The Center for Law &
Public Policy
on Sexual Violence

Confidentiality and Sexual Violence Survivors:

A toolkit for State Coalitions

A project of

The National Crime Victim
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@
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The grant also allowed for the development of this resource guide to help state coalitions develop state-specific confidentiality guides. (Other resources developed by the National Crime Victim Law Institute's Center for Law and Public Policy on Sexual Violence include *Tools For Pro Bono Recruitment: A Resource Guide; A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence* and its companion guide, *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors*.)

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A Word on Language

For simplicity, the terms "victim" and "survivor" are used interchangeably throughout this guide, and a victim or survivor is generally referred to in the feminine form. We recognize that both women and men are victims of sexual violence. According to the Bureau of Justice Statistics, however, "[m]ost rapes and sexual assaults are committed against females. Female victims accounted for 94% of all completed rapes, 91% of all attempted rapes, and 89% of all completed and attempted sexual assaults." BJS, 1992-2000, **http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf** (last referenced August 30, 2005).

Disclaimer

This guide is current as of September, 2005. It is intended as a resource for attorneys served under the Sexual Assault Coalition Technical Assistance Project and does not constitute legal advice.

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INTRODUCTION

The crimes of rape and sexual assault are widespread in the United States. Using a definition of rape that included forced vaginal, oral, and anal sex, the National Violence Against Women Survey found that 1 of 6 women and 1 of 33 men in this country has experienced an attempted or completed rape as a child and/or adult.[1] At the same time, rape is described as the most underreported crime in America.[2] Sexual violence experts agree that confidentiality and privacy concerns are the most significant reasons why sexual assault crimes go unreported.[3]

While all crime victims have rights and interests in confidentiality, sexual violence victims have pronounced interests in privacy. For example, for a victim of sexual violence, the need for autonomy and control over her body, the private details of her life, and the decisions that must be made relative to the assault (including whether and how to assist with a criminal prosecution and how to respond to STD and pregnancy exposure), are often essential to recovery. Safety from a future attack is also a real issue a rape victim must face. In short, we believe that a sexual violence victim whose autonomy and bodily integrity were violated deserves nothing less than complete individual and institutional support to reclaim what was taken.

Unfortunately, most attacks perpetrated on victim confidentiality in the civil and criminal justice systems target victims of sex crimes. This is true, in part, because of the myths that surround rape and the historical mistreatment of this class of victims. Our nation's early rape laws viewed victims with suspicion, requiring unreasonable and incomparable standards of proof and corroboration. A sexual assault victim's sexual history was put on trial while the defendant hid behind the protections of the United States Constitution. This historical mistreatment of rape victims can be seen lingering today in the widespread disregard of sexual violence survivors' confidentiality.

The attack on sexual violence survivors' confidentiality is ubiquitous; not concentrated in any one geographic or cultural community; at play in both civil and criminal justice proceedings; and affecting women, men, children, adults, and persons of all ages, races, and ethnic backgrounds. It must be noted, however, that certain populations are especially vulnerable: victims in small communities face unique hurdles; poor women (*i.e.*, women with incomes of $15,000 or less) are three times more likely to be raped or sexually

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[1] Patricia Tjaden and Nancy Thoennes, Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey. Washington, DC: National Institute of Justice, U.S. Department of Justice (1998).

[2] Dean G. Kilpatrick, National Violence Against Women Prevention Research Center, Medical University of South Carolina.

[3] For example, "rape victims surveyed reported more fear that others would find out [about the assault] than [they feared] catching a sexually transmitted disease or dying." Ronald E. Acierno, Ph.D., Co-Director, Older Adult Crime Victim's Center, National Crime Victim's Research and Treatment Center, Department of Psychiatry and Behavioral Sciences. E-mail to Patrick B. Mooney, 29 Apr. 1997.

assaulted; and women in Native communities are confronted with the highest incidence of sexual assault in the country.[4]

Compounding the problem is the complexity of confidentiality law. Federal confidentiality laws are substantial; state confidentiality laws vary greatly. To protect sexual violence victims requires understanding relevant privacy rules and regulations, evidentiary privileges and waiver, state and federal constitutional rights (including crime victims' rights amendments and statutes), and the unique status of minors, the disabled or other potential classes of victims. This morass of laws leaves few advocates or attorneys fully understanding the extent to which a sexual violence survivor's confidentiality is at risk and how to effectively protect it.

The following guide provides a checklist of issues, questions, and basic tips for a coalition staff attorney to use as a template when creating a confidentiality guide specific to the laws and policies of his/her state. Because the template is general, some of the topics enumerated may not be relevant to a particular state. Alternately, there may be some topics relevant to a state not included below.

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[4] Sarah Deer, "Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law," 38 Suffolk U. L. Rev. 455, n.3 (2005), *citing* Patricia Tjaden & Nancy Thoennes, U.S. Dept of Justice, Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey 22 (2000).

CHAPTER ONE: ESTABLISHING A RELATIONSHIP OF TRUST WITH A SURVIVOR

An integral part of protecting a survivor's confidentiality is establishing a relationship with her based on trust and respect for the victim's needs. Protecting privacy often requires vigorous, rapid, and complex advocacy. It also requires that the survivor provide informed consent; a survivor should be informed of the sources of her privacy, the ways in which her privacy may be compromised or her privilege(s) waived during civil or criminal litigation, the types of items and information that may be exposed, and the role of the advocate/attorney in protecting her privacy. Below is a checklist of issues that should be discussed to build a relationship of trust with a sexual violence survivor.

- Explain the difference between privacy, confidentiality and privilege. It is important that the survivor understand the difference between the general desire to keep certain information private, individual or agency policies or practices regarding confidentiality, and statutory privileges, such as the attorney-client and physician-patient privileges.

- Advise her of her right to privacy and the sources of her privacy rights.

- Explain the contexts in which confidentiality concerns may arise:

  - In crisis center files
  - At the hospital
  - With law enforcement
  - During civil and/or criminal prosecution
  - In the judicial process

- Discuss how privilege may be waived — intentionally or inadvertently — and the consequences of a waiver.

- Advise her about the potential choice between prosecution and privacy.

- Explain to her the different implications that the criminal and civil contexts have on privacy.

- Explain the types of records and information that may be at risk for exposure:

  - Counseling
  - Medical
  - Employment
  - School and Educational
  - Residential and/or Professional
  - Documents pertaining to Real and/or Personal Property

    - Sexual History
    - Marital History
    - Name/Address/Image
    - Court Records including:

        - Court Testimony
        - Physical Evidence
        - Victim Impact Statements
        - Victim Advocate Files
        - Pre-sentence Reports
        - Restitution Awards.

- Explain what the center/advocate/attorney can do to protect her privacy.

- Explain under what circumstances the center/advocate/attorney will disclose information (*i.e.*, informed consent release, mandatory reporting requirement, threat of harm to self or others, court order, etc.). Provide the victim with a copy of the center's confidentiality policies and procedures.

- Explain record-keeping procedures, who has access to her records, and how she can access her own records. *Note:* On occasion, prosecutors' offices have refused to provide a victim with a copy of the victim advocate's file even with a signed release. Because such records may be helpful in a subsequent criminal or civil case, it may be useful to ascertain the local prosecutorial policy at the outset of a case.

CHAPTER TWO: SOURCES OF VICTIM PRIVACY

There are many potential sources for victim privacy. Privacy protections may be found in state or federal statutes, administrative regulations, court rules, and state or federal constitutions. The main sources of privacy for victims will be found in:

- Privileges (Statutory and Common Law)
- Rules of Evidence
- Federal and State Privacy Statutes
- State Constitutions, including Victims' Rights Amendments
- Federal Constitution

This section will briefly discuss each of these sources of privacy and pose questions and issues to research in order to develop a comprehensive resource on victim confidentiality in your particular state.

I. Introduction to Privileges

An evidentiary privilege provides the holder of the privilege with the authority to withhold relevant evidence and often allows the holder of the privilege to prevent others from revealing evidence. Traditionally, many types of communications have been protected from disclosure in court. Though it is undisputed that evidentiary privileges generally inhibit the fact-finding process, privileges exist to protect interests and preserve the integrity of relationships deemed to have such sanctity that legal protection is warranted.[5] These include (but are not limited to) communication between husband and wife, attorney and client, clergy and parishioner, and psychotherapist and patient. The scope of each privilege varies by the type of privilege and varies from state to state. Three general categories of privileges exist: absolute, absolute diluted (also know as semi-absolute), and qualified.

- Absolute - protects any communication or record of communication between a victim and a qualifying service provider made in furtherance of psychological and emotional healing from examination by defendant or the court. The victim holds the privilege when it is absolute and can prevent a third party from disclosing the contents of the communication. When a privilege is absolute, only the victim, who is the privilege holder, may waive it. An absolute privilege does not violate a defendant's due process or confrontation rights.[6]

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[5] *See* John W. Strong, ed., *McCormick on Evidence* (5th ed. 1999).

[6] *See People v. Foggy*, 521 N.E.2d 86 (Ill. 1988), *cert. denied,* 486 U.S. 1047 (holding that trial court's refusal to conduct *in camera* hearing to examine communications made between rape victim and rape crisis counselor, to determine whether records provided source of impeachment, based on absolute statutory privilege of confidentiality of communications between rape victims and rape crisis counselors, did not violate defendant's due process rights or his confrontation rights).

- Absolute Diluted - a privilege that was absolute by its promulgation, but later qualified by a court by allowing for an *in camera* (in chambers) review of the oral communication or the records. Generally, a court's reason for diluting an absolute privilege is a fear of depriving a defendant of due process rights. Generally, when a court conducts an *in camera* review it looks at the content of the communication to determine whether it contains evidence that is both material and relevant to the issues in the case. If the communication contains such, the court will disclose the information to the defendant.[7] When a court dilutes an absolute privilege it is no longer the victim's choice whether or not to waive the privilege; the power to decide shifts to the court.

- Qualified - the privilege as written gives discretion to a judge or administrator to hold an *in camera* review to determine whether the information contained in the confidential communication will be used as evidence in the proceeding. Exact procedures vary by jurisdiction, but typically the court reviews the evidence to determine whether there is any information relevant to the issues in the case. It then performs a balancing test, reviewing the policy reasons for the privilege and weighing any harm that the victim may suffer as a result of revealing information contained in the confidence with any potential probative or exculpatory value the evidence may contain.

A. State Law Privileges

The types of privileges that may be available to a sexual violence survivor vary from state to state. Likewise, the same types of privileges may look very different from state to state. For example, for each privilege, it must be determined:

- Is it an absolute, absolute diluted, or qualified privilege?

- If not absolute, how is the privilege pierced? What is the standard and procedure?

- What types of communications are covered?

- Does the privilege extend to written records, such as reports, memoranda, and working papers produced during the course of the relationship or counseling?

- Whom does the privilege cover (what are the requirements for the privilege to apply, *i.e.*, only licensed/certified counselors, social workers, sexual assault counselors, etc.)?

[7] *See, e.g., People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994).

- Who holds the privilege?

- Who may waive the privilege? Usually only the holder of the privilege (*i.e.,* the victim) can waive the privilege. Exceptions may apply to deceased victims or incapacitated or minor victims.

- If there is a waiver, is it a complete waiver as a matter of law or does the state recognize partial or limited waivers?

- Is some, all, or none of the communication still privileged if the person to whom the victim communicates is obliged by law to disclose the content of the communication?

- May the victim authorize professionals, each of whom has a privileged relationship with the victim, communicate with one another without compromising the privilege?

The types of privileges to be researched in each state include:

- Victim-Counselor Privilege: Although most states afford testimonial privilege to psychotherapists and their patients, many victims receive counseling from service providers who do not have the same credentials and professional license as psychotherapists. A number of states have enacted privileges governing communications between a survivor of sexual assault and a sexual assault advocate or counselor.[8]

Note: Both the American Psychological Association and the American Counseling Association require their members to explain to clients any limitations to confidentiality and to identify any foreseeable situations in which confidential communications might be subject to disclosure. AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Standard 5.01 (Dec. 1992); AMERICAN COUNSELING ASSOCIATION, CODE OF ETHICS AND STANDARDS OF PRACTICE A.3a (eff. July 1995).

[8] An "advocate" or "counselor," for purposes of the victim-advocate privilege, is typically defined as an employee or supervised volunteer who provides emotional or psychological support to a victim of domestic or sexual abuse. An advocate or counselor provides services in conjunction with a rape crisis center or a domestic violence shelter and is not an agent of the government. Most states with a privilege have defined the term "advocate" or "counselor."

If your state does not have a specific advocate privilege, look to other privileges that may apply. These other privileges may also be relevant to establish confidentiality of pre-assault information.

- Psychotherapist (Psychologist, Psychiatrist) Privilege
- Counselor (look to see whether there are licensing requirements)
- Social Worker (look to see whether there are licensing requirements)
- Medical Professional

Certain information may also be privileged based on *content*. For example, in many states, results of certain medical tests (*e.g.*, HIV or STD) or alcohol/drug treatment information must be kept private.

The privilege may not, however, apply, in certain types of proceedings. For example, the Washington Court of Appeals found that the counselor-patient privilege does not apply in dependency proceedings where the fitness of a parent and the welfare of a child are at issue. *See In re J.F.*, 37 P.3d 1227 (Wash. Ct. App. 2001), *citing In re Coverdell,* 696 P.2d 1241 (39 Wash. Ct. App. 1984) (hospital records admissible in dependency proceeding despite records-confidentiality statute because public interest in full disclosure outweighs patient's interest in nondisclosure); *State v. Fagalde,* 539 P.2d 86 (Wash. 1975) (RCW 26.44 reporting requirements trump the psychologist-patient privilege); and *In re Welfare of Dodge,* 628 P.2d 1343 (Wash. Ct. App. 1981) (Wash. Rev. Code 5.60.060(4) creates statutory exception to physician-patient privilege in cases of child abuse).

In *Jaffe*, the United States Supreme Court left open the question of whether a federal victim-rape crisis counselor privilege exists and acknowledged that Rule 501 was open-ended. The Court directed federal courts to "continue the evolutionary development of testimonial privileges." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) *quoting* T*rammel v. United States,* 445 U.S. 40, 47 (1980).

B. Federal Privileges

Federal Rule of Evidence 501 "authorizes federal courts to define new privileges . . . by interpreting common law principles in the light of reason and experience." *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996). In *Jaffee,* the U.S. Supreme Court examined a federal common-law privilege protecting records of statements made to a psychotherapist in furtherance of healing. In its analysis, the Court looked at the private and public interests served by protecting confidential statements made to a psychotherapist and analyzed whether these interests outweighed the interest of admitting the statements into evidence. The Court stated that both public and private interests are served by protecting these communications from disclosure, and extended the privilege to include social workers as well as psychiatrists and psychologists.

The Court left open the question of whether the protection extended to crisis counselors. In analyzing possible future privileges, John H. Wigmore characterized the four elements relied upon by the Court as traditionally viewed as necessary to establish a privilege as:

- The communication must originate in a confidence that it will not be disclosed;

- The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;

- The relationship must be one that the community believes ought to be fostered; and

- The injury that would result to the relationship by the disclosure of the communication must be greater than the benefit that would be gained thereby for the correct disposal of the litigation.

8 John H. Wigmore, EVIDENCE 2285.

In *United States v. Romo*, 413 F.3d 1044 (9th Cir. 2005), the Ninth Circuit Court of Appeals further refined when the *Jaffee* privilege may apply and what may constitute "diagnosis and treatment." Because the Supreme Court in *Jaffee* left the task of defining "in the course of diagnosis or treatment" to the lower courts, the Ninth Circuit found that it is a "factual determination that rests upon consideration of the totality of the circumstances." 413 F.3d 1044, 1047. Relevant factors discussed by the court included:

- The historical nature of the relationship between the individual and his confidant;
- The patient's purpose in making the communication;
- The nature of the contact;
- The timing and location of the communication;
- Objective data, such as medical records, which corroborate the counseling contact; and
- Whether mental health services were provided or requested during the communication.

Id. The court found that no privilege existed for communications made between a licensed professional counselor and an inmate because the communications were not made in the course of diagnosis or treatment. Although the counselor had previously met with the inmate, this particular meeting was not scheduled, the counselor did not know why the inmate wanted to see him, and the counselor's job included a host of duties ranging from arranging social events to providing classes and acting as a case manager. The *Romo* case underscores the importance of managing when, where, and in what context, counseling sessions transpire.

II. Rules of Evidence

Rules of evidence may also provide sources for victim privacy by excluding certain information from court proceedings. Every state has enacted rape shield and other laws that may provide bases for protecting victims' privacy.

A. Rape Shield Laws

Rape shield laws are laws that prevent evidence of a victim's prior sexual conduct from being admitted into evidence during a criminal prosecution for sexual assault. Given the historical mistreatment of rape victims and widespread disregard for their privacy, rape shield laws were enacted to ensure that rape victims are treated with fairness, dignity and respect during a criminal trial by ensuring that victims will not be subject to a public airing of their sexual reputation, past conduct, and other irrelevant information.

All states and the District of Columbia have some form of rape shield law. The American Prosecutors Research Institute has compiled a chart of all states' rape shield laws as of May, 2005 and is available at:
http://www.ndaa-apri.org/pdf/vaw_rape_shield_laws_may_05.pdf

The texts of all states' rape shield laws are available at:
http://www.ndaa-apri.org/pdf/vaw_rape_shield_laws_nov_18_%AD03.pdf

When analyzing the rape shield law in your state, consider the following:

- What type of rape shield law does your state have? The four general types of rape shield laws are:
  - *Legislated Exceptions Laws* - contain general prohibitions on evidence of a victim's prior sexual conduct, subject to at least one legislated exception.
- *Constitutional Catch-All Laws* - modeled after the federal rape shield law, prohibit evidence of prior sexual conduct, subject to at least one legislated exception but also contain an additional exception stating that sexual history evidence is admissible if the judge determines that the Constitution requires its admission.
  - *Judicial Discretion Laws* - contain no legislated exceptions but instead grant judges broad discretion to admit or bar evidence of a victim's sexual history.
  - *Evidentiary Purpose Laws* - determine admissibility of sexual history based on the purpose for which the evidence is offered.

