

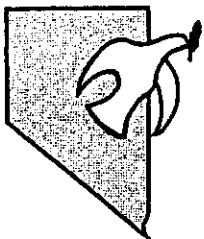
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Nevada Network Against Domestic Violence

May 1, 2003

Senator Mark Amodei, Chair
Senate Judiciary Committee
Nevada State Senate
Legislative Building
Carson City, NV 89710

Chairman Amodei and Members of the Committee;

My name is Susan Meuschke. I am the Executive Director of the Nevada Network Against Domestic Violence (NNADV), the statewide coalition of domestic violence programs in Nevada. I am here today to speak in favor of AB 160.

This bill covers three very important areas 1) wage assignments as part of the protective order process, 2) name changes, and 3) extending privilege to cover communications between victims and advocates. I will limit my comments to Sections 4-13 which deal with privilege.

First, let me acknowledge asking for privilege to be extended to communications between a victim and an advocate is not a matter that we have undertaken lightly. Domestic violence and sexual assault advocates routinely assure victims that their communication will be kept in confidence. We are not only mandated by state and federal law to keep those communications confidential but we also understand that the victim's physical and emotional safety may hinge on that confidentiality. Without such assurances, few victims would contact domestic violence or sexual assault programs or open up to advocates.

In coverage of a recent court decision that spoke directly to these issues the Review Journal wrote, "Victims turn to these shelters in their time of crisis and they do so trusting in the confidentiality that the shelters have worked hard to protect. How many

victims would pour out their hearts to a stranger if they thought that person in a matter of weeks would be recounting the whole conversation in open court for the entire world to hear? And how many volunteers would shelters be able to recruit if testifying against allegedly violent people was part of the job? We believe maintaining confidentiality is vital for the continued success of domestic violence shelters. Judge Cherry was right to conclude, "We need to protect the program. It's too valuable to the community."

Concerns have been expressed by some in the legal community that this statute would deprive them of obtaining critical information for their case or that extending privilege to "advocates" would somehow dilute the significance of privilege. While we certainly understand and are sensitive to these concerns we want to underscore that the intent of this bill is to insure the integrity of our programs and the safety of victims **not** to dilute the importance of privilege or to deprive the defense or the prosecution of access to essential information for their case. The benefit of extending privilege to cover communications between victims and advocates far outweighs any perceived detriment.

At this point I want to go through sections 6 to 13, providing comment and explanation as necessary:

- Section 6 – defines domestic violence
- Section 7 – defines sexual assault
- Section 8 – defines "victim" as anyone alleging an act of domestic or sexual violence. Our intent was to have this definition cover anyone who consults a victim's advocate for the purpose of securing advice, counseling or assistance.
- Section 9 – defines victim advocate, first we want to be clear that this definition does not include advocates who work for law enforcement or prosecution offices, rather it is limited to advocates working in non-profit programs. Second, we want to assure you that local domestic violence and sexual assault programs will be creating and monitoring the training described in this section. It will not place any undue burden on state, county or local governments. Domestic violence and sexual assault programs have been providing training for staff, volunteers and other community members for many years. We, at the Network, are currently assembling materials specifically relating to confidentiality and privilege which we will provide to local programs to include in their ongoing training.

- Section 10 – establishes the type of communication that is to be kept confidential and provides certain exceptions for third party disclosure. This bill is intended to cover all records concerning the victim and the services provided, as well as verbal communications between victim and advocate.
- Section 11 – provides for the victim to be the holder of the privilege, which they can waive.
- Section 12 – provides a list of individuals who can claim the privilege on behalf of the victim. And clarifies that the presumption of privilege exists unless there is evidence to the contrary. This listing is not intended to include the alleged perpetrator.
- Section 13 - Provides limited exceptions to this privilege including; where there is an intent in seeking services to enable a person to commit or plan to commit a crime or fraud; in order to make a report of suspected child or elder abuse; breach of duty; or other disclosure that would be required by statute.

I thank you for your time and attention to this testimony and I would be happy to answer any questions you might have for me.

danger of retaliation by the criminals against whom they testify. Some battered women desire to change their identities to escape their abusers. They and their children often face as much danger in leaving as informants do by testifying. The witness protection program should be expanded to protect these domestic violence victims and their children.

