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From: Clark@njcbw.org
Sent: Friday, April 10, 2015 2:18 PM
To: Comments Mailbox
Subject: NJCBW Comments
Attachments: 4 10 15 Cover Memo and Comments to Rules Comm.docx

Please find attached the NJ Coalition for Battered Women's comments on the Committee on the Rules of Evidence proposed Unified Mental Health Service Provider Evidentiary Privilege. Thanks you for your consideration of these comments.

Sandy Clark
Associate Executive Director
NJ Coalition for Battered Women
609-584-8107

TO: Supreme Court Committee on the Rules of Evidence
FROM: Sandy Clark, Associate Executive Director, NJ Coalition for Battered Women
RE: Comments on the Proposed Unified Mental Health Service Provider Evidentiary Privilege
DATE: April 10, 2015

The NJ Coalition for Battered Women resubmits its comments dated June 2, 2014 regarding the proposed Unified Mental Health Service Provider Privilege (see attached). The Coalition maintains that the points made within these comments justify the exclusion of the Victim Counselor Privilege from the proposed Unified Privilege.

Foremost among these points is that the weakening of the privilege for any victim counselor communications deemed to fall under the new unified privilege will potentially compromise the safety of victims of intimate partner violence. This is not because we fear that the location of the victim will be revealed, for example, but because we fear a batterer's retaliatory actions upon learning the victim disclosed the abusive actions of the batterer. Furthermore, the Coalition fears that should piercing become more frequent, the chilling effect upon victims could discourage them from seeking help. Due to the nature and purpose of victim counselor communications, which are substantially different than the nature and purpose of most mental health communications, for reasons outlined below, the victim counselor privilege needs to remain "absolute". Further, we do not think the strength of a privilege should be dependent on the specific credentials of a service provider but rather on the costs of piercing that privilege.

This need to protect victims of crime and their communications, in our opinion, should override the Committee's goal of providing a unified privilege for communications it views as equivalent. The Coalition disagrees that such communications are equivalent, for example, we do not believe a communication about situational or other depression stemming from chronic abuse is equivalent to a communication about depression stemming from a chemical imbalance. But in any case the context in which such a communication happens, that is, the context of a crime having been committed and the perpetrator of that crime often having strong legal interest in the content of that communication, is so different from a typical mental health communication that it should not be considered equivalent in any way.

The vast majority of states that have adopted a unified mental health provider privilege have not included their victim counselor privilege. The Coalition respectfully urges New Jersey to likewise exclude this privilege. For reasons stated above, we do not think this exclusion will in any way thwart the goal of the Committee.

In its Legislative Findings and Declarations, the NJ Prevention of Domestic Violence Act states that victims of domestic violence should be afforded the maximum protection the law can provide. We believe our strong Victim Counselor privilege embodies this objective and should remain as is for victims of domestic violence as well as other victims of crime.

New Jersey Coalition for Battered Women
Comments on the Supreme Court Committee on the Rules of Evidence
Discussion Draft of the Unified Mental Health Service Provider Evidentiary Privilege

Introduction

The New Jersey Coalition for Battered Women (NJCBW) supports the Supreme Court Committee on the Rules of Evidence pursuit of a unified mental health service provider privilege (UMHSPP) as a logical and well supported endeavor. In its January 19, 2011 Report (Appendix C), the Committee offers examples of many absurd situations that can and do arise under the current hierarchy of mental health privileges. It makes sense that communications between a person and a psychiatrist should be afforded the same evidentiary privilege as communications between a person and a psychologist, for example.

NJCBW differs from the Committee's current approach, however, as related to the victim counselor privilege (VCP). Though the Committee acknowledges the "absolute" nature of this privilege it states that the exclusion of this privilege from a UMHSPP would 1) be at odds with its mental health unification goals and 2) makes a presumption that communications regarding mental health treatment for victims are fundamentally different from and entitled to greater protection than communications regarding treatment for other mental health conditions. NJCBW respectfully disagrees that exclusion of the VCP would be at odds with the Committee's goals and strongly agrees with the presumption stated in #2.

Background

The VCP in New Jersey is based substantially on a law passed in the State in 1983 which provided for a Sexual Assault Counselor privilege (P.L. 1983, Chapter 116). In 1987, domestic violence advocates worked to expand that privilege specifically to protect communications between victims of domestic violence and domestic violence advocates. In 2001, rape care advocates successfully amended the law to clarify that a victim counselor included "rape care advocates" as defined in section 4 of P.L. 2001, c. 81 (C. 52:4B-52) which pertains to Sexual Assault Response Teams.