- Does the rape shield law apply to pretrial hearings or only at trial?

- What are the exceptions to the rape shield? These will vary from state to state, but common exceptions are:

    - Prior sexual conduct with defendant
    - Credibility
    - Bias/motive to fabricate
    - Alternative source of physical evidence/knowledge
    - Pattern of conduct by victim
    - Rebuttal by defendant
    - Mistaken belief by defendant of consent

- Does Federal Rule of Evidence 412 apply? Rule 412 is the federal rape shield statute applicable in federal courts. Rule 412 provides that evidence offered to prove that any alleged victim engaged in other sexual behavior or evidence offered to prove any alleged victim's sexual predisposition is inadmissible in any civil or criminal proceeding involving alleged sexual misconduct. The following exceptions apply:

    - Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

    - Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

    - Evidence the exclusion of which would violate the constitutional rights of the defendant.

B. Other Rules of Evidence

In addition to rape shield statutes, designed specifically to protect the privacy of rape victims, other rules of evidence may also keep certain information from being disclosed. For example, do not forget to analyze evidentiary issues surrounding:

- Relevance/Prejudicial vs. Probative Balancing — admitting a victim's sexual history or other private information is extremely prejudicial and usually not relevant.

- Hearsay

III. Federal Laws

Federal laws that may provide protections for victims' privacy include:

- Violent Crime Control and Law Enforcement Act of 1994;

- Health Insurance Portability and Accountability Act (HIPAA): requires many providers to ensure privacy and confidentiality of patient records;

- Victims of Crime Act (VOCA) and/or Violence Against Women Act (VAWA) funding;

- Family Education Right to Privacy Act (FERPA): establishes privacy in educational records; and

- Freedom of Information Act (FOIA) (*discussed below* in Chapter Two, Section 4.V.A).

IV. State Constitutions/Victims' Rights Amendments

Thirty-three states have enacted state constitutional amendments that afford victims certain basic rights throughout the criminal justice process. A number of those victims' rights amendments (VRAs) contain provisions that may give rise to a victim's constitutional right to privacy. Look to see whether your state's VRA contains one of the following enumerated rights:

- Victim's Right to Privacy
- Victim's Right to Dignity
- Victim's Right to Respect
- Victim's Right to Due Process

See www.nvcap.org for an overview of and links to states' crime victim rights amendments. See also if your state constitution contains a right to privacy other than in the VRA..

V. Additional State Sources of Privacy

It is important also to look to state constitutions, statutes and case law to find a right to privacy that can be used to protect aspects of a survivor's privacy. For example, the Utah Supreme Court recognized "the general proposition that there is and should be such a right which protects against any wrongful or unseemly intrusion into what should properly be regarded as one's personal affairs." *Redding v. Brady*, 606 P.2d 1193, 1195 (Utah 1980). In addition, states that do not have VRAs have victims' rights in statutes. Look to see if the victims' rights statutes contain a right to privacy. Look also to a state's public record laws to

see if it exempts certain information from disclosure. *See below*, Chapter 2, Section 4.V.B on State Open Records Laws.

VI. Federal Constitutional Right to Privacy

Despite the fact that the United States Constitution does not explicitly mention the right to privacy, it is well-settled that such a right is contained within the Constitution. The Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152 (1973). Supreme Court precedent establishes two separate lines of privacy interests: 1) the "individual interest in avoiding disclosure of personal matters," and 2) "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

A. Right to Privacy of Counseling Communications

Although the Court has never decided whether a right to privacy inheres in the doctor-patient relationship generally, *see Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (leaving undecided "[w]hatever constitutional status the doctor-patient relation may have as a general matter"), the information communicated to a therapist fits within the contours of the privacy right. A patient's interests in safeguarding the confidentiality of her therapy records similarly involves issues of privacy, security and decisions to seek medical treatment free from intrusion. The therapist-patient privilege was created to protect these interests.

Recognizing the similarities between therapeutic communications and the intimate spheres of decision accorded constitutional solicitude under the right to privacy, numerous lower courts have decided that the psychotherapist-patient privilege is grounded in the constitutional right to privacy. For example, the following cases have found a constitutional right to privacy in the psychotherapy privilege:

- *In re Lifschutz*, 467 P.2d 557, 567 (Cal. 1970) (finding a patient's interest in keeping confidential therapy communications has constitutional heritage);

- *Caesar v. Mountanos*, 542 F.2d 1064, 1067-68 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977) (recognizing that the constitutional right of privacy extends to psychotherapeutic counseling communications);

- *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F.Supp. 1028, 1038 (D. Haw. 1979) (finding communications between psychiatrist and patient often involve problems in precisely the areas previously recognized by the Supreme Court as within the zone of protected privacy);

- *Borucki v. Ryan*, 827 F.2d 836, 839, 845 & n.14 (1st Cir. 1987) (acknowledging that the majority of federal courts recognize a

constitutional right to privacy in therapeutic counseling and describing that right as existing in the Fourteenth Amendment's concept of personal liberty); and

- *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988) (recognizing a constitutional right of privacy in avoiding disclosures, including psychiatric records).

B. Minors and a Right to Privacy

Minors also have constitutional rights, including a right to privacy. For example, *In Re Gault*, 387 U.S. 1, 17 (1967), established that juvenile defendants have some degree of constitutional protection. Almost a decade later, Justice Brennan, with three Justices concurring and three Justices specially concurring, affirmed that a right to privacy in connection with decisions affecting procreation extends to minors as well. *See Carey v. Population Services, Intern.*, 431 U.S. 678 (1977).

CHAPTER THREE: WAYS IN WHICH PRIVACY IS COMPROMISED

Establishing privacy and protecting it are two different things. A victim's privacy may be severely threatened in the course of criminal or civil litigation. Survivors and their advocates should be aware of the broad range of mechanisms and arguments that may compromise a victim's privacy and similarly aware of ways in which it may be protected. The most common ways in which privacy is breached include:

- Waiver — Intentional, Inadvertent or Implied
- Production and Discovery
- Public Court Proceedings
- Media
- Public Records

This chapter will briefly discuss each way privacy may be compromised and outline some tips to protect privacy.

I. Waiving Victim Privacy

Although a victim may have a privilege protecting private information, that privilege may easily be waived in a number of ways. Often, waiver is inadvertent because a victim or her family are unaware of the consequences of certain actions (*i.e.*, talking to other family members, sharing information with other service providers, talking to law enforcement, etc.). Therefore, it is important for an advocate or attorney to explain to victims about the possibility and consequences of a waiver.

In assessing a state's laws regarding waiver, the staff attorney will want to research the following issues:

A. Who May Waive

- Usually only the holder of privilege can waive.

- Who can waive on behalf of minors (*i.e.*, parents, guardians *ad litem*)?

  Note: a guardian *ad litem* does not necessarily have the automatic right to waive on behalf of a minor. In *S.C. v. Guardian Ad Litem*, 845 So.2d 953 (Fla. Dist. Ct. App. 2003), the Florida court found that a mature minor (14 years old), who was the subject of adjudication of a dependency proceeding, had the right to assert the psychotherapist/patient privilege when her guardian *ad litem* requested access to her records. The minor was entitled, at least, to receive notice and an opportunity to be heard before her guardian *ad litem* was given access to psychotherapy records.

B. Inadvertent Waiver

Many times, a victim waives her privilege without intending to do so. This is extremely significant because once a privilege is breached, it is often legally and practically impossible to remedy any harm that results from the breach. In addition, media access to information may become an issue. Generally, the media may use any information it obtains lawfully, even if someone else unlawfully or inadvertently disclosed it. The media may also be granted access to documents previously sealed by the court. *See e.g.*, *People v. Bryant*, 94 P.3d 624 (Colo. 2004).[9] Therefore, it is vitally important for a victim to be fully advised about the various circumstances that may result in an inadvertent waiver. The most common situations include:

- Multidisciplinary teams; allied professionals sharing information;
- Insurance disclosures;
- Pursuit of administrative benefits, such as social security or unemployment benefits; and
- Parental/family member disclosure.

See e.g., State v. Denis L.R., 678 NW2d 326 (Wis. Ct. App. 2004) *aff'd* 699 NW2d 154 (Wis. 2005) (mother waived her three-year old daughter's therapist-patient privilege by intentionally disclosing a significant part of the daughter's communication to the therapist; communications to therapist that fell within mandatory reporting statute were not privileged). In some states, a privilege may also be waived by the presence of a third party during an otherwise privileged communication.

Centers and coalitions may want to work with advocates and counselors and other professionals to ensure they are adequately warning their clients about the possibility of waiver.

C. Intentional Waiver

There are situations in which a victim may voluntarily waive her privilege. She should do so only after being fully informed about the consequences of her waiver. The most common situations in which a victim may intentionally waive her privilege include:

- Victim reports a crime - A sexual violence survivor should know the extent to which she voluntarily waives her privacy if she chooses to report a crime. For

[9] For the full text of the Court's Order on the News Media's Motion to Unseal Evidence of Kobe Bryant's Statements and Motions to Unseal Briefs and Pleadings In The Court Filed Under Seal Without Notice to Public (Oct. 27, 2004) see **http://www.courts.state.co.us/exec/media/eagle/11-04/844.pdf**.

example, advocates should make it clear to a survivor that, if she wishes to have her attacker(s) arrested and prosecuted, her medical information related to the assault WILL be turned over to law enforcement and the prosecution. Reporting a crime does not, however, automatically mean a victim's counseling or other private records are subject to disclosure.

- Victim files a civil lawsuit - When a victim chooses to file a civil action against her perpetrator, she must be advised that the ability for her to control her privacy will be significantly impeded. A common exception to the psychotherapist and other privileges is that the privilege is waived if the holder of the privilege (the victim) puts her mental state at issue as a claim or defense in a lawsuit. If a victim files a civil suit based on physical and emotional damages sustained as a result of an assault, she may put her mental state at issue for the purposes of waiving the privilege. States vary widely on this issue.

Waiver	**Not a Waiver**
Strunge v. Com., 1994 WL 1251232, Pa.Com.Pl., 1994 (statutory privilege is clearly waived by the filing of a lawsuit seeking recovery for mental or psychological injuries).	*Sorenson v. H & R Block*, 197 F.R.D. 199 (D. Mass. 2000) (fact that the plaintiff brings claims for intentional and negligent infliction of emotional distress does not, in and of itself, operate as a waiver).
Maynard v. Heeren, 563 N.W.2d 830 (S.D. 1997) (there is no privilege as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense).	*Weil v. Dillon*, 109 P.3d 127 (Colo. 2005) (test is whether the plaintiff "significantly injected his physical and mental condition as the basis for his claim").

Victim voluntarily waives privilege - What is the standard for waiver? *See Cabrera v. Cabrera*, 580 A. 2d 1227 (Conn. App. Ct. 1990) (an express or implied waiver cannot occur unless it is the intelligent waiver of a known right, implying the existence of a patient's active decision or consent to waive her privilege). Advocates should argue for the most protection possible.

If a survivor is thinking about signing a waiver with a rape crisis center, she should fully understand the implications of that waiver, including:

- Although the center will voluntarily release only the information asked to be released, doing so waives confidentiality and may make all her records and communications with rape crisis center employees and volunteers subject to release as a result of a subpoena or court order.

- Any person the survivor has ever worked with at the rape crisis center may be called to testify about her records.

- A victim cannot limit what her counselor/advocate says on the stand—the counselor/advocate can repeat anything a survivor said about any issue in her life (not just those related to the sexual abuse or assault at issue in the case).

- The lawyers may ask her counselor/advocate any questions they want based on any references in the records.

- Anything released — records or testimony — may be given to both sides in a lawsuit.

- Anything that is released in a legal proceeding may become public record and therefore available in later court proceedings and to the public.

- Documents provided to prosecutors will likely be disclosed to the defense. This is especially important if the victim decides not to pursue prosecution; the records may still be used without her consent or even over her objection.

D. Burden to Prove Waiver

- Whose burden is it to prove waiver in your state? This varies from jurisdiction to jurisdiction:

- *United States v. LeCroy*, 348 F.Supp. 375 (E.D. Pa. 2004) (attorney-client privilege case) (party asserting the privilege bears the burden of demonstrating that the communication was given in confidence); or

- *Weil v. Dillon*, 109 P.3d 127 (Colo. 2005) (burden is on the party seeking to overcome the privilege); *People v. Turner*, 109 P.3d 639, 640 (Colo. 2005) (defendant has the burden of demonstrating that victim waived privilege).

E. Partial Waivers

Does your state recognize a partial waiver?

- *State v. Denis L.R.*, 678 N.W.2d 326 (Wis. 2005) (privilege is waived if holder voluntarily discloses any significant part of the communication; need not be intentional relinquishment of right; no privilege exists with

respect to information, such as child abuse, that is subject to mandatory disclosure).

- *United States v. LeCroy*, 348 F.Supp. 375 (E.D. Pa. 2004) ("When a party discloses a portion of otherwise privileged material but withholds the remainder, the privilege is waived only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary.")

II. Production and Discovery in Criminal Cases

Confusion often arises around the scope of a defendant's rights to information by production and discovery. While a defendant has a right to discovery from the *government*, there is generally no right to discovery from *third parties*, such as the victim or holders of victim records. Federal courts recognize the important distinction between discovery and production in criminal cases. Specifically,

- Fed. R. Crim. P. 16 "Discovery and Inspection" explicitly and exclusively governs discovery between the **government** and the **defendant** in a criminal case.

- Fed. R. Crim. P. 17 "Subpoena" governs the production of materials from **non-parties**, including non-party crime victims. Federal courts and the United States Supreme Court have uniformly found that Rule 17 is not a discovery device. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951).

Defendants often mis-use Rule 17 subpoenas or the state equivalents as a discovery device, seeking broad requests for information from non-parties pre trial. Therefore, in federal court or in states with rules of evidence that mirror the federal rules, there is often an argument that the defendant is making improper use of a subpoena. In *United States v. Nixon*, 418 U.S. 683, 699-700 (1974), the Supreme Court established a 4-prong test to ensure that Rule 17 subpoenas are not distorted into discovery devices. Under *Nixon*, the court must ensure that the information sought by is not merely a veiled attempt to sidestep the discovery prohibition. Specifically, the court will analyze whether:

- The documents are evidentiary and relevant;

- They are not otherwise procurable reasonably in advance of trial by exercise of due diligence;

- The party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and

- The application is made in good faith and is not intended as a general fishing expedition.

Unless a defendant can satisfy all four prongs under *Nixon*, production of the information should not be ordered.

A. How to Respond to a Subpoena

Every coalition and center should have policies in place regarding how to respond to a subpoena. There are several different ways to challenge a subpoena.

Motion to Dismiss - for an invalid subpoena. For example,

- Defendant has improperly used a Fed. R. Crim. P. 17 subpoena (or state equivalent) as a discovery device. *See above*, test from *United States v. Nixon*.

- Records subpoenaed for a hearing not allowed under subpoena power. For example, records have been subpoenaed to a pretrial hearing but the statute authorizes documents to be subpoenaed only to trial. *See, e.g.*, *State v. Cartwright*, 85 P.3d 305 (Or. 2004) (defendant's subpoena *duces tecum* commanding production of audiotaped prior statements of witnesses, whose testimony the state planned to introduce against defendant at trial, on a date when no evidence would be taken, was an unauthorized attempt to use subpoena as a discovery device to command the early production of the audiotapes).

- Improper service of process or other technical defect.

Motion to Quash - when the defendant is not entitled to the information requested. For example:

- Information sought is subject to privilege.
- Information sought is not relevant.
- Subpoena is overbroad (*i.e.*, a fishing expedition).

Motion to Protect - to place limitations on the use, review, disposal, etc. of information; require redaction of certain information. For example:

- Restrict who has access to certain information (*i.e.*, attorneys, expert witnesses only).
- Limit scope of use of information.

- Require public record sealed both during the course of the litigation and remain sealed once trial ends.

- For example, Oregon Senate Bill 199 (passed and signed into law in July, 2005) provides that, upon the request of the district attorney or the victim, the court will order the parties to not copy or disseminate matters of a sexually explicit nature without the permission of the court. Certain exceptions may apply for law enforcement and certain service providers. The public records law will also be modified to exempt certain sexually explicit matters, such as photographs of a person in a state of nudity, from the Public Records law.

- Require return and/or destruction of materials at final resolution of a case.
- Require that initials or pseudonym be used in all court pleadings and in open court to protect the victim's privacy.
- Place requirement on anyone who gains access to materials to be bound by terms of protective order.

If a motion is denied, an appeal remedy may be available.

B. Distinguishing a Warrant

Occasionally, a warrant may be served on a Center or a victim. It is important to recognize the difference between a warrant and a subpoena. A warrant is a document signed by a judge on probable cause. It is typically served directly by the police in order to search and seize items. In contrast, a subpoena[10] is not issued on probable cause but issues under color of court authority by a party to obtain the presence of either a person or relevant evidence, not protected by confidentiality laws, in association with a formal proceeding such as grand jury, preliminary hearing, or trial. To ensure victim privacy, centers, shelters, and other victim service providers should have established policies articulating how the agency will respond to a warrant. If clients are assured that the program will maintain and protect victim privacy, consenting to a search or providing confidential documents may be a breach of funder or contractual obligations, violate the agency's own policies, and undermine victim/client trust.

[10] A "subpoena" is issued for persons; a "subpoena *duces tecum*" is issued for evidence, such as documents and personal effects.

C. Victim's Due Process Right to Notice

Increasingly, private records are subpoenaed directly from record holders without notice to victims. For sexual violence survivors who seek counseling, records are often held by rape crisis centers, domestic violence shelters, or other agencies who disproportionately serve poor and low-income victims. These victims, and the centers that serve them, have limited resources and typically lack expertise in confidentiality or the funds necessary to hire an attorney to challenge a subpoena. Often the result is disclosure of records despite laws prohibiting such disclosure. Once information is disclosed, it is often difficult to remedy.