IV. Confidentiality Privileges

A number of states have enacted privileges to protect victim-counselor communications.¹²³ These privileges reflect sound public policy because counseling and shelter services offered by battered women's programs are the most effective means of protecting battered women.¹²⁴ State legislatures have recognized the importance of battered women's shelters and service programs in ending violence by funding them. The National Organization for Victim Assistance noted in 1985 that forty-nine states provided subsidies for domestic violence shelters.¹²⁵

Society has created certain privileges to protect the sanctity of certain relationships which it values, including the priest-penitent, attorney-client, and doctor-patient privileges. The victim-counselor privilege falls within this category. These privileges are justified on the theory that the societal utility of the relationship to be protected is considered more important than society's interest in having the evidence disclosed in court, and because the value of the relationship depends upon there being strict confidentiality between the parties. Professor Henry Wigmore described the four necessary conditions for the creation of these privileges:

1. The communication must originate in confidence that it will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
3. The relationship must be one which the community believes should be sedulously fostered; and
4. The injury that would inure to the relationship by the communication's disclosure must be greater than the benefit thereby gained for the correct disposal of litigation.¹²⁶

Wigmore's four necessary conditions have also been used to create or uphold a privilege to keep shelter records confidential. This need is recognized by the federal government's requirements that any domestic

123. This section relies heavily on Confidentiality Manual, *supra* note 79.

124. Lee H. Bowker & Lorie Maurer, *The Medical Treatment of Battered Women*, 12 *WOMEN & HEALTH*, 25, 39-40 (1987); DEL MARTIN, *BATTERED WIVES* 197 (1976).

125. CONFIDENTIALITY MANUAL, *supra* note 79, at 39-40.

126. 8 J. WIGMORE EVIDENCE § 2285 (McNaughton Rev. Ed. 1961).

violence program accepting Victims of Crime Act (VOCA)¹²⁷ or Family Violence Prevention and Services Act¹²⁸ funding have a written policy in place to keep shelter records confidential. These and similar state requirements show that state and federal governments recognize battered women's programs as vital to the community.

Furthermore, battered women expect confidentiality in their dealings with domestic violence hotlines, programs, and shelters. Most victims of domestic violence have been threatened with further assault or even death if they ever reveal what their abusers have done to them. Almost all battered women are terrified of these threats. Many victims of abusive behavior are embarrassed or ashamed about the abuse they have undergone, and/or their inability to control their abusers.¹²⁹ Without assurances of confidentiality, few battered women would contact domestic violence programs or open up to battered women's counselors. Furthermore, domestic violence counselors perform many of the same functions with battered women as do clergy, attorneys, and psychotherapists, whose relationships with the victims are usually protected as confidential. But most of these other professionals have failed battered women badly in the past by not understanding the dynamics of domestic violence, minimizing the abuse, blaming the victims for being abused, not knowing how to help the victims, or frequently using approaches which actually increase the likelihood that the abuse will escalate.¹³⁰ Many states¹³¹ have created victim-counselor privileges to protect

127. 42 U.S.C. § 10601-10607 (West Supp. 1993).

128. Pub. L. No. 98-457, Title III, §§ 302-313 (West Supp. 1993) (codified as reauthorized and amended at 42 U.S.C. §§ 10401-10413 (West Supp. 1993)).

