
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 1896 **Hearing Date:** June 19, 2018
Author: Cervantes
Version: May 10, 2018
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Sexual Assault Counselor-Victim Privilege*

HISTORY

Source: Author

Prior Legislation: None

Support: American Association of University Women of California; California State Student Association; California State University

Opposition: None known

Assembly Floor Vote: 73 - 0

PURPOSE

The purpose of this bill is to specifically provide that a person who is engaged in sexual assault counseling on the campus of a public or private institution of higher education in the is a "sexual assault counselor" for purposes of the sexual assault counselor-victim privilege in existing law.

Existing law provides that the right of any person to claim a privilege provided in statute is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. (Evidence Code § 912 (a).)

Existing law provides that the victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault counselor if the privilege is claimed by any of the following:

- 1) The holder of the privilege;
- 2) A person who is authorized to claim the privilege by the holder of the privilege; or
- 3) The person who was the sexual assault counselor at the time of the confidential communication, but that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. (Evidence Code § 1035.8.)

Existing law requires a sexual assault counselor who received or made a communication subject to the privilege under this article to claim the privilege if he or she is present when the

communication is sought to be disclosed and is authorized to claim the privilege under Evidence Code Section 1035.8. (Evidence Code § 1036.)

Existing law defines “sexual assault counselor” to mean any person who has specified training and experience and who is either of the following:

- 1) A person who is engaged in any office, hospital, institution, or center commonly known as a rape crisis center, whose primary purpose is the rendering of advice or assistance to victims of sexual assault and who has received a certificate evidencing completion of a training program in the counseling of sexual assault victims issued by a counseling center that meets the criteria for the award of a grant established pursuant to Section 13837 of the Penal Code. (Section 1035.2 (a).)
- 2) A person who is employed by any organization providing the programs specified in Section 13835.2 of the Penal Code, whether financially compensated or not, for the purpose of counseling and assisting sexual assault victims. (Section 1035.2 (b).)

Existing law provides that funds appropriated from the state’s Victim-Witness Assistance Fund shall be made available through the Office of Emergency Services (OES) to any public or private nonprofit agency for the assistance of victims and witnesses that meets a number of requirements, including that it “provides comprehensive services to victims and witnesses of all types of crime.” (Penal Code § 13835.2.)

Existing law requires the California Emergency Management Agency (Cal EMA) to provide grants to proposed and existing child sexual exploitation and child sexual abuse victim counseling centers and prevention programs, including programs for minor victims of human trafficking. (Penal Code §13837.)

This bill adds to the definition of “sexual assault counselor” in evidence Code Section 1035.2 : a person who is engaged in a program on the campus of a public or private institution of higher education, whose primary purpose is the rendering of advice or assistance to victims of sexual assault and who received a certificate evidencing completion of a training program in the counseling of sexual assault victims issued by a counseling center that meets the criteria for the award of a grant established pursuant to Penal Code Section 13837 and who meets one of the following requirements:

- 1) Is a psychotherapist , has a master’s degree in counseling or a related field, or has one year of counseling experience, at least six months of which is in rape crises counseling.
- 2) Has 40 hours of training in specified areas by an individual who qualifies as a counselor. The training shall include but not be limited to the following areas:
 - a) Law
 - b) Medicine
 - c) Societal attitudes
 - d) Crisis intervention and counseling techniques
 - e) Role playing

- f) Referral services
- g) Sexuality

This bill makes a number of uncodified findings and declarations including that there is uncertainty among practicing sexual assault counselors as to whether the legal privilege for confidential communications between sexual assault counselors and survivors applies to counselors who provide services and support on college campuses and to declare that the intent of this bill is to remove that uncertainty.

This bill also states in the uncodified findings and declarations that the intent of this act is also to encourage college campuses to take all steps necessary to ensure that communications claimed as privileged remain confidential, including by claiming the privilege in any case where there is not a voluntary, written and time-limited release of information from the survivor of the sexual assault or the disclosure is not compelled by law.

COMMENTS

1. Need for This Bill

According to the author:

With increased attention to the alarming issue of sexual assault occurring at college campuses, there is a need for increased numbers of sexual assault counselors to provide a safe space and appropriate assistance for survivors of sexual assault.

Existing law provides a legal privilege to confidential communications between survivors and sexual assault counselors. However, there is significant confusion and divided opinions about whether this privilege extends to sexual assault counselors working with survivors who are students at a public college or university.