Victims and their attorneys should argue that they have a due process right to notice when privileged records are subject to a subpoena. Procedural due process under the United States Constitution imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Notice and the opportunity to be heard are the universally understood minimal due process safeguards. Victims should be given at least this before their privacy rights are invaded. The central meaning of due process is that " 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' . . . . 'at a meaningful time and in a meaningful manner.' " *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (*quoting Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1972) and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). These safeguards are little to ask given the magnitude of harm that can fall upon patients when their confidential records are disclosed without their knowledge.

Using the Due Process Clause to protect victim privacy is discussed below in Chapter Three, Section 5.

D. Abuse of Discovery Process

While it is difficult to remedy wrongful disclosure of information, some courts have attempted to do so. For example, a Utah trial court issued a memorandum decision regarding a defense attorney's wrongful subpoena and review of privileged records. *See* Appendix A, Memorandum Decision, *State v. Gonzales*, --- P.3d ----, 2005 WL 3434445 (Utah. App. 2005). The court forbade the defense from using the records at trial and ruled that defense attorney's actions created a conflict "that calls into question the professional ethics of his continued representation of the defendant." Gonzales Memorandum Decision at 7. The court found that the defense attorney's knowledge of the privileged records created a conflict of interest because "it is impossible to divorce defense counsel's knowledge obtained from privileged information from his knowledge of the rest of the case[.]" *Id.* at 4. Because of the conflict of interest, the defense attorney withdrew from the case. Attorneys and advocates should make similar arguments to remedy abuse of the discovery process.

III. Public Court Proceedings

When a victim participates in civil or criminal litigation, she has become a part of a public court proceeding. Because this country favors open courts, a victim's attorney must proactively and creatively work to protect a victim's privacy during the course of public court proceedings. For example, the attorney may want to file the following types of motions:

- Motion to Keep Name/Image Out of Record.
- Motion to Protect (place limitations on use of evidence and information).
- Motion to Close the Courtroom (when certain testimony will be proffered).
- Motion to Allow for Alternative Methods of Testimony (*e.g.*, close circuit).
- Motion to Seal Records.

There may be specific state statutes that allow for this type of privacy during public proceedings. For example, Alaska Stat. § 12.61.140 provides that the portion of court or law enforcement records that contains the name of the victim of kidnapping or a sex offense shall be withheld from public inspection and is not a public record. It also provides that "In all written court records open to public inspection, the name of the victim * * * may not appear. Instead, the victim's initials shall be used. However, a sealed record containing the victim's name shall be kept by the court in order to ensure that a defendant is not charged twice for the same offense." *Id.*

Also, with the increasing use of the internet for official business, victims and advocates should be aware whether court records and docket information — often including victim-identifying and victim contact information — are available online. For example, the Oklahoma State Court Network (www.oscn.net) is an easily accessible website that contains information about criminal cases, including transcripts and victims' and witnesses' names and addresses. Due to the efforts of advocates in Oklahoma, some district attorneys have instructed court clerks to use initials on internet documents instead of full names. However, advocates in every state should research what types of court information are accessible on the internet.

IV. Media

A. Media's Use of Information

The media cannot be prevented from reproducing any information it lawfully obtains. Therefore, preemptive measures must be taken to prevent the media from gaining access to the victim's private information.

The protective measures discussed in the preceding section are exceptionally important because generally the media also has open access to public courts. In addition, the First Amendment allows the media to reproduce any lawfully obtained information, even if the information itself was disclosed unlawfully (as long as the media did not participate in the unlawfulness). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that a state may not impose sanctions for the publication of truthful information obtained in official court records open to public inspection); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that a state cannot impose damages on newspaper for publishing name of rape victim which had been lawfully obtained from publicly released police report).

Therefore, preemptive measures must be taken to keep the media from ever securing access to private or privileged information. A sexual violence survivor and her attorney must be aware of all the sources of her privacy in order to protect a victim's private information from the media. This guide is intended to assist a victim and her attorney in identifying sources and how to use them proactively to protect victim privacy.

B. Media's Right to Access the Courtroom

Court typically allow the media access to the courts. There are limits, however, on the type and extent of access. These limits may help protect a victim's privacy or minimize her public exposure. In *Nixon v. Warner Communications, Inc.*, 435 US 589 (1978), the Court ruled that there was no constitutional right for the press to have live witness testimony broadcast or recorded, nor is there a right for the public to see trials broadcast live or recorded. This holding seemed to indicate that the court might not be receptive to a constitutional argument regarding cameras in the courtroom. The Court further defined the First Amendment right of access to attend criminal trials but concluded that the right was not absolute; the qualified right of access may be overcome if a closure order is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (declaring unconstitutional the Massachusetts statute that promoted closure in order to protect young rape victims from further trauma and embarrassment).

C. Excluding Cameras from the Courtroom

Look at the applicable state and local court rules to determine the local jurisdiction's view of cameras in the courts. Almost all states allow presiding judges to use their discretion to allow or deny cameras in the courtroom, but a few states restrict the decision to the Chief Justice of the state supreme court. Specific procedural requirements are often imposed, including advance notice to the parties and the court. Coverage of *voir dire* is almost always restricted.

Most states also restrict coverage of cases involving certain classes of victims or witnesses, including juveniles and victims of sexual crimes. Many states provide strict guidelines for the number of cameras and equipment operators, positioning of cameras and lights, light levels, and movement in the courtroom of any media personnel. A copy of the Colorado State Court Administrator's media policy in the Kobe Bryant case may be found at **http://www.courts.state.co.us/exec/media/eagle/seating/july_19_memo.doc.** In addition, some states allow for the exclusion of cameras upon the objection of witnesses or victims. *See* Appendix C, Cameras in the Courtroom.

V. Public Records

Many government agencies hold documents that may contain information that is private. For example, police reports, drivers' license records, real estate records, public hospital records and court records all may contain sensitive, identifying information about a victim. Some of these records may become public records and subject to disclosure under public records laws. Given that public records laws are designed to *disclose* information, once a survivor's information is part of a public record, her privacy may easily be compromised — either inadvertently or intentionally — through the use of these laws. Therefore, it will be extremely important to understand how to keep things out of the public records from the beginning.

A. Freedom of Information Act

For a list of principal FOIA contacts at federal agencies, *see* http://www.usdoj.gov/04foia/foiacontacts.htm.

The Freedom of Information Act (FOIA) is a federal disclosure statute. It applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local government agencies. Each federal agency is responsible for meeting its FOIA responsibilities for its own records. All federal agencies are generally required under FOIA to disclose records requested in writing by any person. However, agencies may withhold information pursuant to nine exemptions and three record exclusions contained in the statute.

1. FOIA Exemptions

The nine exemptions to FOIA are:

(1) Classified secret matters or national defense or foreign policy.
(2) Internal personnel rules and practices.
(3) Information specifically exempted by other statutes.
(4) Trade secrets, commercial or financial information.
(5) Privileged interagency or intra-agency memoranda or letters.
(6) Personal information affecting an individual's privacy.
(7) Investigatory records compiled for law enforcement purposes.
(8) Records of financial institutions.
(9) Geographical and geophysical information concerning wells.

5 U.S.C. § 552(b)(1)-(9). The two exemptions most relevant to sexual violence victims are: exemptions number (6) *personal information affecting an individual's privacy*; and (7) *investigatory records compiled for law enforcement purposes.*

Personal Information Affecting an Individual's Privacy: This exemption permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). This exemption cannot be invoked to withhold from a requester information pertaining to the requester.

Investigatory Records Compiled for Law Enforcement Purposes: This exemption includes:

- Records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings; and

- Information necessary to protect the physical safety of any individual when disclosure of information about him or her could reasonably be expected to endanger the individual's life or physical safety. 5 U.S.C. § 552(b)(7)(f).

2. FOIA Exclusions

In contrast to the exemptions, the three record exclusions allow an agency to treat certain exempt records as if the records were not subject to the FOIA. An agency is not required to confirm the existence of three specific categories of records. If these records are requested, the agency may respond that there are no disclosable records responsive to the request. The three exemptions are:

(a) Information that is exempt because disclosure could reasonably be expected to interfere with a current law enforcement investigation. There are three specific prerequisites for the application of this exclusion.

- The investigation in question must involve a possible violation of criminal law;
- There must be reason to believe that the subject of the investigation is not already aware that the investigation is underway; and
- Disclosure of the existence of the records — as distinguished from the contents of the records — could reasonably be expected to interfere with enforcement proceedings.

5 U.S.C. § 552(b)(7)(A).

When all three of these conditions are met, an agency may respond to a FOIA request for investigatory records as if the records are not subject to the requirements of the FOIA. In other words, the agency's response does not have to reveal that it is conducting an investigation.

(b) Informant records maintained by a criminal law enforcement agency under the informant's name or personal identifier.

(c) Records maintained by the Federal Bureau of Investigation which pertain to foreign intelligence, counterintelligence, or international terrorism.

B. State Open Records Laws

Nearly every state has its own version of the Freedom of Information Act, referred to variously as Open Records, Open Meetings, Open Government or Sunshine laws. In researching potential privacy protections for victims, a thorough review of a state's open records laws is crucial. The laws may contain exemptions to disclosure that a victim may want to protect. The exemptions may be specific to a certain class of victims, such as victims of sexual violence or minors. For example, Washington law provides:

> Information revealing the identity of child victims of sexual assault who are under age eighteen is confidential and not subject to public disclosure. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

Wash. Rev. Code § 42.17.31901.

In some states the presumption is against disclosure of certain specified information (such as identity of a sexual assault victim or nature of the offense). *See, e.g.,* N.Y. Civ. Rights Law § 50-b ("The identity of any victim of a sex offense . . . or of an offense involving the alleged transmission of the human immunodeficiency virus, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection." However, disclosure may be made to "[a]ny person who . . . demonstrates to the satisfaction of the court that good cause exists for disclosure to that person."). In other states, the victim must overcome the presumption in favor of disclosure.

Statutory exemptions from disclosure also may be based on one or more other factors, such as age of the records and/or the subject matter. For example, Oregon law provides that records less than 75 years old "which contain information about the physical or mental health or psychiatric care or treatment of a living individual," are exempt from public disclosure if disclosure "would constitute an unreasonable invasion of privacy." Or. Rev. Stat. § 192.496. Other types of records often subject to an exemption include public employee personnel records, educational records and law enforcement records pertaining to an ongoing investigation.

States may have a procedure for requesting non-disclosure of personal information. Florida law requires that certain sex-offense related information shall remain confidential so long as the victim meets the conditions articulated in the statute; these include the conditions that:

- the identity of the victim is not already known in the community;
- the victim has not voluntarily called public attention to the offense;
- the victim's identity has not otherwise become a reasonable subject of public concern;
- disclosure of the identity would be offensive to a reasonable person; and
- disclosure would endanger the victim, cause mental or emotional harm, make her reluctant to testify, or otherwise be inappropriate.

Fla. Stat. Ann. § 92.56. Similarly, Or. Rev. Stat. § 192.445 provides:

> [a]n individual may submit a written request to a public body not to disclose a specified public record indicating the home address, personal telephone number or electronic mail address of the individual. A public body may not disclose the specified public record if the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with

the individual is in danger if the home address, personal telephone number or electronic mail address remains available for public inspection.

For links to the states' open records and open meetings laws, *see*: http://www.pbs.org/now/politics/foiamap.html.

It is the federal or state agency's responsibility either to disclose requested records or establish that they are not subject to disclosure by an exemption. Therefore, it is important for a victim to know where private information may be at risk for disclosure, and work with the agency to make sure it asserts an exemption to prohibit disclosure.

CHAPTER FOUR: BALANCING VICTIM'S PRIVACY AGAINST DEFENDANT'S RIGHTS

During a criminal prosecution, there are several competing interests at play: the defendant's fair trial rights; the state's interests in prosecution; and the victim's interests in privacy. This section will primarily focus on the defendant's right to fair trial versus a victim's right to privacy.

It is a common misperception that a defendant's constitutional rights are always at stake, and are balanced against a victim's mere statutory rights (usually a statutory privilege). However, victims and their attorneys must be more vigilant in arguing that a victim's rights reach constitutional magnitudes as well. This section will briefly outline how to re-cast the argument - a balance between a victim's constitutional privacy against a defendant's rights.

I. Scope of Defendant's Rights

The scope of a defendant's rights to access information is commonly misconstrued. Defendant's constitutional rights include the right to a fair trial. This encompasses a right to confrontation and a due process right. In contrast, defendant's rights to discovery and production are proscribed by statute. As discussed above in Section 4.II on Production and Discovery, under Federal Rule of Criminal Procedure 17 and many state statutes, a defendant generally has no right to discovery from third parties in a criminal case.

When a defendant seeks access to a victim's privileged information, the victim's privacy rights are usually defined only by the statutory privilege that covers the records in question. Or, the victim's interests in privacy are disregarded all together, and the argument is cast in terms of a defendant's right versus the state's rights in prosecution. For example, in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States. Supreme Court attempted to strike a balance between defendant and the state. In *Ritchie*, defendant was charged with rape and other sexual crimes involving his 13 year-old daughter. The victim reported to the police who in turn referred the matter to Children's Youth Services (CYS), the state investigative agency charged with investigating possible child abuse. During pretrial discovery, Ritchie served CYS with a subpoena seeking access to all records concerning his daughter. CYS refused to comply because the records were privileged under Pennsylvania law.

The Confrontation Clause is a right that applies at trial. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987). Therefore, it cannot be used as the basis to subpoena records pretrial.

The defendant argued that his constitutional rights to confrontation and due process required disclosure of the confidential records. The court interpreted a defendant's confrontation clause right as a *trial* right designed to prevent improper limits on cross examination. The Court found it does not include the power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Under the Due Process Clause, the Court found that the government has an obligation to turn over evidence in its possession

that is favorable to accused and material to guilt or punishment. Therefore, the Court concluded Ritchie had a constitutional right to info in CYS files that was material to defense. The state privilege that covered the CYS files permitted disclosure and use of the files if subject to judicial order; therefore it interpreted this as a qualified privilege that contemplated disclosure by its statutory terms. The Court held that the due process rights of the defendant required a court to conduct an *in camera* hearing to examine whether any evidence existed that would have changed the outcome of the trial. The Court stated that if such evidence existed, the defendant should receive a new trial.[11]

States responded to *Ritchie* in disparate fashions. While every state has a privilege that protects patient communications with a therapist, they vary widely in the scope and conditions permitting disclosure. Courts have interpreted privileges differently, giving some full effect, sometimes limiting application, and sometimes finding that a privilege violates a defendant's rights. A number of questions were left unanswered by *Ritchie* — and therefore may provide a basis for arguing records are not subject to disclosure. For example:

- Does it apply to an absolute privilege? The privilege in *Ritchie* was qualified, allowing disclosure upon court order.

- Does *Ritchie* apply only when the state is in possession of counseling records? In *Ritchie*, a state agency was involved; even though the prosecutor did not have access to records, the records were still subject to disclosure. However, the Due Process Clause only applies to state action.

- What about the potential impact on low-income victims who more often access government-provided programs rather than private providers? Does such a law have a disparate impact on low-income victims? Is there sufficient basis for an Equal Protection argument?

- What is the proper standard for allowing access? Material relevance or necessary for a fair trial? States vary in application.

- What type of threshold showing does *Ritchie* require for *in camera* review? *Ritchie* did not specify. A lack of a specific standard has resulted in trial courts fashioning their own criteria with the results varying widely.

- Does *Ritchie* only apply to investigative files such as the CYS files? It may be inapplicable to records that are only therapeutic in nature.

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[11] The *Ritchie* Court was careful to note that its decision did not include granting the defendant a right to examine the material. Only after a finding of materiality by a court during an *in camera* review, would a defendant have access to the relevant evidence.

As demonstrated in *Ritchie*, sexual assault victims' privacy is often disregarded. In balancing the interests, the argument usually is cast in terms of either: 1) Defendant's Constitutional Rights v. State's Interests; or 2) Defendant's Constitutional Rights v. Victim's Statutory Privilege. In either case, the defendant usually wins and a victim's records are disclosed.

DEFENDANT'S CONSTITUTIONAL RIGHTS V. STATE'S INTERESTS

In this scenario, the defendant usually wins because courts will err on side of defendant.

- Erring on side of defendant is less likely to be overruled — courts rely on the argument that defendant's liberty and life interests that are at stake;
- Imposing on a victim's privacy seems less risky because courts look at a victim's privacy only in terms of a statutory privilege and balance it against a defendant's liberty interest;
- Victims have limited avenue of appeal in criminal cases; and
- Nonprofits and agencies holding the records often lack the resources to adequately challenge subpoenas.

DEFENDANT'S CONSTITUTIONAL RIGHTS V. VICTIM'S STATUTORY PRIVILEGE

In this scenario, the defendant wins because constitutional rights will always trump statutory rights. The following section will outline ways in which to recast the argument as implicating a victim's constitutional rights. This will provide a more balanced argument for respecting and upholding a victim's privacy rights.

II. Scope of Victim's Right

As discussed in detail above, there are a number of sources of a victim's privacy rights. In summary, a victim and her attorney could turn to the following sources — listed from the more narrow to the more broad — to establish her right to privacy:

- State Sexual Assault Specific Privileges
- Non-Sexual Assault Specific State Privileges/Federal Privileges
- State Evidentiary Rules
- State/Federal Administrative Regulations
- State/Federal Privacy Statutes
- State Victims' Rights Amendments
- State Constitutional Right to Privacy
- Federal Constitutional Right to Privacy
- Federal Constitutional Right to Due Process

III. Arguing Victim's Federal and State Constitutional Rights

DEFENDANT'S CONSTITUTIONAL RIGHTS V. VICTIM'S CONSTITUTIONAL RIGHTS

As discussed previously, a victim's privacy may be found in both the state and federal constitutions. A victim also has a federal right to due process if her liberty interest is at stake. The following arguments may be advanced to argue that due process requires that a victim be notified when her privileged records are subject to a subpoena. See Appendix B for a sample brief advancing this argument.

A. A patient has a liberty interest in maintaining the confidentiality of her therapy records.

- Confidentiality of records is a matter of statutory entitlement. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).
    - Has the State granted patients who seek therapy the right to maintain the confidentiality of their records under the mental health therapist-patient or other privilege?
- There is a state-created privacy right in a statute or constitution. *See Vitek v. Jones*, 445 U.S. 480 (1980).
    - Do your state's statutes, constitution or victims' rights amendments contain a right to privacy?
- Confidentiality in therapy records falls within the federal constitutional right to privacy. (*See* Section 3.VI.A above.)