As defined, a victim counselor in New Jersey includes, among others, those who work with victims of domestic violence and sexual assault who work out of a domestic violence or sexual assault program. Domestic violence advocates, rape care advocates and volunteers of these programs including Domestic Violence Response Team (DVRT) and other volunteers, make up a substantial portion if not a majority of "victim counselors" in New Jersey. Domestic violence programs alone serve approximately 14,000 victims with in-person services and 45,000 with hot-line services annually.

The privilege was designed to cover communications with people who worked in domestic violence and sexual assault programs (victim counselor centers) the majority of whom did not have other credentials that would invoke privileged communications. This statement remains true today even though the staff of such programs now more often include some licensed clinical social workers or other mental health professionals who sometimes do short-term individual or group mental health "treatment" for persons suffering from being victimized. However, most domestic violence advocates, for example, are not mental health professionals

and offer a myriad of services for victims including safety planning; options counseling; housing, financial and legal advocacy; court accompaniment; children's services; and assistance with the application of programs and benefits.

Victim counselors are subject to mandatory reporting of child abuse and neglect.

Reasons Why the Victim Counselor Privilege Should Not Be Included in a Unified Mental Health Service Provider Privilege

1. <u>The Victim Counselor Privilege and Mental Health</u>

NJCBW maintains that despite the definitions included in the VCP, a victim counselor cannot "treat" an emotional or psychological condition in the clinical sense of the word. The use of this word in the VCP could not possibly have intended such a meaning given the definition of victim counselor – essentially one who has 40 hours of training and is under the control of a direct services supervisor at a victim counseling center who provides certain services. Note that not even the "direct services supervisor" is required to be a licensed therapist. All the other professions included in the Committee's draft privilege have specific educational, experiential and/or licensure requirements authorizing them to do clinical mental health counseling. Hence, despite an early, historic emphasis on the "counseling" aspects of victim-counselor communications, it can be argued that a victim counselor is not a mental-health service provider and such communications are not mental health communications. Victim counselors certainly provide a listening ear and emotional support, and in that sense provide therapeutic value to a victim, but they do not "treat", for example, a victim's depression stemming from being in an abusive situation. It is more accurate to say that a victim counselor treats an on-

going abusive situation or at least a current and potential threat of further abuse, by assisting the victim cope with and address that situation in some manner. (Note that by definition, domestic violence victims have an intimate, dating, familial or household relationship with the perpetrator and that some 70% of sexual assault victims at least know the perpetrator of the crime in some capacity, notwithstanding the fact that a victim of a violent crime could have been victimized by a stranger.) This is not to suggest that a licensed mental health professional cannot also be serving as a victim counselor while treating depression stemming from an act of violence. The term "victim counselor", however, only exists as it relates to the VCP. Unlike the professions discussed in the Committee's Report, a victim counselor is not in itself a profession.

NJCBW notes that even though the Committee based its draft in part on the Commission on Uniform Laws' Uniform Rules of Evidence Act, the Commission's own proposed rule change does not include the victim counselor privilege as part of a UMHSPP. The same can be said for California, also serving as a model for the Committee, which did not include its own version of a victim counselor privilege in its UMHSPP scheme. Furthermore, other states that have passed such a unified privilege over the years, largely do not include their victim counselor privilege. There are approximately thirteen states that have adopted a victim counselor or similar victim privilege that have also adopted a unified mental-health or similar privilege. Of these states, only Kentucky incorporated its sexual assault and victim advocate into its unified "counselor-client privilege." Hence, other states either do not consider the victim counselor privilege to be a mental health privilege per se, or consider it to be so fundamentally different in purpose and nature as to exclude it. Apparently these other states did not think that excluding it was at odds with its unification goals.

2. Safety – A Third Policy Goal of the Victim Counselor Privilege

Even if a victim counselor is considered a mental health service provider, NJCBW maintains that information disclosed by a victim of an act of violence involves an added dimension to the content and potential consequences of the disclosure that is not present in the communications of persons who seek help but are not victims of an act of violence. There is always a third and potentially dangerous person involved in communications with victims of violence. Because of this further and critical consideration in the case of the VCP, there is a third policy goal to this privilege in addition to utilization and privacy, namely, to protect the safety of the victim. Indeed this added dimension of the communications with a victim counselor makes it fundamentally different than other counseling communications and should in fact entitle such communications to greater protection.

Under the draft rule, the court will need to determine which parts of a communication are protected pursuant to the UMHSPP and which parts revert back to the current/original privileges. In general, clarifying which communications fall under which privilege may prove challenging. NJCBW believes this process will prove particularly difficult for victim counselor communications. For example, it would be problematic for a counselor or a court to try and separate out a communication about an emotional reaction to an act of violence from the details of that violent act. However, in the case of a victim, those very details are one of the reasons to protect such communications. Discovery of the communication itself, as well as any details of the crime, potentially places a victim in real and greater danger. Hence a victim is going to talk about the impact of the behavior of the perpetrator and typically, in the case of domestic violence, many abusive acts committed by that person in the course of talking about

the impact of the crime(s). This will most likely be in direct contradiction to the warnings of a domestic violence perpetrator not to discuss the abuse with anyone. In fact, non-stranger perpetrators typically do their best to isolate a victim from others for this very reason.

