016.** There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

- (a) The patient;
- (b) Any party claiming through or under the patient;
- (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- (d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

**1017.** (a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

**1018.** There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

**1019.** There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

**1020.** There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

**1021.** There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

**1022.** There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

**1023.** There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

**1024.** There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

**1025.** There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

**1026.** There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection.

**1027.** There is no privilege under this article if all of the following circumstances exist:

- (a) The patient is a child under the age of 16.
- (b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.

## **SEXUAL ASSAULT COUNSELOR**

**1035.** As used in this article, "victim" means a person who consults a sexual assault victim counselor for the purpose of securing advice or assistance concerning a mental, physical, or emotional condition caused by a sexual assault.

**1035.2.** As used in this article, "sexual assault victim counselor" means any of the following:

(a) A person who is engaged in any office, hospital, institution, or center commonly known as a rape crisis center, whose primary purpose is the rendering of advice or assistance to victims of sexual assault and who has received a certificate evidencing completion of a training program in the counseling of sexual assault victims issued by a counseling center that meets the criteria for the award of a grant established pursuant to Section 13837 of the Penal Code and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section 1010; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape crisis counseling.

(2) Has 40 hours of training as described below and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas: law, medicine, societal attitudes, crisis intervention and counseling techniques, role playing, referral services, and sexuality.

(b) A person who is employed by any organization providing the programs specified in Section 13835.2 of the Penal Code, whether financially compensated or not, for the purpose of counseling and assisting sexual assault victims, and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section 1010; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape assault counseling.

(2) Has the minimum training for sexual assault counseling required by guidelines established by the employing agency pursuant to subdivision (c) of Section 13835.10 of the Penal Code, and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas: law, victimology, counseling techniques, client and system advocacy, and referral services.

**1035.4.** As used in this article, "confidential communication between the sexual assault counselor and the victim" means information transmitted between the victim and the sexual assault counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the sexual assault counselor is consulted. The term includes all information regarding the facts and circumstances involving the alleged sexual assault and also includes all information regarding the victim's prior or subsequent sexual conduct, and opinions regarding the victim's sexual conduct or reputation in sexual matters.

The court may compel disclosure of information received by the sexual assault counselor which constitutes relevant evidence of the facts and circumstances involving an alleged sexual assault about which the victim is complaining and which is the subject of a criminal proceeding if the court determines that the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled. The court may also compel disclosure in proceedings related to child abuse if the court determines the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled.

When a court is ruling on a claim of privilege under this article, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged and must not be disclosed, neither he or she nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

If the court determines certain information shall be disclosed, the court shall so order and inform the defendant. If the court finds there is a reasonable likelihood that particular information is subject to disclosure pursuant to the balancing test provided in this section, the following procedure shall be followed:

(1) The court shall inform the defendant of the nature of the information which may be subject to disclosure.

(2) The court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the sexual assault counselor regarding the information which the court has determined may be subject to disclosure.

(3) At the conclusion of the hearing, the court shall rule which items of information, if any, shall be disclosed. The court may make an order stating what evidence may be introduced by the defendant and the nature of questions to be permitted. The defendant may then offer evidence pursuant to the order of the court. Admission of evidence concerning the sexual conduct of the complaining witness is subject to Sections 352, 782, and 1103.

**1035.6.** As used in this article, "holder of the privilege" means:

- (a) The victim when such person has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator.
- (c) The personal representative of the victim if the victim is dead.

**1035.8.** A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault victim counselor if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the sexual assault victim counselor at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

**1036.** The sexual assault victim counselor who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1035.8.

**1036.2.** As used in this article, "sexual assault" includes all of the following:

- (a) Rape, as defined in Section 261 of the Penal Code.
- (b) Unlawful sexual intercourse, as defined in Section 261.5 of the Penal Code.
- (c) Rape in concert with force and violence, as defined in Section 264.1 of the Penal Code.
- (d) Rape of a spouse, as defined in Section 262 of the Penal Code.
- (e) Sodomy, as defined in Section 286 of the Penal Code, except a violation of subdivision (e) of that section.
- (f) A violation of Section 288 of the Penal Code.
- (g) Oral copulation, as defined in Section 288a of the Penal Code, except a violation of subdivision (e) of that section.
- (h) Sexual penetration, as defined in Section 289 of the Penal Code.
- (i) Annoying or molesting a child under 18, as defined in Section 647a of the Penal Code.
- (j) Any attempt to commit any of the above acts.

## **DOMESTIC VIOLENCE COUNSELOR**

**1037.** As used in this article, "**victim**" means any person who suffers domestic violence, as defined in Section 1037.7.