B. Due process requires minimum safeguards of notice and hearing before the state can deprive a patient of her right to confidentiality of her therapy records.

- Due process requires that a patient must receive notice and a hearing "at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (internal quotations and citations omitted).

C. The state cannot establish a subpoena process that invades a patient's protected privacy interests without notice and a hearing.

- The state's subpoena process allows a defendant to subpoena a third-party record holder without providing notice to the patient.

- May the defendant unilaterally invoke state power to gain access to confidential records?

- May records be subpoenaed and released *ex parte*?

- Is there an opportunity for a pre-release challenge to disclosure of records?

Recasting the argument as implicating a victim's federal privacy and due process rights creates a scenario where a constitutional right is being balanced against another constitutional right. Victims and their attorneys should argue that this is not necessarily a direct competition of rights; a defendant does not have a constitutional right against a private citizen (*i.e.*, the victim). Both a victim and a defendant have constitutional rights against the government. A victim is only asking a court for <u>the opportunity</u> to raise her privacy rights before her records are disclosed. There will still be an opportunity to establish whether a defendant's rights require disclosure, but only after the victim receives notice and a hearing.

DEFENDANT'S STATUTORY RIGHT OF DISCOVERY V. VICTIM'S CONSTITUTIONAL RIGHT TO PRIVACY

Another way to recast the argument is as a balance between a defendant's statutory rights of discovery versus a victim's constitutional right to privacy. As discussed above, a defendant has no constitutional pretrial right to discovery against third parties. Rather, it is limited to rights proscribed in federal/state statutes. Most (but not all) discovery provisions discuss disclosures from the state. Therefore, in response to a defendant's subpoena against a record holder or third party for a victim's private information, attorneys can cast the argument as a defendant's statutory right to discovery vs. a victim's constitutional right to privacy. A victim's constitutional right to privacy is paramount to a defendant's statutory right.

STATE V. VICTIM

It should also be noted that the state may argue that it has a right to information about the victim in the interests of public good or prosecution. In this case, the victim should argue the same sources of privacy rights as discussed in response to a defendant's infringement upon a victim's privacy, including privileges, state and federal rules and statutes, and the state and federal constitutions.

CHAPTER FIVE: OTHER PRIVACY ISSUES

I. Online Counseling Programs

There is an increasing interest in the use of the internet to serve sexual violence victims. The internet can be a useful and efficient way to reach more survivors, particularly younger survivors who are more computer-savvy and likely to use online services. A 2001 study by the Kaiser Foundation found that two-thirds of youth are using the web to research health information; forty-four percent of teens and young have used the internet to access sexual health information online and nearly one-fourth have researched sexual violence.[12] Eight-two percent of the youth surveyed cited confidentiality as "very important" when looking for health information.

The usefulness of this type of service must be carefully balanced with the privacy implications that may arise in the context of online counseling. For example, potential issues regarding implementation, privacy and safety, application of privileges, anonymity of victims, and documentation, must be analyzed before utilizing an online counseling program, especially if the program potentially involves victims and counselors participating in the program from multiple states.

The following provides a checklist of potential issues that should be examined to determine the effectiveness and safety of an online counseling program. While some issues apply only to interstate communications, other considerations apply regardless of whether services intended to be confidential are being provided intra- or interstate:

A. Implementation

- Do local programs have capacity to meet needs if an online counseling program relies on volunteer counselors?

- Who pays for the equipment and safety measures to implement an online counseling service (*e.g.*, computers, software, internet services)?

- What are the requirements for training counselors (*e.g.*, to ensure shared understanding of privacy/technical procedures; options for victims; what about information lost online)?

- How will counselors not in the victim's area/state have knowledge of local resources available to a victim?

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[12] The full text of the Kaiser Family Foundation survey on youth and the internet, released in December 2001, is available online at **http://www.kff.org/content/2001/20011211a.**

- How will it be confirmed that a particular counselor has the necessary qualifications to provide counseling in another state?

B. Privacy & Safety

- Is there assurance that the counselor is accessing a computer in a private place? Will counseling only be provided from the program's office? Who will ensure compliance? (If need private computer, who pays?)

- What protections are in place to protect victims who may be accessing services from a public place (*e.g.*, public library, school campus, or computer lab)?

  - If services are only available to victims who have a private computer, what are the implications for victims in lower socio-economic groups whose access to private computers is more likely restricted?

- Are there warnings about the use of wireless internet services that may be accessible to others? Is use of an unsecured wireless system a potential waiver of confidentiality?

- Even if a counselor has a way to remove information from his or her computer, what are the confidentiality (and safety) implications for a victim who stores information on her computer?

  - What and how will a victim be advised regarding storing of information on the computer that the victim is using, and the effect of retrievability of information in the event of a subpoena *duces tecum* or waiver of privilege contest?

  - What will be communicated to the victim to help the victim understand the implications of retaining an electronic or print transcript of the communication(s)?

- Does your state have any laws or regulations governing the provision of on-line counseling?

- Do HIPAA or other privacy regulations apply? Are state laws in effect that are more protective than HIPAA and thus may govern the counseling relationship?

C. Application of Privileges

- What are the privilege implications of interstate communications?

- If victim and counselor are in different states, will advocates be trained as to which state's privilege applies? Is there a method in place to ensure that advocates meet the requirements for advocate privilege in the state where the victim resides?

- States may have varying degrees of privilege: absolute, qualified, none.

- Different states have different requirements in order for the counselor to qualify for the privilege may apply.

- How will the coalition or center meet or communicate victim expectations regarding privileged communications from state to state?

- Does state law address whether electronic communications between a counselor and a victim are subject to an evidentiary privilege?

- Is there a need for client 're-education' regarding privilege expectations.

- Do all counselors satisfy the relevant state(s) privilege requirements?

  - How will this be ascertained?
  - How will it be documented?

- Who will assume the burden of contesting in court a request for records? Who will bear the cost?

- Waiver of privilege: Again, different states have different requirements as to what constitutes a waiver of privilege, when certain communications are not privileged in the first place (*i.e.*, communications whose content must be reported, such as child abuse), and when various professionals with whom a victim holds a privilege may communicate with one another without breaching a victim's privilege.

  - Presence of third party. In some but not all states the presence of a third part will result in a waiver of the privilege. If cross-border counseling will be provided, the counselor may need to ascertain whether a third party is present. A victim should be informed as to whether the third party's presence will result in a waiver of the privilege.

  - *See above*, concerns regarding use of wireless internet services.

D. Anonymous Victim

- A provider may need to know what state a victim is in to determine what laws apply (*see above*, discussion of privilege issues).

- There is a risk of abuse by offenders if a counselor cannot tell who is accessing services.

- In the event that it is necessary to determine whether there is a conflict of interest this will not be possible if information is neither collected nor retained. Providing services if there is a conflict may constitute a violation of agency or ethical guidelines.

- Funders, state, or federal regulations may impose certain restrictions on providing services to minors.

  - How will an advocate or agency confirm eligibility to receive services?

- How does a counselor confirm victim's ability to consent to services?
  - Age?
  - Disability?
  - Informed consent?

- How will counselors comply with mandatory reporting requirements?

  - In light of varying state regulations in this arena, which reporting requirements apply?

    - Children
    - Elders
    - Other vulnerable populations
    - HIV/STD

  - Because all of these laws differ state to state, what will victims expect?

    - How may a counselor address a victim's expectations?

  - Individual licensing/professional organization may have reporting obligations that apply.

E. Lack of Documentation of Service

- If no records are maintained, it will not be possible for a survivor to request follow-up assistance from the initial responder. This lack of continuity of service may be detrimental to survivors.

- What if a survivor wants a record maintained?

- What if a victim waives privacy and wants the sexual assault counselor to testify — will this be an option? Is this practice consistent with provider policy at the agency where the provider is located?

  - Even without a written record, an advocate may be subpoenaed.

- Is there a complaint process in place or a way to ensure accountability to victims by providers?

II. Mandatory Reporting Requirements

All states have passed some form of mandatory child abuse and neglect reporting law and many have passed other mandatory reporting laws pertaining to the abuse of vulnerable populations. The requirements of the reporting laws vary from state to state, including who is required to report and what types of abuse are covered. The following determinations should be made when researching mandatory reporting requirements:

- Who is covered by mandatory reporting requirements?

  - Social worker
  - Psychologist or psychiatrist
  - Rape crisis or domestic violence counselor
  - Doctor
  - Lawyer
  - School counselor
  - Other provider, such as a teacher or public official, who may be subject to professional reporting obligations.

- When are they mandated to report?

  Reporting requirements vary widely state to state, and are subject to interpretation by government and state bar officials. *See, e.g.*, Connecticut Attorney General Richard Blumenthal Opinion Interpreting Mandatory Reporter Statute, Sept. 30, 2002 (sexual relations between a minor 13 years or over and under 16, with a partner under 21 and more than 2 years older than the minor, does not *per se* constitute abuse or neglect and thus does not impose an automatic

reporting requirement). States also vary widely as to when abuse must be reported; a mandatory reporting obligation may range from a limited an obligation (*e.g.,* information received in the scope of work performance) to 24-hour a day / 7 day a week obligation (unless disclosure is subject to a privileged relationship).

- What types of abuse are subject to mandatory reporting?
  - Child Abuse (For a discussion of mandatory child abuse reporting obligations and links to all states' mandatory reporting laws, *see* Susan K. Smith, Mandatory Reporting of Child Abuse and Neglect, available online at: **http://www.smith-lawfirm.com/mandatory_reporting.htm**.)
  - Elder Abuse (Does this include physical, emotional or financial abuse?)
  - Abuse of Individuals with Disabilities
- What information triggers the duty to report?

Not all criminal sexual activity may rise to the level of child abuse under a mandatory reporting statute. For example, in *Conn. AG Blumenthal Opinion Interpreting Mandated Reporter Statute, Sept. 30, 2002,* the Connecticut Attorney General issued an opinion interpreting Connecticut's mandated reporter statute concluding that the Department of Children and Families (DCF) interpretation of the reporting scheme is reasonable: that it does not require mandated reporters automatically to report, without more, sexual relations between a teenaged minor under 16 with an individual who is more than two years older but is under the age of 21, in every instance. Rather, the statute requires mandated reporters to use their professional judgment to assess all situations involving minors, including those involving consensual sexual relations between minors 13 or older with individuals under 21, to consider the relative ages of the parties involved along with all other information available to them, and to report to DCF or a law enforcement agency any incident where the reporter concludes that he or she has reasonable cause to suspect or believe that the child has been abused or neglected.

A trend in the law has developed to require psychiatrists and other therapists to take "reasonable steps" to protect an intended victim when they learn that a patient presents a "serious danger of violence to another." This is known as the *Tarasoff* Rule or "duty to warn." This trend started with the case of *Tarasoff* v. *Regents of the University of California*, 17 Cal.3d 425 (Cal. 1976). In *Tarasoff*, the California Supreme Court found that a psychologist and psychiatrist had failed in their duty to protect an intended victim from their client's dangerous behavior, which resulted in the victim's death. The psychologist and psychiatrist had prior awareness of their client's intent to kill the victim and the court held them liable for monetary damages.

While the *Tarasoff* ruling, strictly speaking, applies only in California, courts in a number of other states have followed *Tarasoff* in finding therapists liable for monetary damages when they failed to warn someone threatened by a client. Most of these cases are limited to situations in which patients threaten a **specific identifiable victim**, and they do not usually apply where a patient makes a general threat without identifying the intended target. States that have enacted laws on this question of a threat to a specific victim have similarly limited the duty to warn to such situations.

III. Access to HIV Information

A sexual violence victim may want to gain access to the HIV or other sexually-transmitted disease information of her offender. However, this information is often exempt from disclosure. Recognizing the need for victims to know this pertinent health and safety information, a number of states have enacted laws to specifically allow sex crime victims to request and/or obtain HIV testing of an offender. States vary in the time when a victim may request testing and/or information (arrest, charging, conviction, incarceration) and in the procedural requirements for obtaining the information.

For a chart of the states' laws, s*ee* Appendix D, HIV Testing and Sex Crimes on page 105.

IV. Use of Interpreters

Using an interpreter to translate for a victim speaking a foreign language or sign language should not destroy a victim-counselor privilege. However, it is an issue that has yet to be adequately addressed in some states. A few states, like Georgia and Colorado, have resolved this issue legislatively. *See* Ga. Code Ann. § 24-9-107 (2000); and Colo. Rev. Stat. § 13-90-209 (2000). It may also be difficult to locate a translator especially in small or rural communities. Care must be taken to choose a translator who does not know the parties involved. This can be very difficult, however, in insulated communities or communities with small minority populations or where the language or dialect is not widely spoken. Informal interpreters (*i.e.*, family members) may also create problems regarding privilege or safety.

Some states have licensing or court certification programs for interpreters; others do not. In addition, interpreters may be governed by a code of ethics that requires confidentiality.

- Do your state's laws, rules or procedures provide for an interpreter code of ethics? For example, the State of Washington Department of Social and Health Services' Language Interpreter and Translator Code of Professional Conduct provides that "Interpreters/translators shall not divulge any information obtained through their assignments, including but not limited to information gained through access to documents or other written

material." Wash. Admin. Policy No. 7.21 (accessible online at http://www.nsrsn.org/PDFs/state_contract/K99_DSHS_Policy_7.21_LEP.pdf.)

- Does a discipline or field adhere to a code of ethics for interpreters? For example, the National Council on Interpreting in Health Care has developed a Code of Ethics for Interpreters in Health Care.

V. Different Privacy Implications for Certain Classes of Victims

Attorneys and advocates should be aware that certain classes of victims may have class-specific privacy issues. For example, victims in educational settings, victims in the military, minors, or incapacitated victims are examples of classes of victims that will have different privacy implications. Below are a few of the unique issues to consider:

A. Victims in Educational Settings

Sexual violence in educational settings can present a complex overlay of federal and state laws and individual school policies. In addition, school obligations with regard to privacy and confidentiality may depend on the type of institution (public or private), level of institution (primary, secondary or higher education), age of victim and assailant, status of victim and assailant (student, teacher/school employee, guest, etc.), and location of assault. When a sexual assault occurs in any type of educational setting, a wide range of issues may arise:

- Federal laws that may affect sexual assault victim confidentiality include:
  - Family Education Right to Privacy Act, , 20 U.S.C. § 1232g.
  - Jeanne Clery Disclosure Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f).
  - Campus Sex Crimes Prevention Act, Public Law 106-386, § 160.
  - Foley Amendment (to the Campus Sex Crimes Prevention Act).
- Look to the school's policies and procedures regarding victim privacy.
- For additional discussion on victims in Educational Settings, *see* Chapter Four of the Center for Law and Public Policy on Sexual Violence's *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors.*

B. Military Victims

Traditional state and federal privileges have not applied in the military context. For example, no doctor-patient, clergy-parishioner, or social worker-client privilege exists in the military for certain disclosures.

In response to reports showing that victims of sexual assaults in the military rarely come forward, the Pentagon is implementing a policy that would allow a victim to report incidents without automatically triggering an investigation. The military is also in the process of establishing the regulations that will govern reporting and recordkeeping. Victim safety and privacy concerns remain a concern.

> "Restricted reporting is intended to give a victim additional time and increased control over the release and management of his/her personal information, and to empower him/her to seek relevant information and support to make more informed decisions about participating in a criminal investigation. A victim who receives appropriate care and treatment, and is provided an opportunity to make an informed decision about a criminal investigation, is more likely to develop increased trust that his/her needs are of primary concern to the command and may eventually decide to pursue an investigation. Even if the victim chooses not to pursue an official investigation, this additional reporting avenue gives commanders a clearer picture of the sexual violence within their command, and enhances a commander's ability to provide an environment, which is safe and contributes to the well-being and mission-readiness of all of its members."
>
> *U.S. Department of Defense*
> *Office of the Assistant Secretary of Defense*
> *(Public Affairs)*
> *News Release No. 267-05 (March 18, 2005)*

- The new policy allows a sexual assault victim to disclose the incident in confidence to a sexual assault response coordinator, a health care provider or a chaplain.
- A victim will then be assigned a victim advocate.
- A victim will receive medical treatment and counseling without triggering an investigation.
- Violating a victim's request for confidentiality would result in discipline under the Uniform Code of Military Justice, loss of credentials, or other personnel or administrative actions.
- If information regarding a sexual assault reaches a commander, he or she is permitted to report the possible assault to law enforcement officials for a full investigation regardless of the victim's wishes.

C. Minors/Incapacitated Victims

In contrast to adult survivors, the privacy rights of sexual violence victims who are minors are governed by a wide array of rules and regulations scattered throughout a complex network of state statutes, agency policies, and individual practices. Minors' rights are likely to vary depending upon the age of the victim, the victim's status (*e..g.,* minor living at home, emancipated minor, minor serving in the military, minor parent), the type of treatment or services sought, the nature of the litigation (civil or criminal, adult or juvenile court, domestic relations or personal injury), and myriad other considerations.

Issues to consider where minor victims are concerned include:

- What is your state's public policy regarding the autonomy of minors and the provision of legal services?

- What is your state's public policy regarding the autonomy of minors and the provision of health and counseling services?

  - *See* Monograph — "State Minor Consent Laws: A Summary," by A. English & K. Kenney, Center for Adolescent Health and the Law.

- Do mandatory reporting obligations implicate privacy rights for minors? (*See, e.g., State v. Denis L.R.*, 678 NW2d 326 (Wis. Ct. App. 2004) *aff'd* 699 NW2d 154 (Wis. 2005) (child's communications to therapist were not privileged to the extent that they addressed matters the counselor was under a duty to report).

- To what extent does a guardian *ad litem* have access to minor's records?

  - *S.C. v. Guardian Ad Litem*, 845 So.2d 953 (Fla. Dist. App. 2003), the court acknowledged a minor's right to privacy and right to assert the psychotherapist-patient privilege in response to a guardian *ad litem's* request for records. "Common sense also dictates that failing to permit a mature minor the opportunity to object to the involuntary disclosure of private and intimate details shared with a therapist can only have a negative effect on the minor's relationship with both the therapist and guardian *ad litem* and would often taint the minor's perception of the fairness of the legal process." *Id.*.