129. But battered women cannot control the abuser's violence. See DUTTON, *supra* note 72, at 40.

130. Schechter & Gray, *supra* note 38, at 243-47.

131. See, e.g., ALA. CODE § 15-23-40 to 15-23-45 (1994); ALASKA STAT. §§ 9.25.30, 12.45.049, 25.35.052-059 (Michie Supp. 1994); ARIZ. REV. STAT. ANN. § 13-4401 *et seq.* (West Supp. 1994); CAL. EVID. CODE §§ 1037.1-1037.7 (West Supp. 1993); CONN. GEN. STAT. ANN. § 52-146k (West Supp. 1993); FLA. STAT. ANN. § 90.5035 (West Supp. 1994); ILL. ANN. STAT. ch. 110, para. 8-802.1-802.2 & ch. 40, para. 2312-27 (West Supp. 1993); IND. CODE ANN. § 35-37-6-1 - § 35-37-6-11 (Michie Supp. 1994); IOWA CODE ANN. § 217.30 (West 1994); KY. REV. STAT. ANN. § 422A.0506 (Michie Supp. 1994); LA. REV. STAT. ANN. § 46:2124.1 (West Supp. 1994); MA. REV. STAT. ANN. tit. 16, § 53-A (West Supp. 1994); MASS. GEN. L. ch. 233 § 201 & 20K (West Supp. 1995); MICH. COMP. LAWS ANN. § 600.2157a (West Supp. 1995); MINN. STAT. ANN. § 595.02(f) (West Supp. 1993); N.H. REV. STAT. ANN. §§ 17C-C:1-C:10 (1994); N.J. STAT. ANN. § 27:84A-22.14-§ 2A:84A-22.5 & 2A:84A-29 (West Supp. 1993); N.M. STAT. ANN. § 31-25-6 (1993); N.D. CENT. CODE § 14-07.1-18 (1994); 42 PA. CONS. STAT. ANN. § 5943.1 (West Supp. 1993) & 23 PA. CONS. STAT. ANN. §§ 6102 and 6116 (West Supp. 1993); UTAH CODE ANN. §§ 78-3c-14 (Michie Supp. 1994); WASH. REV. CODE ANN. § 70.125.065 (West Supp. 1993); and WYO. STAT. §§ 1-12-116 & 14-3-210 (1994).

battered women, victims of rape,¹³¹ or victims generally. Other states have recognized these privileges judicially.¹³² typically basing their decisions on some or all of the following arguments: (1) Wigmore's four conditions; (2) the similarity of the victim-counselor relationship to that of other relationships protected by other privileges; (3) extending an already existing privilege to the counselor who works under the supervision or control of someone holding a statutory privilege; (4) denying the privilege to someone unable to afford a private therapist; (5) denying the victim equal protection; (6) victim-counselor communications fall within the "zone of privacy" which state and federal constitutions protect; (7) the fact that most states require rape and/or domestic violence counselors to undergo specified training to be certified; and (8) the privilege is implied by accepting and contracting with the state agencies that distribute VOCA or Family Violence Prevention and Services Act or funding, or state programs with confidentiality requirements.

These victim-counselor privileges have been upheld in some states, even when challenged by defendants in criminal cases.¹³⁴ However, other states have required records to be turned over to the court in criminal cases for *in camera* review to determine which parts, if any, should be released after weighing whether the probative value of disclosing them outweighs the effect of its disclosure on the victim.¹³⁵ Of course, the testimony or records should be excluded if the matters are not relevant, highly prejudicial or available from other sources, or if the questioning is repetitious or harassing.¹³⁶

132. Studies of battered women indicate that large numbers of them are raped by their abusers. Walker, *supra* note 10, at 48, found that 59% were raped. Jacquelyn Campbell, *Nursing Assessment for Risk of Homicide with Battered Women*, Community Health Nursing Department, Wayne State University College of Nursing, Michigan, 1986, reports other studies showing that 59% (of nonhomicidal) to 75% (of homicidal) battered women experience marital rape.

133. See, e.g., *Marriage of Kern*, D.R.L. No. 84-3-03103 (Super. Ct., Spokane City, Wash. May 9, 1986) (holding that records of a domestic violence program are entitled to a qualified privilege); *People v. Pena*, 487 N.Y.S.2d 935 (N.Y. Sup. Ct. 1985) (recognizing a rape victim-counselor privilege); and *In re Pittsburgh Action Against Rape*, 428 A.2d 126 (Pa. 1981) (recognizing a qualified rape victim-counselor privilege).

134. See, e.g., *State v. J.G.*, 52 Crim. L. Rptr. (BNA) 1460 (No. A-5595-09074 N.J. Super Ct. App. Div. 1/6/93); *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988), *cert. denied*, 486 U.S. 1047 (1988); *Connaw. v. Wilson*, 602 A.2d 1290 (Pa. 1992); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

135. See, e.g., *State v. Shiffra*, 499 N.W.2d 719 (Wis. Ct. App. 1993); *Advisory Opinion of the House of Representatives*, 469 A.2d 1161 (R.I. 1983); *Comm't v. Two Juveniles*, 491 N.E.2d 234 (Mass. 1986); *Comm't v. Stockhammer*, 570 N.E.2d 992 (Mass. 1991) (allowing defense counsel to review sexual assault records); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994).