This uncertainty may deprive student survivors of sexual assault from having confidence that the advice and support they receive from sexual assault counselors is truly confidential. This is especially problematic given the sensitive and traumatic the discussions about a survivor's experience may be.

The support provided by sexual assault counselors to student survivors is intended to be inclusive, regardless of when or where the assault occurred. This can include accompanying the survivor to off-campus interactions with medical professionals, local law enforcement, and the judicial system. Without the clear security of the legal privilege and the confidentiality of communication that comes with it, student survivors may not be comfortable being accompanied by sexual assault counselors in these interactions, however beneficial their assistance may be otherwise.

Enduring an incident of sexual assault can negatively impact a student survivor's health, both mental and physical, as well as academic outcomes. Student survivors who should have access to a system that provides trauma-informed, coordinated, and confidential support. Having access to an on-campus sexual assault counselor who can provide confidential advice could mean the difference between a student survivor reaching out for help or staying silent.

2. Privileged Communications

Unless otherwise provided by statute, no person has a privilege to do any of the following: refuse to be a witness; refuse to disclose a matter, object, or writing; or to insist that another person does not testify, disclose a matter, or produce a writing. (Evidence Code § 911.) Evidence Code Section 911 codifies established law. (See *Chronicle Publishing Co. v. Superior Court* (1960) 54 C.2d 548, 565, quoting the text of Section 911.) A privilege may be an exemption from the duty to take the stand and testify altogether (e.g., criminal defendant or spouse), or an exemption from the duty to answer certain questions because of the privileged nature of the underlying subject (the usual witness's privilege). (9 Witkin Cal. Evid. Witnesses Section 60.) A privilege is personal to the holder; thus, it *must* be claimed and if not claimed, may be waived. (*Ibid.*)

3. The Sexual Assault Counselor-Victim Privilege

Current law defines “sexual assault counselor” to mean any person who has specified training and experience and who is either of the following:

- 1) A person who is engaged in any office, hospital, institution, or center commonly known as a rape crisis center, whose primary purpose is the rendering of advice or assistance to victims of sexual assault and who has received a certificate evidencing completion of a training program in the counseling of sexual assault victims issued by a counseling center that meets the criteria for the award of a grant [from Cal EMA to child sexual exploitation and child sexual abuse victim counseling centers and prevention programs]. (Evidence Code Section 1035.2 (a).)
- 2) A person who is employed by any organization providing the programs in [any public or private nonprofit agency for the assistance of victims and witnesses that is eligible for funding by the OES and that meets a number of requirements, including that the agency “provides comprehensive services to victims and witnesses of all types of crime], whether financially compensated or not, for the purpose of counseling and assisting sexual assault victims. (Evidence Code Section 1035.2 (b).)

A sexual assault counselor who provides services on the campus of a college or university, whether public or private, would presumably qualify as a “sexual assault counselor” under the definition of that term in subdivision (a) of Section 1035.2 if the counselor were either “*engaged* in any . . . institution, or [in a] center commonly known as a rape crisis center, whose primary purpose is the rendering of advice or assistance to victims of sexual assault.” The fact that the existing statute uses the word “engaged” means that the sexual assault counselor is not required to be a college or university employee. In fact, the counselor could be a volunteer while still being “engaged” by a campus-based program.

A sexual assault counselor who provides services on the campus of a college or university, whether public or private, would also presumably qualify as a “sexual assault counselor” under the definition of that term in subdivision (b) of Section 1035.2 if the counselor were *employed* by any nonprofit agency for the assistance of victims that provides services to all victims of all crimes. Thus, if the counselor were not an employee or volunteer with a public or private college or university-operated center, and was either an employee or volunteer with a victim assistance organization located on a college or university campus, the counselor would seem to be covered by the definition of “sexual assault counselor” in existing law.

4. Clarifying that a Counselor at a Public or Private College is Covered

Although existing law does not specify that it applies to rape crisis centers and victim assistance offices that are located on colleges and university campuses, the general terms used in existing law seem to encompass such centers and offices, as well as their services. Therefore, sexual assault counselors who provide services in such centers and office would seem to qualify as a “sexual assault counselor” for purposes of the sexual assault counselor-victim privilege in existing law. However, the author asserts that there is some confusion as to whether or not persons engaged in assisting victims of sexual assault on college campuses are included in the sexual assault counselor privilege so this bill specifically includes them.

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