- Are there guardianship issues of which to be aware?

VI. Name and Identity Changes

Whether and how a survivor of sexual violence can or should legally change her name, social security number or other identifying information is a complicated issue. The issue raises concerns of social and political policy that vary state-to-state, and in fact, county-to-county. Critically, the downfalls of any identity change need to be conveyed to a survivor prior to any change so that she can make an informed decision regarding the identity change. Two such downfalls that must be carefully considered are 1) the likely loss of one's work history and educational accomplishments and credit history, and 2) the realities of a publication requirement.

For more thorough discussion on name and identity changes, *see* Chapter One, Section II of the Center for Law and Public Policy on Sexual Violence's *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors.*

VII. Confidentiality and Direct Representation

Significant confidentiality, privacy, and ethical considerations arise if a center or coalition, seeks to provide legal representation in a non-legal setting. These considerations include:

- Staff supervision.
  - A lawyer must supervise all staff with whom a victim communicates information intended to be protected by attorney-client privilege.
  - Non-legal staff may not have access to client files. If a client signs a release authorizing legal staff to communicate with the agency's non-legal staff, the attorney-client privilege may be waived and a victim's records may be subject to disclosure.
  - Is the lawyer supervised by a non-lawyer on legal matters and, if so, is such supervision permitted under the state's disciplinary rules?
- Does the coalition have private office space to meet with clients in order to ensure that staff who are not covered by attorney-client privilege will not have access to:
  - Oral communications.
  - Client files, including client intake and service records.

For a more comprehensive discussion of direct representation, see the Center for Law and Public Policy on Sexual Violence's 2005 publication *Tools For Pro Bono Recruitment: A Resource Guide.*

CHAPTER SIX: POLICIES AND PROCEDURES TO PROMOTE CONFIDENTIALITY

Programs and centers are advised to develop the following policies and procedures to promote and protect victim confidentiality.

- Rules of Professional Conduct
- Written and Signed Confidentiality Statement
- Exceptions to Confidentiality
  - Child Abuse and Other Mandatory Reporting
  - Ongoing or Future Crimes/Harm to Self or Others
- Notifying Victim of Confidentiality Policy
- Ensuring that Victim has Given Informed Consent When She Waives Right to Privacy
- Confidentiality for Support Groups
- Providing Confidential Services to Minors
- Record Keeping —What Information Records Should and Should Not Contain
- Definition of "Records" and "Record Custodian"
- Maintenance, Storage, and Disposal of Records
- Internal Communications and Supervision Within the Center
- Electronic Communication (Email, Online Counseling)
- Responding to Subpoenas

APPENDIX

A. ***State v. Gonzales,*** --- P.3d ----, 2005 WL 3434445 (Utah. App. 2005)
Memorandum Decision **59**

B. Excerpt from NCVLI *Amicus Curiae* Brief, *State v. Gonzales* **69**

C. Cameras in the Courtroom **91**

D. HIV Testing and Sex Crimes **105**

Appendix A

State v. Gonzales **Memorandum Decision**

2005 WL 3434445 (Utah. App. 2005)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	**MEMORANDUM DECISION**
Plaintiff,	:	**CASE NO. 011905307**
vs.	:	
ARTHUR ANTHONY GONZALES,	:	
Defendant.	:	

This matter comes before the Court on a Motion to Quash and Sanction pursuant to defendant's obtaining the victim's psychological records without her waiver of privilege and in violation of the Utah Rules of Evidence.

In March of this year defense investigators attempted to serve a subpoena on the victim's mother in order to obtain names of mental health providers where the victim may have obtained treatment. In response, the Assistant District Attorney sent a letter to defense counsel asking that further contact with the victim be made through the District Attorney's Office. Defense counsel was informed that the victim was specifically not waiving any privilege with regard to her mental health records, that she would move to quash any subpoenas designed to gain access to those records and that she would invoke her victim's rights pursuant to statute. On April 8th, entered by Minute Entry, the Court ordered

any contact with the victim's family to be arranged through the District Attorney's Office.

In April, two subpoenas were issued to mental health providers without copies provided to the victim, her guardian or the prosecution. Defense counsel had also obtained mental health records of the victim from University Neuropsychiatric Institute ("UNI") by subpoena, again without sending copies to the victim or the opposing party.

Defense counsel obtained the records from UNI pursuant to a signed, notarized Affidavit executed by defense counsel which stated that the victim had placed her mental and physical health at issue in a case. After complying with the subpoena, UNI informed defense counsel that the records had been given to him in error. At the time of UNI's acknowledgment of error, the Assistant District Attorney was not made aware by defense counsel of the claim of error. The prosecution did discover and bring to the attention of the Court on April 8th that defense counsel had obtained and kept the records.

Defense counsel did not inform the Court of the claim of error, did not return the documents of UNI and did not turn the documents over to the Court until the Court ordered him to do so on April 8th. At that time, defense counsel willingly supplied the records and freely admitted he had already read, marked and

obtained information from the records in preparation for his representation of the defendant. Defense counsel believed that although he had full access to the records, the defendant himself had had limited access to the information his lawyer obtained.

The information which defense counsel has with respect to treatment providers and any conditions from which the victim previously suffered comes directly from these medical records.

Since April 8th, the medical records have been kept under seal and reviewed only by the Court.

Though it may be proper for the Court to review *in camera* the alleged victim's medical records without her waiver of privilege, there is no law, even where an exception to privilege allows a defendant access to otherwise confidential records, that gives a defendant the right to examine all of the confidential information or search through files without supervision.

In this case, defense counsel, without Court knowledge or approval, obtained confidential medical records claimed to be supplied in error and then defense counsel studied them in aid of preparation for his case.

It certainly is reasonable to conclude that the defendant would also have to be informed regarding the information in order to participate in his own defense. Further, it is impossible to divorce defense counsel's knowledge obtained from the privileged

information from his knowledge of the rest of the case or to determine or monitor how that knowledge of privileged information has affected the strategy and knowledge of the rest of the case.

Additionally, defense counsel obtained the medical records by representing that the victim/patient had "placed mental or physical condition at issue <u>as a claim or defense</u> in a lawsuit (emphasis added)." Nothing factually supports this representation. The patient is the alleged victim of the crime, not a party raising a claim or defense. Rather, it is the defendant who seeks the information for possible impeachment purposes in aid of his defense.

To interpret the language relied upon by defendant in the Affidavit to mean that such privileged information could be intended to be obtained for possible purposes of impeachment as part of a "defense," without anything factually in support of piercing the privilege, would eliminate the privilege altogether since any defense, indeed any case, always allows possible impeachment of any witness. The language upon which defendant relies on its face and by its plain meaning in the context of the phrase cannot be so broadly read. The patient must "place mental or physical condition at issue as a claim or defense in a lawsuit." Merely by being required to take the stand as a witness, the victim

has not placed her mental condition at issue as a claim or defense in a lawsuit.

Having obtained access to very personal and possibly embarrassing information about the victim, the defendant asserts but has not shown that the victim is "an emotionally unstable and troubled young girl who is pathologically dishonest and manipulative who fabricated her story in order to prevent her mother from marrying Mr. Gonzales." But whether that assertion could justify an order requiring health care providers to submit privileged records to the Court for an *in camera* review in aid of impeachment is not the issue here. That issue was not timely or appropriately brought to the Court.

The facts here are that defendant, by subpoena, erroneously (plaintiff asserts deceptively) obtained, and UNI erroneously provided, privileged information without waiver of privilege. And most importantly, once error in providing privileged information was asserted by UNI, defense counsel did not immediately submit the records to the Court to be kept under seal until the issue of error could be determined. Instead, he maintained and studied them until the prosecution's Motion to Quash came before the Court.

If the defendant relies on State v. Cardall, 982 P.2d 79 (Utah 1999), as the basis for his right to access to victim's records, as it appears he does, then he must also accept that the determination

of privileged records' discoverability, according to that case, was to have been determined by the Court's *in camera* review <u>before</u> he could have acquired access to their contents. Accordingly, in this case at the service of the subpoena he could have directed the recipients of the subpoenas to turn over the records under seal to the Court before he read and studied them.

Certainly, defense counsel knew the privilege existed. Certainly he knew that the prosecution claimed the privilege and would strongly oppose any exception to be taken to it. Certainly he knew, as well, that UNI asserted error in having complied with defendant's subpoena. And <u>before</u> he issued the subpoenas, certainly he knew or should have known, that without waiver of privilege, the <u>Cardall</u> case implied and required Court scrutiny of the information sought prior to piercing the privilege. Finally, how could counsel not have known or realized that once he had obtained and reviewed the privileged information it would become impossible to remove the taint of that knowledge from his representation in the case?

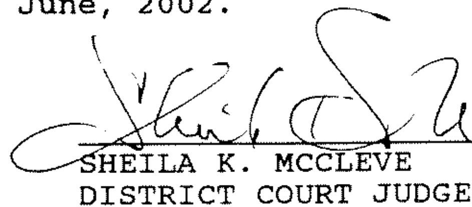
Clearly, the Motion to Quash the subpoenas must be granted. Even assuming the defendant's erroneous interpretation (that victim's mental state is an element of a claim or defense in the criminal trial) is a good faith interpretation of law, still he evidences a suggestion of a lack of good faith here by having

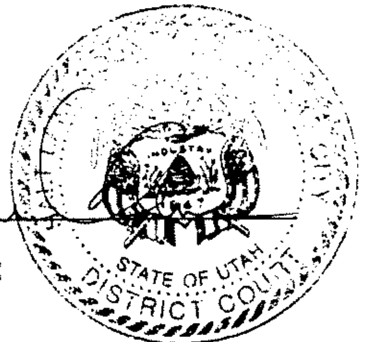
reviewed the privileged information prior to Court scrutiny. This conclusion is supported by the fact that he relies upon the Cardall case to claim access to the records which itself also prerequisites Court scrutiny prior to access.

As sanctions, the Court orders that the information so obtained by subpoena may not be used at trial and the defense counsel will write an apology to the victim for having inappropriately obtained it.

Despite his good character and reputation, by having obtained knowledge of the witness which cannot now be erased, defense counsel has inserted a question whether the trial can be a fair one which is not able to be resolved. Of equal concern, by tainting his knowledge of the case with irretractable, impermissible, privileged information about the witness, counsel appears to have created a conflict that calls into question the professional ethics of his continued representation of the defendant.

Dated this 14th day of June, 2002.





SHEILA K. MCCLEVE
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this_____ day of June, 2002:

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____

Appendix B

Excerpt from NCVLI *Amicus Curiae* Brief in

State v. Gonzales

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff/Appellee, Case No. 20020935-SC

v.

ARTHUR ANTHONY GONZALES,

Defendant/Appellant

BRIEF OF *AMICUS CURIAE* NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF APPELLEE

APPEAL FROM JURY CONVICTIONS FOR ATTEMPTED RAPE OF A CHILD, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-5-402, 76-4-101 (1999), AND FORCIBLE SEXUAL ABUSE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-404 (1999), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH C. FRATTO PRESIDING

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Excerpt from Utah v. Gonzales Amicus Brief
Utah Supreme Court Case No. 20020935-SC (filed December 2003)

A. A victim has a due process right to notice and hearing prior to any disclosure of her therapy records.

The victim in this case had neither notice nor opportunity to object before the defendant received and reviewed her privileged counseling records. Procedural due process under the United States Constitution imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

Implicit in the notion of "due process" is that a victim is afforded *at the very least* notice and opportunity to be heard before her privacy rights are invaded. The central meaning of due process is that "'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' . . . . 'at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1972) and Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Procedural safeguards of notice and opportunity to be heard reflect "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." Feuntes, 407 U.S. at 81.

1. A patient has a liberty interest in maintaining the confidentiality of her therapy records.

Three sources of law provide a victim a liberty interest in maintaining the confidentiality of her mental therapy records.[1] First, the State of Utah has granted patients who seek therapy the

[1] *Amicus* also suggests that a patient has a property interest in maintaining the confidentiality of her records, though obviously not a tangible property. The Supreme Court has recognized that the definition of "property" has evolved: "Much of the existing

right to maintain the confidentiality of their records under the mental health therapist-patient privilege. Second, Utah law creates a privacy right. And third, the jurisprudence defining a constitutional right to privacy suggests that the right to confidentiality in therapy records may have constitutional sources as well.

a. The State of Utah has created a liberty interest by creating a right to maintain the confidentiality of therapy records.

The United States Supreme Court has found that matters of statutory entitlement can trigger due process. For example, in Goldberg v. Kelly, 397 U.S. 254 (1970), the United States Supreme Court held that due process required a welfare recipient be afforded an evidentiary hearing before the termination of benefits. Despite the fact that there was no constitutional right to the benefits, "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them." 397 U.S. at 262. This Court has also found that statutory entitlements are interests sufficient to trigger due process protections. See Worrall v. Ogden City Fire Dept., 616 P.2d 598 (Utah 1980) (finding statutory entitlement to continued employment triggering due process).

The Supreme Court has also found state law to be a source of liberty interests. In Vitek v. Jones, 445 U.S. 480 (1980), the Court found a liberty interest in a "state-created right" and gave independent recognition of the "stigma" ingredient of liberty. Vitek held that "[t]he involuntary transfer of a Nebraska state prisoner to a mental hospital implicates a liberty interest that is protected by the due process clause." There was an "objective expectation" that gave the prisoner "a liberty interest that entitled him to the benefits of the appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital." 445

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wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

U.S. at 490-91. This Court has also found state-created rights that rise to the level of a liberty interest. See Linden v. State Dept. of Corrections, 2003 UT App 402, ¶ 13 (finding parolees have liberty interest limited by restrictions that govern parole but still entitled to due process protection).

In contrast, in Paul v. Davis, 424 U.S. 693 (1976), the Supreme Court found that the plaintiff had not suffered deprivation of liberty when local police released fliers naming him as an "active shoplifter." The Court found that the plaintiff's injury to his reputation did not raise due process concerns because state law did not extend him any legal guarantee of present enjoyment of reputation which had been altered as a result of the challenged actions. The Court stated:

> [There] exists a variety of interests which are difficult in definition, but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant by the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the 14th Amendment apply whenever the State seeks to remove or significantly alter that protected status. [In] each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in [due process].

Paul v. Davis, 424 U.S. 693, 710-11 (1976) (citations and quotations omitted).

Like the situations in Goldberg and Vitek, the State of Utah has created a right to keep communications between a patient and a therapist confidential. Utah Rule of Evidence 506 provides that:

> information communicated in confidence and for the purpose of diagnosing or treatment the patient, a patient has a privilege, during the patient's life, *to refuse to disclose and to prevent any person from disclosing* (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, including

> guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnoses and treatment under the direction of the physician or mental health therapist.

Utah R. Evid. 506(b) (emphasis added). This right grants a patient a protected status by having a right to refuse and prevent disclosure of her therapy records.

This is not like the case in Paul v. Davis, where the State had not guaranteed a right to reputation. To the contrary, Utah has affirmatively guaranteed patients who seek therapy a right to refuse or prevent disclosure of their therapy records under the mental health therapist-patient privilege.[2] When a patient seeks therapy she does so under assurances from the State that her communications will remain confidential and that she has power to keep them confidential. These interests, having been initially recognized and protected by state law and relied upon by those seeking treatment, must be subject to the procedural guarantees of the Fourteenth Amendment before they are stripped away.

b. Confidentiality in a patient's therapy records falls within the privacy right as defined by this Court.

In addition to having the privilege itself, the Utah Supreme Court has also acknowledged a general right to privacy. In Redding v. Brady, 606 P.2d 1193 (Utah 1980), the Court agreed "with the general proposition that there is and should be such a right which protects against any wrongful or unseemly intrusion into what should properly be regarded as one's personal affairs." 606 P.2d at 1195. In further defining the right, the Court stated:

> It seems sufficient for our purpose herein to say that what the right of privacy protects is to be determined by applying the commonly accepted standards of social propriety. This includes those aspects of an individual's activities and manner of living that would generally be regarded as being of such personal and private nature as to belong to himself and to be of no proper concern to others.

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[2] The applicability and scope of the mental health therapist-patient privilege will be discussed in detail in Section II of this brief.

> The right should extend to protect against intrusion into or exposure of not only things which might result in actual harm or damage, but also to things which might result in shame or humiliation, or merely violate one's pride in keeping his private affairs to himself.

606 P.2d at 1195. The Court in Redding v. Brady found that the rights to freedom of the speech and press and right of the public to have information on salaries of public university employees outweigh the privacy interests of the employees in the financial information.[3] In stark contrast, records of a patient's confidential communications to a mental health therapist for treatment purposes are "of such personal and private nature as to belong to [her]self and to be of no proper concern to others" and exposure of those records would "violate one's pride in keeping [her] private affairs to [her]self." Accordingly, the records should be protected under the right to privacy as defined by this Court and rise to the level of a liberty interest that cannot be taken away without due process.

c. The rationale behind the constitutional right to privacy should encompass the interests in maintaining the confidentiality of therapy records.

In addition to possessing a privilege under state law, a mental health therapist-patient privilege "may have some constitutional foundation." State v. Gotfrey, 598 P.2d 1325, 1329 (Utah 1979) (Stewart, J., concurring in part and dissenting in part). This foundation comes from the constitutional right to privacy recognized by the United States Supreme Court.

Despite the fact that the United States Constitution does not explicitly mention the right to privacy, it is well-settled that such a right is contained within the Constitution. The Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of

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[3] The Utah Legislature later enacted a statute that specifically provided for this type of information to remain private, and in a follow-up opinion that Court found that where the Legislature has given specific recognition and protection to the privacy rights of certain employees, these statutory rights outweighed the right to know public information. See Redding v. Jacobsen, 638 P.2d 503 (Utah 1981).

privacy does exist under the Constitution. . . . [and is] founded in the Fourteenth Amendment's concepts of personal liberty and restrictions upon state action." Roe v. Wade, 410 U.S. 113, 152-153 (1973). Supreme Court precedent establishes two separate lines of privacy interests: 1) the "individual interest in avoiding disclosure of personal matters," and 2) "the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977). The Supreme Court recently reiterated that there is a fundamental right to privacy in the Constitution. See Lawrence v. Texas, -- U.S. --, 123 S.Ct. 2472 (2003).