136. CONFIDENTIALITY MANUAL, *supra* note 79, at 222-27.

A. Nondisclosure Laws

To protect personal privacy, the federal government and many states prohibit disclosure of information or records of those seeking care or help for mental health,¹³⁷ public welfare,¹³⁸ drug and alcohol abuse,¹³⁹ or domestic violence problems.¹⁴⁰ These laws prohibit disclosure in the absence of the client's formal authorization, even when there is litigation. Nondisclosure laws are often enforced by civil or criminal sanctions against the institution or person that unlawfully disclosed the information. They apply to everyone working or volunteering at the institution, not just to the specified professional. For example, under the Family Violence Prevention and Services Act, domestic violence programs must provide assurance that the address or location of any shelter facility will not be disclosed except upon written authorization from the persons responsible for operating the program and documentation that procedures have been developed and implemented, including copies of the policies and procedure, to ensure the confidentiality of records pertaining to any individual who is provided prevention or treatment services by any program assisted under the Act.¹⁴¹

At least eleven states have a statutory communication privilege for communications between the battered woman and her counselor.¹⁴² In addition, at least twenty-three states restrict disclosure of information about their shelters and their residents, clients of domestic violence programs,¹⁴³ to the whereabouts of battered women, whether or not they are staying at a shelter,¹⁴⁴ or information received by clients served at

137. See, e.g., CAL. WELP. & INST. CODE § 5428 (Supp. 1984).

138. See Robert Weisberg & Michael Wolf, *Confidentiality Laws and State Efforts to Protect Abused and Neglected Children: The Need for Statutory Reform*, 18 FAM. L. Q. 143, 174 (1984).

139. See 21 U.S.C. § 1175 (1982); 42 U.S.C. § 4582 (1976).

140. CONFIDENTIALITY MANUAL, *supra* note 79.

141. 42 U.S.C. §§ 10408 and 10402(a)(e) (West Supp. 1995).

142. CONFIDENTIALITY MANUAL, *supra* note 79, at 236.

143. ALA. CODE § 30-6-8 (1994); ARIZ. REV. STAT. ANN. §§ 23-332 and 36-3009 (West Supp. 1994) (\$1,000 civil fine for disclosing shelter location); CAL. PENAL CODE § 273.7 (West Supp. 1995) (misdeemeanor to maliciously disclose domestic violence shelter location); CONN. GEN. STAT. § 8-360 (West Supp. 1995) (public agency forbidden to disclose domestic violence shelter location); N.H. REV. STAT. ANN. § 173-C:6 (1994) (domestic violence shelter absolutely privileged); N.Y. SOC. LAW § 439h (West Supp. 1995); N.Y. DOM. REL. LAW § 75-j (West Supp. 1995) (party seeking custody and residing in shelter shall not disclose shelter location); OXLA. STAT. ANN. tit. 43A, § 3-313 (West Supp. 1995) (court may not order disclosure of domestic violence shelter address); OR. REV. STAT. § 108.620 (1994) (domestic violence shelter locations confidential); 23 PA. CONST. STAT. ANN. § 6112 (West Supp. 1995) (nondisclosure of domestic violence program address in proceedings under abuse act).

144. CONFIDENTIALITY MANUAL, *supra* note 79, at 237, n.506 (lists various Arizona, Florida, Illinois, Massachusetts, New Jersey, New York, South Dakota, Texas, Utah, Washington, and Wisconsin statutes).

the shelter, often as a condition for receiving funding.¹⁴⁵ These laws, however, do not generally prohibit courts from compelling counselors to disclose records or testify about communications with battered women, although the very existence of a nondisclosure law and its legislative history may bolster the argument for the judicial creation of a battered woman-counselor communication privilege.¹⁴⁶

Statutes differ as to who holds the privilege. California, Connecticut, Illinois, New Hampshire, Pennsylvania, and Wyoming make clear that the battered woman is the sole holder of the privilege.¹⁴⁷ Alaska and North Dakota give the privilege both to the battered woman and to those working at a domestic violence program.¹⁴⁸ New Hampshire and North Dakota protect the disclosure of a domestic violence shelter's location by also prohibiting the battered woman from revealing it, even if she so desires.¹⁴⁹ Other states prohibit who may be compelled to testify.¹⁵⁰ Statutes may also clarify whether the privilege survives the client's death or disability and, if so, who holds it.