It takes great courage for a victim to discuss their victimization. This is not a consideration for other people who do not have criminal acts associated with their reaching out for help. Protecting the victim from the perpetrator's knowledge that this behavior was discussed, is one reason for this strong privilege. Not only does a victim disclose information about the abuse with great fear, trepidation and possibly terror, disclosure of these communications is not likely to cause only stigma and embarrassment, but also deep shame and anxiety and a possibility of re-victimization.

3. <u>The Victim Counselor Privilege Is Very Susceptible to Subpoena</u>

Moreover, and very importantly, because the communications between a victim and a victim counselor center around the commission of an act(s) of violence, they are far more likely to be of interest because of the frequency with which they involve court cases where the perpetrator is seeking information to help their defense. If only to try and find discrepancies and grounds for impeaching a victim/witness, such communications are far more pursued than other mental health communications. In New Jersey, domestic violence and rape care programs are routinely subpoenaed by defense attorneys. Just as routinely, due to the strength of the VCP, the programs' motions to quash are successful. Again, this is not an added burden shared by other mental health professions and their clients. Victims need a stronger

privilege in an environment whereby their communications are often sought in dangerous situations.

4. The Unified Mental Health Service Provider Privilege Would Weaken the Victim Counselor Privilege

The Committee has acknowledged the result of including the VCP in its proposed unified mental-health privilege, namely that it will subject it to many exceptions and otherwise weaken it. These exceptions do not currently apply to the VCP. Historically, and for the reasons explained above, unlike the other privileges proposed for inclusion in the unified mental-health privilege, the VCP is an absolute privilege. It is not entirely clear how protected the communications between a victim and a victim counselor deemed to be related to "mental-health" would be under the UMHSPP. NJCBW is concerned that by including the VCP with other privileges that have historically been weaker, there will be a watering down effect, which will weaken the VCP. In its November 10, 2010 Memorandum to the Committee on Evidence, the Subcommittee on Privileges mentions two cases in point. In two psychologist-patient cases involving victims, one, an alleged act of sexual assault, the psychologist-patient privilege was in fact pierced. Although we cannot know the outcome of these cases had they involved a victim counselor instead of a psychologist, NJCBW believes the VCP, for reasons cited above, should remain as strong as it is today.

NJCBW also believes that including the VCP as part of a UMHSPP would in fact lead to many renewed attempts to pierce it and such efforts would be more likely to succeed due to its weakening. It is anticipated that defense attorneys will argue over and over again that the

communications were made for purposes of addressing a victim's mental health and not subject to the original absolute privilege, which will also exist contemporaneously. We believe this will result in a decrease in safety for some victims and eventually a decrease in the comfort level of victims to confide in victim counselors.

A Functional Approach for the Victim Counselor Privilege Makes Sense

For these reasons, NJCBW does not believe the VCP should be included in the UMHSPP. However simply excluding the VCP from the UMHSPP does not address the disparity in protection a victim communication has depending on whether a victim speaks with a domestic violence advocate or a licensed clinical social worker, for example. We conclude that the only option for addressing this disparity is, in the case of the victim counselor privilege only, to use a functional approach; that is, to attach the victim-counselor privilege to the victim and the communications made, regardless of who the communication is with, provided it is with a victim counselor, mental health professional or other service provider deemed appropriate.

The Committee states that under a functional approach, communications regarding depression triggered by a violent crime would be treated differently than communications regarding depression triggered by other causes. For all the reason cited above, NJCBW believes that is exactly right – communications about violent crime depression should be treated differently than, for example, communications about post-partum depression, because the risks involved with disclosure of those respective communications are fundamentally different for all the reasons stated above.

Summary

NJCBW believes that victim-counselor communications are substantively and fundamentally different than other mental health communications and by their very nature are entitled to a stronger privilege as the law currently provides. **We urge the Committee to either exclude the VCP from the proposed UMHSPP, retaining its status quo, or that it take a functional approach as it relates to the VCP and allow it to attach to victims and communications had with other service providers.**

As advocates for victims of violence against women we appeal to the Committee to reconsider its approach on this issue and not weaken the strong protection victim-counselor communications have had since 1987. NJCBW would consider it a major setback in efforts to provide victims the maximum protection the law can provide.

Respectfully Submitted on June 2, 2014 by:

NJ Coalition for Battered Women
1670 Whitehorse Hamilton Square Road
Trenton, NJ 08690

Contact: Sandy Clark or Mark Ferraz, Esq. at 609-584-8107