Although the Court has never decided whether a right to privacy inheres in the doctor-patient relationship generally, see Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992) (leaving undecided "[w]hatever constitutional status the doctor-patient relation may have as a general matter"), the information communicated to a therapist fits within the contours of the privacy right. A patient's interests in safeguarding the confidentiality of her therapy records similarly involve issues of privacy, security, and decisions to seek medical treatment free from intrusion. The privilege was created to protect these interests.

Confidentiality is the cornerstone of effective therapy and recovery.[4] Individuals make treatment decisions relying on the privacy afforded by the privilege, for "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." Jaffe, 518 U.S. at 10. The Utah Court of Appeals found that Utah's privilege "encourage[s] the patient to make a full and complete disclosure" and that the confidentiality of

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[4] This is well established as a matter of common sense and medical research. See, e.g., Anna Y. Joo, Note, "Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor," 32 HARV. J. ON LEGIS. 255, 264 (1995); Louis Everstine et al., Privacy & Confidentiality in Psychotherapy, 35 AM. PSYCHOLOGIST 828, 836 (1980); Ryan D. Jagim et al., Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-party Disclosure, 9 PROF. PSYCHOL. 458 (1978).

the privilege allows a patient "to receive effective medical treatment, free from embarrassment and invasion of privacy that might result form the physician's disclosure of the information." State v. Anderson, 972 P.2d 86, 89 (Utah Ct. App. 1998). The information communicated to a therapist in the course of therapy concerns virtually without exception "the most intimate of human activities[,] . . . relationships," and thoughts. Casey, 431 U.S. at 685. In fact, the United States Supreme Court created a federal psychotherapist-patient privilege, finding that such a privilege "facilitat[es] the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." Jaffe v. Redmond, 518 U.S. 1, 11 (1996).

Recognizing the similarities between therapeutic communications and the intimate spheres of decision accorded constitutional solicitude under the right to privacy, numerous lower courts have decided that the psychotherapist-patient privilege is grounded in the constitutional right to privacy. In the words of one court,

> [t]he Supreme Court has consistently been concerned with protecting individuals against governmental intrusion into matters affecting the most fundamental personal decisions and relationships. No area could be more deserving of protection than communications between a psychiatrist and his patient. Such communications often involve problems in precisely the areas previously recognized by the Court as within the zone of protected privacy, including family, marriage, parenthood, human sexuality, and physical problems.

Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F.Supp. 1028, 1038 (D. Haw. 1979) (citations omitted). The Supreme Court of California found in In re Lifschutz, 467 P.2d 557, 567 (Cal. 1970),

> [w]e believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In Griswold v. Connecticut, 381 U.S. 479, 484 []the United States Supreme Court declared that "Various guarantees [of the Bill of Rights] create zones of privacy,"

> and we believe that the confidentiality of the psychotherapeutic session falls within one such zone.

467 P.2d at 567; see also, Daury v. Smith, 842 F.2d 9, 13 (1st Cir. 1988) (recognizing a constitutional right of privacy in avoiding disclosures, including psychiatric records); Borucki v. Ryan, 827 F.2d 836, 839, 845 & n.14 (1st Cir. 1987) (acknowledging that the majority of federal courts recognize a constitutional right to privacy in therapeutic counseling and describing that right as existing in the Fourteenth Amendment's concept of personal liberty); Caesar v. Mountanos, 542 F.2d 1064, 1067-68 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977) (recognizing that the constitutional right of privacy extends to psychotherapeutic counseling communications); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F.Supp. 1028, 1038 (D. Haw. 1979).

In summary, a victim's federal constitutional rights to privacy are implicated in her confidential therapy records and the victim in this case had a liberty interest in maintaining that confidentiality. Privacy, personal security, and the unrestricted choice to seek medical or mental health treatment motivate the constitutional underpinnings of this privacy right. Despite these interests, the defendant unilaterally eviscerated the victim's rights and accessed her confidential records without her knowledge or opportunity to object. The prosecutor and the court were similarly shut out of the defendant's decision. As discussed below, the victim's constitutional rights to due process and the Utah Victims' Rights Amendment prohibit such an unjust result.

2. Due process requires minimum safeguards of notice and hearing before the State can deprive a patient of her right to confidentiality of her therapy records.

Having established a liberty interest in protecting the promised confidentiality of therapy records, due process requires that a patient must be notified when that guarantee of confidentiality is invaded. This means that a patient must receive notice and a hearing "at a

meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. at 80 (internal quotations and citations omitted). As this Court has acknowledged, "timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness." Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), citing Worrall v. Ogden City Fire Dept., 616 P.2d 598, 601-02 (Utah 1980) and Goss v. Lopez, 419 U.S. 565, 579 (1975). See also Mathews v. Eldridge, 424 U.S. at 333 ("The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society'") (internal citations omitted).

In Worrall v. Ogden City Fire Dept., 616 P.2d 598 (1980), this Court explained that where state law confers on a person a claim of entitlement to continued employment absent sufficient cause for discharge, such entitlement constitutes a property interest, protected by the Due Process Clause. Accordingly, any significant deprivation "must be *preceded* by notice and opportunity for hearing appropriate to the nature of case[.]" 616 P.2d at 601 (emphasis added). Similarly, state law provides the victim in this case with a privilege in her mental therapy records; any deprivation or infringement of that privilege must be preceded with notice and hearing.

In this case, no "meaningful" notice or hearing was provided to the victim—she was given *no* notice at all. The victim's confidential therapy records were disclosed and reviewed long before she ever knew they were subpoenaed. The harm suffered by this disclosure is irreversible—she cannot now choose to disclose or protect her records. "[T]he fundamental requisite of due process of law is the opportunity to be heard, a right which has little reality or worth unless one is informed that the matter is pending and one can choose for himself whether to contest." Worrall, 616 P.2d at 601. In order to meaningfully protect the victim's interests in

her private confidential therapy records, she must be given notice and opportunity to be heard prior to their disclosure. Any other result would afford "little reality or worth" to her rights and "immediately collide[] with the requirements of the Constitution." Goss v. Lopez, 419 U.S. 565, 575 (1975).

This case is similar to Kallstrom v. City of Columbus, 136 F.3d 1055, 1059 (6th Cir. 1998). In Kallstrom, the Sixth Circuit Court of Appeals held that the plaintiffs had a constitutionally protected privacy interest under the substantive component of the Fourteenth Amendment's Due Process Clause which prohibited the City of Columbus from disclosing certain personal information from their personnel files without adequate notice. Plaintiffs were undercover officers employed by the Columbus Police Department who were involved in a gang-related drug conspiracy investigation. During the criminal drug conspiracy case, defense attorneys requested and obtained from the City plaintiff Kallstrom's personnel and pre-employment file as a public records request. 136 F.3d at 1059. Additional personnel files of other plaintiffs were also released. None of the plaintiffs were given notice of the release of their personnel files. Plaintiffs brought a 42 U.S.C. § 1983 claim against the City, claiming that dissemination of personal information contained in their personnel files violated their Due Process Clause right to privacy. 136 F.3d at 1059.

The Kallstrom court found that the officers' privacy interests implicated a fundamental liberty interest, specifically their interest in preserving their lives and family members and preserving their personal security and bodily integrity. Id. at 1062. The court ordered an injunction to prevent the City from releasing private information about the officers which may potentially jeopardize the officers' and family members' safety without first notifying the officers. Id. at 1069. The court stated:

> Such action betrays the fundamental notion of fairness underlying the Due Process Clause. If the officers and their families are going to have a meaningful opportunity to protect themselves against unjustified or arbitrary deprivation of their fundamental rights to privacy and personal security, the City must provide the officers with prior notice and the opportunity to be heard.

Id. at 1069 (citing Fuentes, 407 U.S. at 80-81).

The court in Kallstrom based its finding of a liberty interest both on privacy and on the safety risks created by disclosure of the information to potential gang members; the same principles of privacy and security apply here. The victim had a statutory and constitutional right to privacy in her therapy records that rise to the level of a liberty interest. Individuals receive therapy in order to receive treatment for mental or emotional problems; therapy records contain highly private and sensitive information communicated to a therapist under the promise of confidentiality. Individuals seeking therapy rely on the protections of the privilege. A patient's sense of security may be severely jeopardized when confidences protecting her innermost fears and thoughts are breached without warning. And specifically, giving a rape victim's assailant her confidential therapy records raises profound safety concerns.

Despite these interests, like the defense attorney in Kallstrom, the defense in this case was able to render the victim's privacy rights and the privilege meaningless by obtaining the information from the record holder without her knowledge. As recognized in Kallstrom, constitutional principles of due process and fairness require that the victim have a "meaningful opportunity to protect [herself] against unjustified or arbitrary deprivation of [her] fundamental rights to privacy and personal security" by providing her with prior notice and an opportunity to be heard.

Notice and the opportunity to be heard are the universally understood due process safeguards. These safeguards are little to ask given the magnitude of harm that can fall upon patients when

their confidential records are disclosed without their knowledge. This case highlights the cruelty that can result without any safeguards in place—where a rape victim's confidential records were, unbeknownst to her, handed over to her assailant.

3. The State cannot establish a subpoena process that invades a patient's protected privacy interests without notice and a hearing.

The defense attorney in this case issued a subpoena as an officer of the court and pursuant to the power of the court.[5] Under Utah Rule of Criminal Procedure 14, defendant sought and obtained the victim's records without her notice. Rule 14 provides: "A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects. The Court may quash or modify the subpoena if compliance would be unreasonable." Utah R. Crim. P. 14(b). The Rule is silent about notice. However, the defendant argues that state law affirmatively required that he *not* notify the victim, the prosecutor, [6] or the Court when he subpoenaed the victim's confidential records. He states:

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[5] *Amicus* acknowledges that there are a handful of courts that have found that similar use of a state's subpoena process by a private litigant or attorney does not rise to the level of state action for the purposes of damages actions under 42 U.S.C. § 1983 claims. See Bochetto v. Labrum & Doak, L.L.P., 1997 WL 560191 (E.D. Pa.); Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983). These cases are distinguishable because they considered whether a private litigant was a state actor subject to damages for invading another's civil rights. The question to be decided here, however, is whether the State can extend the subpoena process to invade a rape victim's confidential therapy records without first providing her notice and an opportunity to object, as the defendant suggests. It can not.

[6] The defense attorney did swear to at least notify the prosecutor. By signing and notarizing the Affidavit for release of the victim's records, Mr. Montgomery agreed to the following condition: "Concurrently with submitting these documents to the University of Utah, I will provide all parties to this lawsuit with this affidavit and a copy of the subpoena for medical records." Addendum B of Appellant's Brief, at ¶ 4. However, as far as *amicus* can discern from the briefing, Mr. Montgomery did not concurrently serve the prosecutor with a copy of the affidavit and a copy of the subpoena, nor did he even notify the prosecutor that he had received and reviewed the victim's

"Both the Rules of Criminal Procedure and recent Utah case law[7] instruct defendants to subpoena records without notifying the trial court, the State, or the subject of the records." Appellant's Brief at 23. The defendant's position can be countenanced only if the State wanted to create a subpoena process that gives litigants the unfettered authority to invade another's protected rights without his or her knowledge. The State could not have wanted such a result, where an alleged rapist and his attorney, under the authority of the subpoena process, can obtain a victim's confidential therapy records without her knowledge. Those records are subject to constitutional and statutory protections, and any intent to invade them without first giving the victim an opportunity to be heard would violate her right to due process.

This case is similar to Fuentes v. Shevin, where the United States Supreme Court struck down Florida's and Pennsylvania's prejudgment replevin statutes as violating procedural due process. Both statutes provided for the issuance of writs ordering state agents to seize a person's possessions, simply upon the *ex parte* application of any person who claims a right and posts a

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privileged records. In fact, Mr. Montgomery did not notify the prosecutor even after the University informed him that the records had been released in error.

[7] Defendant's reading of Utah law stretches too far, citing State v. Pliego, 1999 UT 8, ¶ 18, 974 P.2d 279, and State v. Hansen, 2002 UT 114, ¶ 6, 61 P.3d 1062, for the proposition that Utah law requires a defendant to subpoena record holders directly when attempting to obtain privileged mental health records. See Appellant's Brief at 24-25. However, neither of these cases support defendant's further assertion that a defendant is *required* to serve the subpoenas "without notifying the trial court, the State, or the subject of the privileged records." Both cases discussed the proper procedure for obtaining records was to subpoena record holders directly, but neither case addressed who would be served copies of the subpoena. In Pliego, it was implicit that at least the prosecutor had notice of the subpoena because the defendant first tried to access the records through the prosecutor's office. In Hansen, it was clear that the State was in fact aware of the defendant's attempt to obtain privileged records because he had invoked the power of the Court. Nothing in either of these cases stands for the proposition for which defendant asserts: that Utah law affirmatively requires that a defendant serve a subpoena on a record holder *without* notifying the trial court, the State, or the subject of the privileged records.

bond. 407 U.S. at 69. Neither statute allowed for notice to be given to the possessor of the property or an opportunity to challenge prior to seizure. Id. While state agents executed the writs, the Court found that the statutes "abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." 407 U.S. at 93. The Court found that this creates an unconstitutional process.

The similarities between the replevin statutes in Fuentes and the defendant's interpretation of the subpoena rules in this case are obvious. Defendant's interpretation allows private parties to invade the constitutional rights of another. It allows the defendant to "unilaterally invoke state power" through the subpoena process to violate the victim's privacy interests, but at the same time, leave the State "in the dark." There is no state participation, evaluation, or court oversight. As the Court recognized in Fuentes, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." 407 U.S. at 81. Like the replevin statutes in Fuentes, the subpoena process as advanced by the defendant must be rejected as unconstitutional.

Indeed, accepting defendant's interpretation of the Utah subpoena process will violate the interpretive principle that courts should construe laws to avoid constitutional problems. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." DeBartolo v. Florida Gulf Coast Building & Constr.

Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501, 504 (1979)); Linder v. United States, 268 U.S. 5, 17-18 (1924) (in order to avoid constitutional issues, court interpreted federal statute regulating drug distribution as not authorizing federal government to usurp state power to regulate practice of medicine). To the extent the State intended such a result by enacting the subpoena rules, it should be rejected.

To the extent Utah's subpoena rule can be construed as defendant urges, this Court should imply procedural safeguards to avoid attributing an unconstitutional intent. It is a natural inference and the obvious conclusion that when a victim's constitutional right to privacy is being threatened by the release of her privileged records under the subpoena process established by the State, due process requires that she have notice and an opportunity to be heard at a meaningful time and in a meaningful manner.[8]

C. Notice and the opportunity to be heard are the only way to give meaning to the therapist-patient privilege, protect the victim's privacy, and meet the public policy concerns behind the privilege.

In this case, the victim has been granted a privilege that purportedly allows her to "refuse to disclose and to prevent any other person from disclosing" her confidential communications. See Utah R. Evid. 506(b). However, the victim has no opportunity to "refuse" or "prevent"

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[8] Should this Court find that the subpoena process created by the State and as interpreted by the defendant does not meet the state action requirement for due process analysis, surely this requirement would be met when a court decides whether to grant a motion to quash or to release the records. A patient whose interests in her confidential therapy records are being determined by the court is entitled to due process safeguards. The problem with this argument, of course, is that if the record holder of a patient's confidential records does not file a motion to quash and releases the records as in this case, under the argument advanced by the defendant, the issue will never reach the victim or the court. The State and the victim will still be in the dark while the defendant has *carte blanche* to review the victim's records. The only way to safeguard the victim's interests is to require that a victim receives notice when her therapy records are subpoenaed.

disclosure when disclosure occurs before she receives notice that disclosure has been demanded through a subpoena. Notice and an opportunity to be heard are the only way to give meaning to her rights to exercise the privilege.

The Massachusetts Supreme Court recognized both this general proposition and the unique and problematic circumstances surrounding privileged materials of witnesses in criminal trials. In Com. v. Oliveira, 780 N.E.2d 453, 457 (Mass. 2002), the court found the language of Massachusetts' psychotherapist-patient privilege, which provides a patient the right to "refuse" and "prevent" disclosure, requires that "[t]he patient must therefore affirmatively exercise the [] privilege[.]" 780 N.E.2d at 458 (internal quotations and citations omitted). Compare Mass. G.L. c. 233, § 20B with Utah R. Evid. 506(b). The court then recognized that,

> in the context of a criminal proceeding, pragmatic difficulties face a witness wishing to prevent the disclosure of privileged records. The witness is not a "party" to the case; the district attorney does not represent the witness, and may have interests that conflict with the witness; the witness will often not have (and not be able to afford) counsel; and, of the utmost concern, the witness may not even receive timely notice that the records are being sought.

780 N.E.2d at 461. The court then discussed various ways judges have devised ways to inform witnesses, including requiring notice, appointment of counsel or guardian ad litem, or by recommending that summonsed record holders contact the patient and obtain a waiver. Id. "Steps that enhance a witness's ability to make an affirmative, informed choice between waiver or assertion of a privilege, or that protect potentially applicable privileges while waiting to hear directly from witnesses, are permissible and appropriate." Id. at 462. Here, *amicus* asks this Court to adopt the simple procedural safeguards that a victim whose records are subject to subpoena are afforded notice and hearing prior to disclosure. These safeguards are "permissible," "appropriate," and necessary to effectuate the victim's rights.

The public policies behind the privilege support these safeguards. In Debry v. Goates, 2000 UT App 58, 999 P.2d 582, cert. denied, 9 P.3d 170 (2000), a civil plaintiff, not protected by the Crime Victims' Amendment, was provided more protection to maintain the confidentiality of her confidential records than was the victim in this case. The plaintiff brought a malpractice action against a doctor who provided an affidavit to plaintiff's husband in a divorce proceeding relating to the plaintiff's mental state, without any notice to the plaintiff. The court found that the communications between the plaintiff and defendant-doctor were protected under the Rule 506 privilege and that, even though the 506 (d)(1) exception applied ("element-of-a-claim-or-defense" exception), the doctor was required to give notice to the patient that her privilege was being challenged. There are of course important distinctions in this case that must be mentioned. First, this was a civil malpractice action for damages, not a criminal prosecution. Second, the record holder was not under subpoena to release the records, but rather voluntarily supplied an affidavit concerning the plaintiff's mental state. And third, the case speaks about the record holder or therapist's obligation to notify a patient when her privilege is being waived, not about a general right to notice when a criminal defendant has subpoenaed confidential records.