**1037.1.** As used in this article "**domestic violence counselor**" means any of the following:

(a) A person who is employed by any organization providing the programs specified in Section 18294 of the Welfare and Institutions Code, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of domestic violence, who has received specialized training in the counseling of domestic violence victims, and who meets one of the following requirements:

- (1) Has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in the counseling of domestic violence victims.
- (2) Has at least 40 hours of training as specified in this paragraph and is supervised by an individual who qualifies as a counselor under paragraph (1); or is a psychotherapist, as defined in Section 1010. The training, supervised by a person qualified under paragraph (1), shall include,

but need not be limited to, the following areas: history of domestic violence, civil and criminal law as it relates to domestic violence, societal attitudes towards domestic violence, peer counseling techniques, housing, public assistance and other financial resources available to meet the financial needs of domestic violence victims, and referral services available to domestic violence victims.

(b) A person who is employed by any organization providing the programs specified in Section 13835.2 of the Penal Code, whether financially compensated or not, for the purpose of counseling and assisting victims of domestic violence, and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section 1010; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in counseling victims of domestic violence.

(2) Has the minimum training for counseling victims of domestic violence required by guidelines established by the employing agency pursuant to subdivision (c) of Section 13835.10 of the Penal Code, and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas: law, victimology, counseling techniques, client and system advocacy, and referral services.

**1037.2.** As used in this article, "confidential communication" means information transmitted between the victim and the counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the domestic violence counselor is consulted. It includes all information regarding the facts and circumstances involving all incidences of domestic violence, as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser.

The court may compel disclosure of information received by a domestic violence counselor which constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim or another household member and which is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services. The court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator. The court may also compel disclosure in proceedings related to child abuse if the court determines that the probative value of the evidence outweighs the effect of the disclosure on the victim, the counseling relationship, and the counseling services.

When a court rules on a claim of privilege under this article, it may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege consents to have present. If the judge determines that the information is privileged and shall not be disclosed, neither he nor she nor any other person may disclose, without the consent of a person authorized to permit disclosure, any information disclosed in the course of the proceedings in chambers.

If the court determines that information shall be disclosed, the court shall so order and inform the defendant in the criminal action. If the court finds there is a reasonable likelihood that any

information is subject to disclosure pursuant to the balancing test provided in this section, the procedure specified in subdivisions (1), (2), and (3) of Section 1035.4 shall be followed.

**1037.3.** Nothing in this article shall be construed to limit any obligation to report instances of child abuse as required by Section 11166 of the Penal Code.

**1037.4.** As used in this article, "holder of the privilege" means:

- (a) The victim when he or she has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator.

**1037.5.** A victim of domestic violence, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a domestic violence counselor if the privilege is claimed by any of the following persons:

- (a) The holder of the privilege.
- (b) A person who is authorized to claim the privilege by the holder of the privilege.
- (c) The person who was the domestic violence counselor at the time of the confidential communication. However, that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

**1037.6.** The domestic violence counselor who received or made a communication subject to the privilege granted by this article shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege under subdivision (c) of Section 1037.5.

**1037.7.** As used in this article, "domestic violence" means "domestic violence" as defined in Section 6211 of the Family Code.

**1037.8.** A domestic violence counselor shall inform a domestic violence victim of any applicable limitations on confidentiality of communications between the victim and the domestic violence counselor. This information may be given orally.

## **FAMILY CODE SECTIONS**

**6209.** "Cohabitant" means a person who regularly resides in the household. "Former cohabitant" means a person who formerly regularly resided in the household.

**6211.** "Domestic violence" is abuse perpetrated against any of the following persons:

- (a) A spouse or former spouse.
- (b) A cohabitant or former cohabitant, as defined in Section 6209.
- (c) A person with whom the respondent is having or has had a dating or engagement relationship.
- (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).
- (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.
- (f) Any other person related by consanguinity or affinity within the second degree.

## PENAL CODE SECTIONS

**13835.** The Legislature finds and declares as follows:

(a) That there is a need to develop methods to reduce the trauma and insensitive treatment that victims and witnesses may experience in the wake of a crime, since all too often citizens who become involved with the criminal justice system, either as victims or witnesses to crime, are further victimized by that system.

(b) That when a crime is committed, the chief concern of criminal justice agencies has been apprehending and dealing with the criminal, and that after police leave the scene of the crime, the victim is frequently forgotten.

(c) That victims often become isolated and receive little practical advice or necessary care.

(d) That witnesses must make arrangements to appear in court regardless of their own schedules, child care responsibilities, or transportation problems, and that they often find long waits, crowded courthouse hallways, confusing circumstances and, after testifying, receive no information as to the disposition of the case.