B. Child Abuse Reporting Requirements

Although battered women's program privileges also cover information about children, other statutes provide exceptions to battered women's privilege or nondisclosure statutes when the information regards reports of suspected child abuse or neglect,¹⁵¹ or children in need of aid proceedings. However, Connecticut's and Pennsylvania's battered woman-counselor privilege statutes have no exception for reporting child abuse or neglect. North Dakota's statute makes reporting and testifying optional if the counselor deems it necessary to protect a child or if compelled to disclose by a court. Several states, including Alaska,

145. ARIZ. REV. STAT. ANN. § 36-3005 (West Supp. 1994); CONN. GEN. STAT. § 46b-38c (West Supp. 1995); MINN. STAT. ANN. § 13.80 (West Supp. 1995); MISS. CODE ANN. § 93-21-107 (1994); MO. REV. STAT. § 455.230 (Vernon Supp. 1995); NEB. REV. STAT. § 42-918 (1994); NEV. REV. STAT. § 217.420 (Michie 1995); N.H. REV. STAT. ANN. § 173-B:21 (1994); OHIO REV. CODE ANN. § 3113.36 (West Supp. 1993); OKLA. STAT. tit. 43A § 3-313 (West Supp. 1995); OR. REV. STAT. § 108.620 (1994); S.D. CODIFIED LAWS ANN. § 25-10-20 (1994).

146. See, e.g., *Allred v. Alaska*, 554 P.2d 411 (Alaska 1976) (creating a social worker-patient psychotherapist testimonial privilege).

147. CONFIDENTIALITY MANUAL, *supra* note 79, at 266.

148. *Id.*

149. *Id.* at 267.

150. Pennsylvania and Wyoming prohibit the domestic violence counselor from testifying and Michigan makes the privileged information inadmissible.

151. See, e.g., ALASKA STAT. § 25.35.054 (Michie Supp. 1994); CAL. EVID. CODE § 1037.2 (West Supp. 1995); ILL. ANN. STAT. ch. 40, para. 2312-27 (West Supp. 1995); MICH. COMP. LAWS § 600.2157a (West Supp. 1995); MICH. STAT. ANN. § 27A.2157(1) (West Supp. 1995); WYO. STAT. § 14-3-21a (1994).

Louisiana, Massachusetts, and New Hampshire (the latter three where the perpetrator is being prosecuted criminally), require the court to do a balancing test *in camera*, before ruling on the admissibility of testimony or records.¹⁵²

C. Waiver of Privileges

Privileges are often deemed waived when third parties are present at the conversation, even when the confidence was inadvertently overheard by a bystander. But some third parties, such as translators, are considered reasonably necessary for the communication to take place, so their presence does not waive the privilege. In some states statutes establishing privileges for battered woman's and crime victim's communications clarify that the privilege is meant to cover group counseling sessions.¹⁵³ But the presence of a police officer generally waives the privilege or confidentiality unless either the presence was unknown to the client¹⁵⁴ or the officer was required to be present.¹⁵⁵

V. Jurisdiction, the UCCJA, and Discovery

Many battered women are faced with the terrifying obstacle of having to reveal their addresses in order to get their cases into court, often the only forum which can even begin to give them the protection, custody, divorce, and/or permission to relocate with children that they need. In order for the court to ascertain whether it has jurisdiction, the person bringing the suit is expected to include his or her address right in the complaint or petition. When the complainant is not represented by counsel, this address informs the responding party where to answer the complaint or petition once served. Despite the myth that virtually all parties are represented in family court proceedings, the reality is that representation is the exception.¹⁵⁶

Although some states have court rules or statutes permitting a battered woman to keep her address inaccessible to the respondent or his attorney,¹⁵⁷ the very fact that a case is brought in a particular court frequently

152. CONFIDENTIALITY MANUAL, *supra* note 79, at 337-38.

153. These states include Alabama, Alaska, California, Louisiana, Massachusetts, Michigan, New Jersey, New Mexico and Pennsylvania, according to CONFIDENTIALITY MANUAL, *id.* at 350.

154. See *People v. Harris*, 456 N.Y.S.2d 694 (N.Y. 1982), cert. denied, 460 U.S. 1047 (1983); *Blackmon v. State*, 633 P.2d 669 (Alaska 1982).

155. 81 AM. JUR. 2d § 234.

156. ADAMS & GABANEY, *supra* note 81, at 88 (noting that only 25% of women were represented in domestic violence cases, and only 10% of women were represented when their abusers were not married to them).

157. See, e.g., TEX. FAM. CODE ANN. § 71.111 (Michie Supp. 1994).