However, the rationale of the court is equally supportive of the right of a victim to receive notice when her confidential records are at risk of disclosure through a subpoena:

> Even if the communications may fall into this exception to the privilege, the patient has the right to be notified of the potential disclosure of confidential records. Such notice assures that the patient can pursue the appropriate procedural safeguards in court to avoid unnecessary disclosure. This is particularly important when it is not the patient raising the issue of her mental state in a subsequent proceeding.

2000 UT App at ¶ 28.

In this case, defendant attempted to use the "element-of-a-claim-or-defense" exception also invoked in Debry. The victim, like the plaintiff in Debry, had no opportunity to contest

release of the records. In violation of the mandate of Debry, the defendant's position provides no procedural safeguards to protect the victim's privacy rights. While this is a criminal case and Debry was a civil case, the privacy rights in confidential records are the same. And given the additional constitutional protections afforded to crime victims and the important public interests in the confidentiality of therapy records, defendant's position cannot be maintained.

Legislatures and courts nationwide have recognized the important public policies behind a patient-therapist privilege. In Jaffe v. Redmond, 518 U.S. 1 (1996), the United States Supreme Court created a federal privilege protecting confidential communications between a psychotherapist and a patient. 518 U.S. 1, 10. The Court found that effective psychotherapy

> depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

518 U.S. at 10.

The Court balanced the importance of the privilege with the likely evidentiary benefit that would result from the denial of the privilege.

> If the privilege were rejected, confidential communications between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

518 U.S. at 11-12.

Other courts have also emphasized the potential devastating impacts if patients did not have confidence in the confidentiality of their communications.

> Patient confidence is essential for effective treatment. Because the information revealed by the patient is extremely personal, the threat of disclosure to outsiders may cause the patient to hesitate or even refrain from seeking treatment. * * * It cannot be gainsaid that society desires to protect and provide succor for the relationship of psychologist and client, and that without the confidentiality which the privilege provides, many people would simply forego therapeutic treatment.

Kalenevitch v. Finger, 595 A.2d 1224, 1226 (Pa. Super. 1991) (internal quotations and citations omitted).

The importance of the privilege and ability of the patient to control the privilege can also be illustrated in Kennestone Hospital, Inc. v. Hopson, 538 S.E.2d 742 (Ga. 2000). Kennestone, although dealing with civil discovery rules—and, in contrast, a criminal defendant has no right to pretrial discovery—demonstrates the importance given to the privilege that protects communications between therapist and patient. Under Georgia's civil discovery rules, a party seeking discovery must serve all parties with a request, and the nonparty or any party may file an objection with the court. 538 S.E.2d at 422. The rules further provided that if no objection was filed within ten days of the request, the nonparty to whom the request is directed shall comply with the request. Id.

However, the Georgia Supreme Court found that a patient's failure to file an objection within ten days of the request for privileged communications, as the rules required, could not infer intent to waive the privilege. "Given the importance of the privilege in encouraging and protecting confidential communications concerning mental health of individuals, we hold that a party's silence and failure to act in response to a request for privilege matter from a nonparty health care provider or facility under [the discovery rules] does not waive the party's privilege by implication." 538 S.E.2d 742, 745. Of course, in this case, the victim had no notice or opportunity to silently acquiesce to disclosure of her records.

The strong public interests served by assuring patients who seek therapeutic treatment confidentiality in their treatment records are undermined by defendant's actions and arguments in this case. The privilege belongs to the patient and can be waived only by the patient. To allow the defendant to unilaterally disregard the privilege, without notifying the patient, destroys patients' confidence that their communications will remain confidential and will inevitably force patients to choose between therapy, privacy, and prosecution.

Notice and an opportunity to "refuse" or "prevent" disclosure of therapy records is not much to ask for given the important public policy interests in encouraging citizens to seek treatment knowing their communications will be safeguarded and the fact that Utah—as most states—has explicitly guaranteed a right to confidentiality in therapy records. To fail to provide this minimal procedural accommodation, would render the privilege meaningless.

Appendix C

Cameras in the Courtroom

From: Michael Gibson
Date: December 2, 2003
Re: Cameras in the Courtroom

A. The Rise of Mass Broadcasting and the AMedia Circus.@

Mass broadcasting of judicial proceedings in the United States has a long and controversial history. With the spread of radio in the early 20th century, sensational cases began to find an audience.[1] By the early 1920's, news agencies began to film high-profile trials.[2] One noteworthy example was the Scopes Amonkey@ trial in 1925.[3] The trial was broadcast by radio, and was heavily photographed by both still photographers and newsreel cameras, creating a true media circus. The attorneys and the judge showed an awareness of the attention the media frenzy created, and the media made their presence known by giving the trial participants stage directions while court was in session.[4]

The 1920's also saw the sensational trials of Sacco and Vanzetti and Leopold and Loeb, after which, in 1924, the American Bar Association (ABA) appointed a special committee to study the Atroublesome tendencies@ of the media in reporting courtroom proceedings.[5] Although there were some efforts by individual courts to restrain the media, many courts did not find the

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[1]Ruth Ann Strickland and Richter H. Moore, Jr, *Cameras in State Courts: A Historical Perspective*, 78 Judicature 128, 129. (November-December 1994).

[2]*Id.*

[3]*Id.* at 129-130

[4]*Id.* at 130

[5]*Id.*

presence of media broadcasting equipment in courtrooms to be a problem. No fixed rules were adopted during the next ten years.[6]

The first real efforts to ban cameras from the courtroom can be traced to the 1935 trial of Bruno Hauptman, the so-called "Lindbergh Baby" trial.[7] Hauptman's trial had all the hallmarks of a media circus. It was a highly publicized, sensational trial, with hundreds of print reporters and approximately 120 cameramen in the courtroom with virtually unimpeded access and little control from the judge.[8] Though the judge had originally denied the media's requests to film during the proceedings, allowing filming only during recesses, he relented during trial.[9] Photographers and cameramen were virtually uncontrollable, climbing on counsel tables and distracting witnesses with flash bulbs.[10] Film from the trial was shown on newsreels in theaters during the trial.[11]

The judge eventually banned all media from the courtroom because of the disruptions, but the damage was done and Hauptman was, unsurprisingly, convicted. Despite the rejection of Hauptman's appeal on grounds that his conviction resulted from prejudicial publicity, his case provided the impetus for a wholesale re-evaluation of the guidelines for media access to the

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[6] Larry V. Starcher, *Cameras in the Courts - A Revival in West Virginia and the Nation,* 84 W. Va. Law Rev. 267, 268 (January 1982).

[7] *Id.*

[8] Strickland, *supra* note 1, at 130.

[9] Christo Lassiter, *The Appearance of Justice: TV or Not TV - That is the Question*, 86 J. Crim. L. & Criminology 928, 936 (1996).

[10] Strickland, *supra* note 1, at 130.

[11] Lassiter, *supra* note 9, at 936.

courts.[12] In 1937, the ABA adopted Canon 35 as part of the Canons of Judicial Ethics. As adopted, the Canon read:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.[13]

Though the Model Canon was only advisory, most states adopted Canon 35 without change.[14] In 1952, the ABA amended the Canon to ban the televising of courtroom proceedings, and included the “distraction of witnesses” as an additional justification.[15] The amendment was adopted by most states as well.[16]

B. The Reaction of the States and the Supreme Court's Response.

[12]Starcher, *supra* note 6, at 268.

[13]A.B.A Canons of Judicial Ethics No. 35 (1937).

[14]Strickland, *supra* note 1, at 130. Some states exempted still photography.

[15]Starcher, *supra* note 6, at 269. The amendment did provide an exception for naturalization hearings. The Federal Rules of Civil Procedure also banned radio broadcasts and still photography from Federal Courts under Rule 53.

[16]Strickland, *Supra* note 1, at 130.

As the popularity of television grew, Canon 35 came under nearly constant attack from news organizations.[17] Several western states began to challenge the need for a ban on cameras in the courtroom. Colorado was one of the first states to do so. In 1956, the Colorado Supreme Court held hearings regarding electronic broadcasting from courtrooms.[18] The hearings resulted in a state-wide policy allowing the decision to be made at the discretion of the judge sitting in each trial. Oklahoma and Texas soon followed suit.[19]

The issue remained unresolved on a federal level for several years. In 1965, a Texas case, *Estes v. Texas*,[20] was the first to bring the question of cameras in the courtroom to the Supreme Court. *Estes* involved the swindling trial of a friend of President Lyndon B. Johnson, Billy Sol Estes. The trial judge, exercising his discretion under Texas law, allowed the pre-trial hearing and the trial to be televised. Though not on the scale of the Hauptman trial, the record shows considerable disruption during the trial, with up to a dozen still and motion-picture cameramen.[21] Overruling the Texas courts, the Supreme Court held that the circumstances of the trial constituted a deprivation of Estes=Fourteenth Amendment due process rights. Though the court made no specific finding of prejudice in the case, the court=s opinion made clear that it

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[17]Starcher, *Supra* note 6, at 269.

[18]*In Re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P.2d 465 (Colo 1956). The hearings outlined many arguments pro and con, but did not do any independent research.

[19]Strickland, *Supra* note 1, at 131. Both states cited the educational value for the public to see court proceedings as outweighing the potential for distraction or abnormal behavior.

[20]*Estes v. Texas*, 381 US 532 (1965).

[21]*Id*., at 536. In the words of Justice Clark, the record shows that Athe picture presented was not one of that judicial serenity and calm to which the petitioner was entitled.@

found the presence of television cameras inherently prejudicial. Indeed, Justice Clark's opinion for the court stated that television "in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused."[22] The opinion rested, in part, on the fact that the majority of the states and the federal courts, at the time, did not allow electronic broadcasting of courtroom proceedings.[23]

Estes did not resolve the issue, however. There were six concurring opinions, and they took a variety of approaches to the issue. The nexus of these opinions essentially stated that, under specific facts, television coverage of a trial may present prejudicial problems sufficient to violate a defendant's due process rights, but that the Constitution did not require a complete ban on televised coverage based on a presumption of prejudice.[24] In fact, the court left open the possibility that advances in television technology might reduce the court's concerns sufficiently to eliminate the threat of prejudice.[25] The question of whether cameras may ever be permitted in state courts was not answered.[26]

The Supreme Court would not address the question for nearly two more decades. In 1972, the ABA replaced the Canons of Judicial Ethics with the Model Code of Judicial Conduct,

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[22]*Id.*, at 544.

[23]*Id.*

[24]Lassiter, *supra* note 9, at 938.

[25]*Estes*, *supra* note 20 at 541.

[26]In *Nixon v. Warner Communications, Inc*, 435 US 589 (1978), however, the court ruled that there was no constitutional right for the press to have live witness testimony broadcast or recorded, nor is there a right for the public to see trials broadcast live or recorded. This seemed to indicate that the court might not be receptive to a constitutional argument regarding cameras in the courtroom.

placing the ban on electronic broadcasting in Canon 3(A)(7), but making no substantial changes.[27] The states, however, continued a slow but steady march toward opening their courts to cameras. By 1978, six states had laws allowing cameras access to the courts, and ten more states had experimental programs.[28] Florida was at the forefront of the charge.

C. Florida's Experiment.

In 1975, Post-Newsweek Stations, Florida, Inc. filed a petition with the Florida Supreme Court to modify the state's Code of Judicial Conduct Canon 3(A)(7) to allow the electronic media access to the courts.[29] At that time, the State's Code mirrored the Model Code in all relevant ways. After reviewing comments, reports and exhibits from a wide array of interested parties, the court allowed a one-year experiment in several of the state's judicial circuits, during which the electronic media was allowed to cover judicial proceedings without the consent of the parties, but subject to standards of conduct and technology adopted by the court.[30] After some early difficulties, the program ended in mid-1978.[31] Based on specific positive comments of some of the judges involved in the program, a more general survey of the judges involved, and a

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[27]Strickland, *supra* note 1, at 132. The Canon read, with some exceptions for educational purposes, that:

> “A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions. . .”

[28]Lassiter, *supra* note 9, at 940.

[29]*In re Petition of Post-Newsweek Stations, Florida, Inc., for Change in Code of Judicial Conduct*, 370 So.2d 764, 766 (1979).

[30]*Id.*

[31]*Id.* at 767.

survey of the non-judicial participants, the court decided to amend Florida=s Canon 3(A)(7) to allow electronic broadcasting of judicial proceedings.[32]

The court discussed at length the potential due process,[33] First Amendment, Sixth Amendment[34] and practical considerations[35] involved in the decision. The court voiced some concern over potentially significant adverse effects on particular classes of witnesses, pointing to three cases where the judge denied a request to exclude the electronic media: the spouse of a murder victim, a state=s witness who was a state prisoner, and a 16-year old rape victim.[36] The court determined that, while such cases present special circumstances under which the electronic media should be excluded, that decision should be left to the presiding judge.[37] The judge=s discretion should be exercised in accordance with a Aqualitatively different@ standard articulated by the court.[38] The experience of Florida=s courts was emblematic of the general shift across the

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[32]*Id.* at 781-82. The new Canon 3(A)(7) read: ASubject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.@ The accompanying commentary noted that the media would only be allowed to broadcast in accordance with the court=s specific guidelines.

[33]*Id.* at 771.

[34]*Id.* at 774.

[35]*Id.* at 774-75. Practical considerations included physical disruption, psychological effect, commercial exploitation, prejudicial publicity, effects on particular classes of witnesses, and privacy rights of the participants.

[36]*Id.* at 778-79.

[37]*Id.* at 779.

[38]*Id.* The standard states that: AThe presiding judge may exclude electronic media

country. As television became more a part of everyday life, and the courts of numerous states gained experience in televising trials, the stage was set for a definitive resolution by the Supreme Court.[39]

D. *Chandler v. Florida*

In 1981, the Supreme Court heard *Chandler v. Florida.*[40] The case involved a highly publicized televised trial of two Miami Beach policemen accused of burglary and other associated crimes.[41] The trial attracted a great deal of attention, in part because the defendants were police officers, and in part because an amateur radio operator happened to overhear the defendants in the course of their crime.[42] Over the objections of defense counsel, the presiding judge allowed electronic coverage of the trial, and one camera was present for portions of the prosecution (including the testimony of the amateur radio operator) and the prosecution’s closing argument. Less than three minutes of the trial were eventually broadcast, showing only parts of the prosecution’s case.[43] The defendants were convicted and eventually appealed their conviction to the Supreme Court.

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coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.”

[39] Lassiter, *supra* note 9, at 940.

[40] *Chandler v. Florida*, 449 US 560 (1981).

[41] *Id*. at 567.

[42] *Id*.

[43] *Id*. at 568.

By the time the case came before the Court, 28 states permitted cameras in at least some state courts, and 12 more states were studying the question.[44] Defendants argued that allowing cameras into the courtroom violated their due process rights, basing their claim on *Estes v. Texas*.[45] Finding that *Estes* did not establish a *per se* rule banning cameras in the court on due process grounds, the Court turned to the question of whether it should establish such a constitutional rule.[46] The Court concluded that such a rule was not necessary. The mere possibility of prejudicial publicity was insufficient to convince the Court that an absolute ban was mandated by the Constitution.[47] Thus, the Court in *Chandler* held that the Constitution neither prohibited nor mandated courtroom access for the electronic media, and deferred to the state supreme courts to provide, under their supervisory powers, for the inclusion or exclusion of electronic media in state courts.

In the aftermath of *Chandler*, the door was opened for states to develop guidelines for electronic media access to the courts. In 1982, the ABA amended Canon 3(A)(7), eliminating the 1972 prohibition on cameras in the courts and replacing it with more permissive language. The new Canon read:

> A judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by a supervising

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[44] *Id*. at 565, No. 6. Cameras had access to all state courts in 19 states, only appellate courts in six states, and only trial courts in three states.

[45] *Id*. at 570.

[46] *Id*. at 573-74.

[47] *Id*. at 574-75.

appellate court or other appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right of parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.[48]

Most states thus left the decision to the presiding judge, leaving the focus to shift to the establishment of sufficient guidelines to help judges make the decision, and to ensure that media circuses will be avoided.[49]

E. Current Status

In 1990, the ABA House of Delegates adopted a Revised Model Code. The new Code eliminated any mention of electronic broadcasting whatsoever.[50] The ABA determined that the regulation of cameras in the courtroom, rather than a subject for a judicial discipline, is Amatter of court administration,@ and is Amore appropriately regulated by separate court rules.@[51] Though some states retain older versions of the Model Code of Judicial Conduct, or have written their own version, thirty-two states have adopted the current version that makes no mention of the

[48]A.B.A. Model Code of Judicial Conduct Canon 3 (1972)(Amended 1982).

[49]Starcher, *supra* note 6, at 298.

[50]A.B.A. Model Code of Judicial Conduct (1990).

[51]Vermont Code of Judicial Conduct Canon 3 (1994).

presence of cameras in courtrooms.[52] It is therefore necessary to look at court rules and relevant statutes governing judicial administration in each state.

The states have rapidly opened the doors of their courtrooms to cameras in the aftermath of *Chandler*, and that trend continues. Today, all 50 states either have an experimental rule or a permanent rule allowing cameras in some courtrooms at least on the appellate level.[53] Forty-two states allow cameras in trial courts for civil trials and thirty seven-states allow cameras in criminal trials.[54] Currently only the District of Columbia has no rule allowing cameras, and is not considering such a rule.[55] Deleware, Indiana, New Jersey and Pennsylvania have experimental rules. However, eliminating states that restrict cameras to only trial or appellate courts, only civil or criminal, or allow exclusion on the request of any party at any level, there are thirty states with statutorily unlimited access for cameras.[56] Furthermore, the rules are continually evolving, so this list is subject to constant change.