(e) That a large number of victims and witnesses are unaware of both their rights and obligations.

(f) That although the State of California has a fund for needy victims of violent crimes, and compensation is available for medical expenses, lost income or wages, and rehabilitation costs, the application process may be difficult, complex, and time-consuming, and victims may not be aware that the compensation provisions exist.

It is, therefore, the intent of the Legislature to provide services to meet the needs of both victims and witnesses of crime through the funding of local comprehensive centers for victim and witness assistance.

**13835.10.** (a) The Legislature finds and declares all of the following:

(1) That the provision of quality services for victims of crime is of high priority.

(2) That existing victim service programs do not have sufficient financial resources to consistently recruit and employ fully trained personnel.

(3) That there is no consistency in the training provided to the various agencies serving victims.

(4) That comprehensive training for victim service agencies is geographically limited or unavailable.

(5) That there is currently no statewide comprehensive training system in place for the state to insure that all service providers receive adequate training to provide quality services to victims of crime.

(6) It is the intention of the Legislature to establish a statewide training program within the agency or agencies designated by the Director of Finance pursuant to Section 13820 to provide comprehensive standardized training to victim service providers.

(b) The agency or agencies designated by the Director of Finance pursuant to Section 13820 shall establish a statewide victim-assistance training program, the purpose of which is to develop minimum training and selection standards, certify training courses, and provide funding to enable local victim service providers to acquire the required training.

(c) (1) For the purpose of raising the level of competence of local victim service providers, the office shall adopt guidelines establishing minimum standards of training for employees of victim-witness and sexual assault programs funded by the office to provide services to victims of crime. The agency or agencies shall establish an advisory committee composed of recognized statewide victim service organizations, representatives of local victim service programs, and others selected at the discretion of the executive director to consult on the research and development of the training, selection, and equivalency standards.



(2) Any local unit of government, community-based organization, or any other public or private nonprofit entity funded by the agency or agencies as a victim-witness or sexual assault program to provide services to victims of crime shall adhere to the training and selection standards established by the agency or agencies. The standards for sexual assault victim service programs developed by the advisory committee established pursuant to Section 13836 shall be the standards for purposes of this section. With the exception of the sexual assault standards, the agency or agencies shall conduct or contract with an appropriate firm or entity for research on validated standards pursuant to this section in consultation with the advisory committee established pursuant to paragraph (1). The agency or agencies may defer the adoption of the selection standards until the necessary research is completed. Until the standards are adopted, affected victim service programs may receive state funding from the agency or agencies upon certification of their willingness to adhere to the training standards adopted by the agency or agencies.

(3) Minimum training and selection standards may include, but shall not be limited to, basic entry, continuation, supervisory, management, specialized curricula, and confidentiality.

(4) Training and selection standards shall apply to all victim service and management personnel of the victim-witness and sexual assault agencies funded by the agency or agencies to provide services to victims of crime. Exemptions from this requirement may be made by the agency or agencies. An agency which, despite good faith efforts, is unable to meet the standards established pursuant to this section, may apply to the agency or agencies for an exemption. For the purpose of exemptions, the agency or agencies may establish procedures that allow for partial adherence. The agency or agencies may develop equivalency standards which recognize professional experience, education, training, or a combination of the above, for personnel hired before July 1, 1987.

(5) Nothing in this section shall prohibit an agency, funded by the agency or agencies to provide services to victims of crime, from establishing training and selection standards which exceed the minimum standards established by the agency or agencies pursuant to this section.

(d) For purposes of implementing this section, the agency or agencies has all of the following powers:

(1) To approve or certify, or both, training courses selected by the agency or agencies.

(2) To make those inquiries which may be necessary to determine whether every local unit of government, community-based organization, or any other public or private entity receiving state aid from the agency or agencies as a victim-witness or sexual assault program for the provision of services to victims of crime, is adhering to the standards for training and selection established pursuant to this section.

(3) To adopt those guidelines which are necessary to carry out the purposes of this section.

(4) To develop or present, or both, training courses for victim service providers, or to contract with coalitions, councils, or other designated entities, to develop or present, or both, those training courses.

(5) To perform other activities and studies necessary to carry out the intent of this section.

(e) (1) The agency or agencies may utilize any funds that may become available from the Victim-Witness Assistance Fund to fund the cost of training staff of victim service agencies which are funded by the agency or agencies from the fund. The agency or agencies may utilize federal or other state funds that may become available to fund the cost of training staff of victim service agencies which are not eligible for funding from the Victim-Witness Assistance Fund.