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[52]These states are Alaska, Arizona, Arkansas, California, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming.

[53]*Cameras in the Courts: Summary of State Court Rules*, National Center for State Courts (2002). This source, like this memo, does not consider territories or commonwealths of the U.S.

[54]*Id.* There is some overlap in those states.

[55]*Id.* Indeed, the District of Columbia does not seem to have adopted a Code of Judicial Conduct either.

[56]*Id.* These states are: Alaska, Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

The state guidelines that govern cameras in the courtroom vary widely. Almost all states allow presiding judges to use their discretion, but a few states restrict the decision to the Chief Justice of the state supreme court, for example. Advance notice is often required. Coverage of *voir dire* is almost always restricted. Most states restrict coverage of cases involving certain classes of victims or witnesses, including juveniles and victims of sexual crimes. Many states also provide strict guidelines for the number of cameras and equipment operators, positioning of cameras and lights, light levels, and movement in the courtroom of any media personnel. In addition, some states allow for the exclusion of cameras upon the objection of witnesses or victims. As noted above, it is important to look at the applicable state and local court rules to determine the local status of cameras in the courts.

Appendix D

HIV Testing and Sex Crimes

HIV Testing and Sex Crimes

Summary of State Laws: The following chart outlines the rights of victims of sex crimes with regard to HIV testing of the offender and the victim in the U.S. states, the District of Columbia and the U.S. territories. *Note*: HIV testing may encompass a broader range of testing for sexually transmitted diseases.

- 2 states (OK, TN) provide for some sort of HIV testing upon arrest.
- 5 states (CO, ID, MO, NJ, TN) provide for mandatory HIV testing at charging.
- 6 states (DE, FL, KN, NJ, OH, TX) provide for mandatory HIV testing at charging if the victim requests.
- 4 states (AK, AR, VA, WI) provide for mandatory HIV testing at charging if court finds requisite probability of exposure.
- 10 states (AZ, CA, GA, HI, IL, IA, MD, NC, OR, SC) provide for mandatory HIV testing at charging if the victim requests and court finds requisite probability of exposure.
- 12 states (CA, FL, GA, IL, IN, LA, MI, MS, MO, NH, WA, WV) and American Samoa and Guam provide for mandatory HIV testing at conviction.
- 17 states (AR, CN, HI, KN, ME, MD, MN, MT, NE, NY, OR, PA, RI, SC, UT, VT, VA), the District of Columbia and the Virgin Islands provide for mandatory HIV testing at conviction at the request of the victim.
- 3 states (AZ, IA, SD) provide for mandatory HIV testing at conviction if victim requests and court finds requisite probability of exposure.
- 7 states (AL, GA, MS, MO, RI, UT, WY) provide mandatory HIV testing upon confinement.
- 1 state (KY) provides mandatory HIV testing if recommended by the CDC Guidelines.
- 1 state (CA) allows a victim of an uncharged crime to request HIV testing of alleged perpetrator if alleged perpetrator is also charged with a sex offense against another victim and the court finds requisite probability of exposure.
- 18 states (AK, AR, CN, HI, ID, IL, LA, MN, NE, NH, OR, PA, RI, SC, SD, UT, VT, WV) and American Samoa, Guam and the Virgin Islands provide for HIV testing of the victim.
- No relevant HIV testing statutes were found in Massachusetts, New Mexico, Nevada, North Dakota, Puerto Rico or the Northern Marianas.

About the Project: This chart is a joint project of the National Conference of State Legislatures (NCSL), 7700 East First Place | Denver, CO 80230 and the National Crime Victim Law Institute (NCVLI) of Lewis & Clark Law School, 10015 SW Terwilliger Boulevard | Portland, OR 97219. This project was updated in August 2005 by NCVLI Staff Attorney Liani Jean Heh Reeves and Lewis & Clark law student Nate Pliska. Questions should be directed to NCVLI at 503.768.6819 or ncvli@lclark.edu.

Disclaimer: The information contained in this chart is educational and intended for informational purposes only. It does not constitute legal advice, nor does it substitute for legal advice. It does not constitute the practice of law and should not be relied upon as such. NCSL and NCVLI disclaim all liability of any kind arising from the use of, or misuse, of the information contained and referenced herein and do not accept responsibility for accuracy or any errors or omissions.

Key to Table:

V = Victim | D = Defendant | * = at request of V

State	Statute (see statute for specific crime type and degree)	Time of Testing	Requirements to Test	Results Provided to Victim	Victim HIV Test Provided	HIV Counseling & Referral Provided	Applicable to Juvenile Defendants	Who Bears Cost	Notes
ALABAMA	Ala. Code § 22-11A-17	Conviction/ Confinement	All persons sentenced to confinement or imprisonment in any city or county jail or any state correctional facility for 30 or more consecutive days shall be tested for sexually transmitted diseases or if sentenced over 90 days, 30 days before release.	X*		V			What if D is convicted but not sentenced to imprisonment?
ALASKA	Alaska Stat. § 18.15.300 et seq.	Charging	Mandatory when probable cause is established by the court.	X *	X	V, D	Yes	If convicted, D pays.	
ARIZONA	Ariz. Rev. Stat. Ann. § 8-341 [applicable to juveniles only]	Conviction	Prosecuting attorney to petition court for testing per the request of the victim when the perpetrator is a minor; court makes finding of significant exposure or sex offense.	X		V, D	Yes-ONLY		
	Ariz. Rev. Stat. Ann. § 13-1401 et seq.	Charging	Prosecuting attorney to petition court for testing per the request of the victim; court makes finding of significant exposure or sex offense.				Yes		
ARKANSAS	Ark. Stat. Ann. § 16-82-101	Charging Conviction	If court determines reasonable cause. Once convicted, mandatory testing if victim requests.	X	X	V	Yes		

CALIFORNIA	Cal Pen Code § 1524.1	Charging	At victim's request if court finds probable cause.	X*		V – pre-request V, D – before disclosure	Yes		Prosecutor must advise victim of right to make request.
		Uncharged	Victim of uncharged crime may request if D is also charged with a sex offense; court finds probable cause.						
		Conviction	Mandatory testing at conviction.						
COLORADO	Colo. Rev. Stat. § 18-3-415	Charging	Mandatory testing.				Yes		To be used in mandatory upward sentencing if D had notice of HIV infection prior to date offense was committed.
	Colo. Rev. Stat. § 18-3-415.5	Charging	Mandatory testing.	X*			Yes		D's voluntary submission to testing admissible as mitigation.
CONNECTICUT	Conn. Gen. Stat. § 54-102b, § 504-102c,	Conviction	Testing ordered upon request of victim or court.	X*	X	V	Yes		Non-compliance is a class C misdemeanor.
DELAWARE	Del. Code Ann. tit. 10, § 1077	Charging	Order testing at request of victim.	X*		V, D	Yes	D pays.	Court provides defendant with information concerning HIV testing.
DISTRICT OF COLUMBIA	D.C. Code Ann. § 22-3901 et seq.	Conviction	Testing is conducted on request of the victim.	X		V, D			

FLORIDA	Fla. Stat. § 775.0877	Conviction	Court orders testing.	X*					Provides for criminal transmission of HIV.
	Fla. Stat. § 960.003	Charging or Conviction	Court orders testing at request of victim.	X*		V	Yes		Victim's request for disclosure shall be considered a standing request for subsequent HIV test results obtained within 1 year after initial test performed.
GEORGIA	Ga. Code § 17-10-15, § 31-22-9.1 et seq.	Arrest / Charging	Testing is conducted on request of the victim. If defendant does not consent, testing upon a probable cause finding of the court.	X*		V		Cost borne by victim or arrested person in discretion of court.	
	Ga. Code § 17-10-15	Conviction	If no prior request by victim, upon conviction testing is mandatory within 45 days.	X		V			
	Ga. Code § 42-5-52.1	Incarceration	Mandatory within 30 days.						
HAWAII	Haw. Rev. Stat. §§ 325-16; 325-16.5	Charging	Upon V's request and after in camera probable cause hearing.	X to V's designee.	X	V, D (pre- and post-testing)	Yes	Dept. of Health funding for V testing.	V shall be informed as soon as practicable after the assault of availability of counseling and right to request testing of person charged and the right to V's own testing.
		Conviction	Mandatory if V requests.	X	X	V, D	No		

IDAHO	Idaho Code § 39-604	Charging	Mandatory.	X	X if D tests HIV+.	V if D tests HIV+.	Yes	Counseling and testing at no cost to victim if D tests HIV+.	Mandatory for all persons confined or imprisoned in any state prison facility at admission and release.
ILLINOIS	Ill. Rev. Stat. ch. 705, § 405/5-710 [applicable to juvenile only]	Conviction	Mandatory.	X	X	V	Yes-ONLY	Paid by county and taxed as costs against minor D.	Court has discretion to determine to whom the results may be revealed.
	Ill. Rev. Stat. ch. 720, § 5/12-18	Charging	After probable cause hearing or indictment, prosecutor shall seek order if victim requests.	Court has discretion to determine to whom the results may be revealed.				Paid by county and taxed as costs against D.	In no case shall the identity of he victim be disclosed.
INDIANA	Ind. Code § 31-37-19-12 [applicable to juvenile only]	Conviction	Mandatory.	X		V	Yes-ONLY		
	Ind. Code § 35-38-1-7.1 et seq.	Sentencing							Aggravating factor if D knew was carrier of HIV and had received risk counseling.
IOWA	Iowa Code § 915.42, § 915.43	Allegation or Conviction	Prosecutor petitions for order if victim requests; court holds in camera hearing. Must try to obtain written informed consent first.	X		V –pre-hearing V, D	Yes		D shall be provided lawyer. V may be represented by private counsel. V may not be compelled to testify.

KANSAS	Kan. Stat. Ann. § 38-1692 [applicable to juvenile only]	Charging Conviction	Court orders if victim requests. Once convicted, court may order or shall order if victim requests.	Released to V's designated health care provider.		V	Yes-ONLY	Paid by health dept.; shall order restitution from D.	At time of first appearance, judge shall inform each victim that testing and counseling is available. If test negative, court shall order another test 6 months later.
	Kan. Stat. Ann. § 65-6009	Arrest or Charging Conviction	Court orders if victim or district attorney requests. Once convicted, court may order or shall order if victim requests.	Released to V's designated health care provider.		V		Paid by health dept.; shall order restitution from D.	At time of first appearance, judge shall inform each victim that testing and counseling is available.
KENTUCKY	Ky. Rev. Stat. § 438.250	Conviction	Mandatory if recommended by CDC guidelines.	X pursuant to 510.320.			?	Cost to D.	Mandatory
LOUISIANA	La. Rev. Stat. Ann. § 15:535, La. Crim. Ann. art. 499	Conviction	Mandatory.	X	X is D tests HIV+.	V	X? See Juv: Ch C art. 908.1		
MAINE	Me. Rev. Stat. Ann. tit. 5, § 19203-F	Conviction	Testing conducted on request of the victim; must request no later than 180 days after conviction.	Released to victim advocate.		V, D Mandatory pre-disclosure counseling.	Yes		
MARYLAND	Md. Crim. Proc. Code Ann. § 11-109 et seq.	Charging Conviction	Testing conducted if victim requests and court finds probable cause. Mandatory if victim requests.	X		V –pre and post-test counseling, D	Yes		Victim shall be notified of date, time, location of hearing and the right to be present.

MICHIGAN	Mich. Comp. Laws § 333.5129	Charging Conviction	Court may order. Mandatory testing.	Victim must consent to give name and address.	X?	D	Yes	Court may order D to pay actual and reasonable costs of testing upon conviction.	
MINNESOTA	Minn. Stat. § 611A.19	Conviction	Testing is conducted at the request of or with consent of the victim	X *		V	Yes		
MISSISSIPPI	Miss. Code Ann. § 99-19-203	Conviction	Mandatory at conviction. If confined over 90 days, test 30 days prior to release.	X and V's spouse.		V			
	Miss. Code Ann. § 43-21-623 [applicable to juvenile only]						Yes-ONLY		
MISSOURI	Mo. Rev. Stat. § 191.659 et seq., § 566-135	Charging Conviction Confinement	Court ordered testing of defendants charged certain crimes. Mandatory upon conviction. All persons imprisoned or confined in the Department of Corrections will undergo HIV testing.	X			Yes		
MONTANA	Mont. Code Ann. § 46-18-256	Conviction	Testing is mandatory at the request of the victim.	X	X	V -if requested	Yes		

NEBRASKA	Neb. Rev. Stat. § 29-2290	Conviction	Testing is mandatory at the request of the victim.	X	X	V, D	Yes	Cost by D unless court finds indigent.	
NEVADA	Nev. Rev. Stat. § 201.358								Provides for B felony if person engages in conduct likely to transmit disease if person has tested positive and received actual notice of HIV+ result.
NEW HAMPSHIRE	N.H. Rev. Stat. Ann. § 632-A:10-b	Conviction	Mandatory	X to V/W Office; V/W Office may notify V regardless of V's request.	X	V, D	Yes		
NEW JERSEY	N.J. Stat. Ann. § 2A:4A-43.1 et seq. [applicable to juvenile only]	Charging	Mandatory test for SA or aggravated SA.	Disclose to victim witness office.		V	Yes-ONLY	May order D to reimburse cost.	
	N.J. Stat. § 2C:43-2.2 et seq.	Charging	Mandatory at request of victim.	Disclose to victim witness office.		V	Yes	May order D to reimburse.	
NEW YORK	N.Y. Crim. Proc. Law § 390.15, Pub. Health Law § 2785 et seq.	Conviction	Mandatory upon request of victim in writing within 10 days of conviction.	X		V	Yes		

NORTH CAROLINA	N.C. Gen. Stat. § 15A-615	Charging	Testing on request of the victim and probable cause finding.	X		V, D			
OHIO	Ohio Rev. Code Ann. 2907.27	Charging	Testing is mandatory on request of the prosecutor or victim.	X*					Must inform victim of test and right to receive results; is an ongoing request.
OKLAHOMA	Okla. Stat. tit. 63, § 1-524 et. seq	Arrest	Testing conducted on court order following arrest for certain crimes	Disclose to victim witness coordinator or V's designated professional.	X – victim provided preventative treatment if within 6 hours.			Cost by D. No cost to V for testing or treatment required by V due to positive result.	
OREGON	Or. Rev. Stat. § 135.139	Charging Conviction	Testing of the defendant can be requested by the victim and probable cause hearing. At conviction, court seeks consent to test or if victim requests testing is mandatory.	Disclose to V's designated physician.	X	V –if requested, D		Cost by CVC; restitution to state.	V must be notified that testing and counseling are available.
PENNSYLVANIA	Pa. Cons. Stat. tit. 35, § 521.11a	Conviction	Testing is mandatory upon request of the victim.	X	X	V			
RHODE ISLAND	R.I. Gen. Laws § 11-37-17	Conviction	Testing conducted on those persons guilty of a sexual offense when requested by the victim.	X*	X	V	Yes		
	R.I. Gen. Laws § 42-56-37	Confinement	Required testing for HIV if in adult correctional institution.						

SOUTH CAROLINA	S.C. Code Ann. § 16-3-740	Charging Conviction	Testing upon request of V and court orders after probable cause hearing. Once convicted, testing mandatory if V requests.	X	X –if requested	V –if requested, D	Yes	State pays; if convicted, D may reimburse unless indigent.	D has right to counsel at probable cause hearing.
SOUTH DAKOTA	S.D. Codified Laws Ann. § 23A-35B-1 et seq.	Conviction	Testing upon request of the written request of victim and probable cause hearing.	Disclose to V's designee	X	X	Yes	County pays; may request reimbursement if D convicted.	Apply at charging?
TENNESSEE	Tenn. Code Ann. § 39-13-112, § 39-13-521	Arrest	Testing upon request of victim in case of aggravated assault (limited to specific victims). Immediate testing required for persons charged with a sexual offense.	X		D		Testing upon request of victim in case of aggravated assault.	
TEXAS	Tex. Crim. Proc. Code Ann. § 21.31	Charging	Testing can occur at either the request of the court or of the victim.	X					
UTAH	Utah Code Ann. § 64-13-36 [applicable only to prisoners]	Conviction/ Confinement	Testing conducted on all prisoners who have been adjudicated and found guilty of a criminal offense and who are in custody of the Department of Corrections.			D			
	Utah Code Ann. § 76-5-502 et seq.	Conviction	Mandatory if V requests within six months of conviction.	X	X –CVRF pays		Yes	D responsible for cost unless indigent.	

VERMONT	Vt. Stat. Ann. tit. 13, § 3256	Conviction	Testing conducted at request of victim.	X	X	V	Yes	Cost by Dept. of Public Safety.	
VIRGINIA	Va. Code Ann. § 18.2-62	Charging Conviction	Probable cause hearing. After conviction, testing conducted when the attorney for the Commonwealth has consulted with the victim of a sexual assault.	X		V, D	Yes		
WASHINGTON	Wash. Rev. Code § 70.24.340, § 70.24.105	Conviction	Mandatory after conviction.	X*		V, D			
WEST VIRGINIA	W. Va. Code § 16-3C-2	Conviction	Mandatory.		X	V, D		V testing and counseling paid by bureau; restitution to state unless indigent goes to "HIV testing fund."	Prosecutor must inform V of availability of and recommendation for voluntary HIV testing and counseling.
WISCONSIN	Wis. Stat. § 968.38	Charging	DA shall apply if probable cause that victim was significantly exposed or if victim requests; then probable cause hearing.	X					
WYOMING	Wyo. Stat. § 35-4-134	Conviction/ Confinement	Mandatory testing of any individual imprisoned or confined in any state penal institution, county or city jail or any community correctional facility.						

AMERICAN SAMOA	Am. Samoa Code Ann. § 46.3619	Conviction	Mandatory.	X	X	V	No		
GUAM	8 Guam Code Ann. § 120.60	Conviction	Mandatory.	X	X	V	No		
VIRGIN ISLANDS	5 V.I. Code Ann. § 3911	Conviction	Mandatory at request of victim.	X	X	V (pre- and post-testing), D	No		Prosecutor shall advise victim of right to request the testing of D.