(2) Peace officer personnel whose jurisdictions are eligible for training subvention pursuant to Chapter 1 (commencing with Section 13500) of Title 4 of this part and correctional or probation personnel whose jurisdictions are eligible for state aid pursuant to Article 2 (commencing with Section 6035) of Chapter 5 of Title 7 of Part 3 are not eligible to receive training reimbursements under this section unless the person receiving the training is assigned to provide victim services

in accordance with a grant award agreement with the agency or agencies and is attending training to meet the established standards.

**13835.2.** (a) Funds appropriated from the Victim-Witness Assistance Fund shall be made available through the agency or agencies designated by the Director of Finance pursuant to Section 13820 to any public or private nonprofit agency for the assistance of victims and witnesses which meets all of the following requirements:

(1) It provides comprehensive services to victims and witnesses of all types of crime. It is the intent of the Legislature to make funds available only to programs which do not restrict services to victims and witnesses of a particular type of crime, and which do not restrict services to victims of crime where there is a suspect in the case.

(2) It is recognized by the board of supervisors as the major provider of comprehensive services to victims and witnesses in the county.

(3) It is selected by the board of supervisors as the agency to receive funds pursuant to this article.

(4) It assists victims of crime in the preparation, verification, and presentation of their claims to the State Board of Control for indemnification pursuant to Article 1 (commencing with Section 13959) of Part 4 of Division 3 of Title 2 of the Government Code.

(5) It cooperates with the State Board of Control in verifying the data required by Article 1 (commencing with Section 13959) of Part 4 of Division 3 of Title 2 of the Government Code.

(b) The agency or agencies designated by the Director of Finance pursuant to Section 13820 shall consider the following factors, together with any other circumstances it deems appropriate, in awarding funds to public or private nonprofit agencies designated as victim and witness assistance centers:

(1) The capability of the agency to provide comprehensive services as defined in this article.

(2) The stated goals and objectives of the center.

(3) The number of people to be served and the needs of the community.

(4) Evidence of community support.

(5) The organizational structure of the agency which will operate the center.

(6) The capability of the agency to provide confidentiality of records.

(c) The agency or agencies designated by the Director of Finance pursuant to Section 13820 shall conduct an evaluation of the activities and performance of the centers established pursuant to Chapter 1256 of the Statutes of 1977 to determine their ability to comply with the intent of this article, and shall report the findings thereon to the Legislature by January 1, 1985.

**13835.4.** In order to insure the effective delivery of comprehensive services to victims and witnesses, a center established by an agency receiving funds pursuant to this article shall carry out all of the following activities in connection with both primary and optional services:

(a) Translation services for non-English speaking victims and witnesses or the hearing-impaired.

(b) Follow-up contact to determine whether the client received the necessary assistance.

(c) Field visits to a client's home, place of business, or other location, whenever necessary to provide services.

(d) Service to victims and witnesses of all types of crime.

(e) Volunteer participation to encourage community involvement.

(f) Services for elderly victims of crime, appropriate to their special needs.

**13835.5.** (a) Comprehensive services shall include all of the following primary services:

(1) Crisis intervention, providing timely and comprehensive responses to the individual needs of victims.

(2) Emergency assistance, directly or indirectly providing food, housing, clothing, and, when

necessary, cash.

(3) Resource and referral counseling to agencies within the community which are appropriate to meet the victim's needs.

(4) Direct counseling of the victim on problems resulting from the crime.

(5) Assistance in the processing, filing, and verifying of claims filed by victims of crime pursuant to Article 1 (commencing with Section 13959) of Part 4 of Division 3 of Title 2 of the Government Code.

(6) Assistance in obtaining the return of a victim's property held as evidence by law enforcement agencies, if requested.

(7) Orientation to the criminal justice system.

(8) Court escort.

(9) Presentations to and training of criminal justice system agencies.

(10) Public presentations and publicity.

(11) Monitoring appropriate court cases to keep victims and witnesses apprised of the progress and outcome of their case.

(12) Notification to friends, relatives, and employers of the occurrence of the crime and the victim's condition, upon request of the victim.

(13) Notification to the employer of the victim or witness, if requested by the victim or witness, informing the employer that the employee was a victim of or witness to a crime and asking the employer to minimize any loss of pay or other benefits which may result because of the crime or the employee's participation in the criminal justice system.

(14) Upon request of the victim, assisting in obtaining restitution for the victim, in ascertaining the victim's economic loss, and in providing the probation department, district attorney, and court with information relevant to his or her losses prior to the imposition of sentence.

(b) Comprehensive services may include the following optional services, if their provision does not preclude the efficient provision of primary services:

(1) Employer intervention.

(2) Creditor intervention.

(3) Child care.

(4) Notification to witnesses of any change in the court calendar.

(5) Funeral arrangements.

(6) Crime prevention information.

(7) Witness protection, including arranging for law enforcement protection or relocating witnesses in new residences.

(8) Assistance in obtaining temporary restraining orders.

(9) Transportation.

(10) Provision of a waiting area during court proceedings separate from defendants and families and friends of defendants.

## **WELFARE and INSTITUTIONS CODE**

**18290.** The Legislature hereby finds and declares that there is a present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence. There are hundreds of thousands of persons in this state who are regularly beaten. In many such cases, the acts of domestic violence lead to the death of one of the involved parties. Victims of domestic violence come from all socioeconomic classes and ethnic groups, though it is the poor who suffer most from marital violence, since they have no immediate access to private counseling and shelter for themselves and their children. Children, even when they are not physically assaulted, very often suffer deep and lasting emotional effects, and it is most often

the children of those parents who commit domestic violence that continue the cycle and abuse their spouses.

The Legislature further finds and declares that there is a high incidence of deaths and injuries sustained by law enforcement officers in the handling of domestic disturbances. Police arrests for domestic violence are low, and victims are reluctant to press charges or make citizens arrests. Furthermore, instances of domestic violence are considered to be the single most unreported crime in the state.

It is the intention of the Legislature to begin to explore and determine ways of achieving reductions in serious and fatal injuries to the victims of domestic violence and begin to clarify the problems, causes, and cures of domestic violence. In order to achieve these results, it is the intention of the Legislature that the state shall support projects in several areas throughout the state for the purpose of aiding victims of domestic violence by providing them a place to escape the destructive environment.

**18291. Definitions.**

(a) "Domestic violence" means abuse perpetrated by and committed against a family or household member.

(b) "Family or household member" means spouse, former spouse, or any other adult person who regularly resides in the household and has sexual relations with another family or household member residing in the household, or who within the last six months regularly resided in the household during which time he or she had sexual relations with another family or household member presently residing in the household.

**18293.** In order to be eligible for funding pursuant to this chapter, the programs shall demonstrate their ability to receive and make use of any funds available from governmental, voluntary, philanthropic, or other sources which may be used to augment any state or county funds appropriated for the purposes of this chapter. Each program shall make every attempt to qualify the program for any available federal funding.

No provision of this section is intended to prohibit programs receiving funds pursuant to this chapter, from receiving additional funds from any other public or private source. Funds provided pursuant to this chapter shall not be used to reduce the financial support from other public or private sources.

Proposed or existing programs which meet the requirements set forth in Section 18294, shall receive funding pursuant to this chapter upon the approval of the local board of supervisors. Priority for funding shall be given to agencies and organizations whose primary function is to administer domestic violence programs. Prior to approving a program or programs for such funding, the board shall consult with individuals and groups which have expertise in the problems of domestic violence and in the operation of domestic violence programs including operations of existing domestic violence programs. Upon approving one or more programs for funding, the board shall direct the county treasurer to disburse moneys from the county's domestic violence program special fund and for funding, the board shall designate a local agency to monitor the program or programs. Such monitoring shall include information regarding the number of persons requesting services; the number of persons receiving services according to the type of services provided; and the need, if any, for additional services or staffing.

Programs which receive funding from the provisions of this chapter shall, to the extent feasible, provide services to physically handicapped victims of domestic violence. If the program cannot

provide the services, then the program's staff, to the extent feasible, shall assist in referring the handicapped person to other programs and services in the community where assistance may be obtained.

**18294.** Such programs shall be designed to provide the following basic services to victims of domestic violence and their children:

- (a) Shelter on a 24 hours a day, seven days a week basis.
- (b) A 24 hours a day, seven days a week switchboard for crisis calls.
- (c) Temporary housing and food facilities.
- (d) Psychological support and peer counseling.
- (e) Referrals to existing services in the community and follow-up on the outcome of the referrals.
- (f) A drop-in center to assist victims of domestic violence who have not yet made the decision to leave their homes, or who have found other shelter but who have a need for support services.
- (g) Arrangements for school age children to continue their education during their stay at the center.
- (h) Emergency transportation to the shelter, and when appropriate, arrangements with local law enforcement for assistance in providing such transportation.

**18295.** In addition to the services required in Section 18294, to the extent possible, and in conjunction with already existing community services, the centers shall provide a method of obtaining the following services for the victims of domestic violence:

- (a) Medical care.
- (b) Legal assistance.
- (c) Psychological support and counseling.
- (d) Information regarding reeducation, marriage and family counseling, job counseling and training programs, housing referrals and other available social services.