

A Bill for an Act Relating to the Hawaii Rules of Evidence.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to include within the Hawaii Rules of Evidence a privilege that would shield confidential communications made by a victim of sexual assault, domestic violence or child abuse to a qualified counselor.

This Act is based in part on the second alternative in The Final Report of the Committee on Hawaii Rules of Evidence, ("Final Report") prepared for the Hawaii Supreme Court and for the Legislature pursuant to Senate Concurrent Resolution No. 136 and Senate Resolution No. 118, Fifteenth Legislature, 1990. The other version would permit disclosure of otherwise confidential victim-counselor communications upon a showing of substantial relevance and pursuant to an in camera inspection procedure. This Act differs from both versions in the Final Report because it creates two categories of victim counselor: sexual assault counselors and domestic violence victims' counselors. These categories follow the Massachusetts law.

The Legislature notes that one feature of this Act is that it expressly excludes counselors who do not operate "independently of any law enforcement agency, prosecutor's office, or the department of human services." With this feature, the privilege reflects the strong public interest in encouraging victims of violence to obtain needed counseling while assuring that the privilege will not suppress statements made in the law-enforcement context.

SECTION 2. Section 346-244, Hawaii Revised Statutes, is amended to read as follows:

"[§346-244] Admissibility of evidence. The physician-patient privilege, the psychologist-client privilege, [and] the spousal privilege, and the victim-counselor privilege shall not be grounds for excluding evidence in any judicial proceeding resulting from a report pursuant to this part."

SECTION 3. Section 350-5, Hawaii Revised Statutes, is amended to read as follows:

"§350-5 Admissibility of evidence. [Neither the] The physician-patient privilege, the psychologist-client privilege, [nor] the spousal privilege, and the victim-counselor privilege shall not be [ground] grounds for excluding evidence in any judicial proceeding resulting from a report of child abuse or neglect pursuant to this chapter."

SECTION 4. Section 587-44, Hawaii Revised Statutes, is amended to read as follows:

"§587-44 Admissibility of evidence. The physician-patient privilege, the psychologist-client privilege, [and] the spousal privilege, and the victim-counselor privilege shall not be available to exclude evidence of imminent harm, harm, or threatened harm in any proceeding under this chapter."

SECTION 5. Section 626-1, Hawaii Revised Statutes, is amended by

adding a new rule to be appropriately designated and to read as follows:

“Rule Victim-counselor privilege. (a) Definitions. As used in this rule:

- (1) “Domestic violence victims’ program” means any refuge, shelter, office, safe home, institution or center established for the purpose of offering assistance to victims of abuse through crisis intervention, medical, legal, or support counseling.
- (2) “Sexual assault crisis center” means any office, institution, or center offering assistance to victims of sexual assault and the families of such victims through crisis intervention, medical, and legal, or support counseling.
- (3) A “victim” is a person who consults a victim counselor for assistance in overcoming any adverse emotional or psychological effect of sexual assault, domestic violence, or child abuse.
- (4) A “victim counselor” is either a sexual assault counselor or a domestic violence victims’ counselor. A sexual assault counselor is a person who is employed by or is a volunteer in a sexual assault crisis center, has undergone a minimum of thirty-five hours of training and who is, or who reports to and is under the direct control and supervision of, a registered social worker, nurse, psychiatrist, psychologist, or psychotherapist, and whose primary function is the rendering of advice, counseling or assistance to victims of sexual assault. A domestic violence victims’ counselor is a person who is employed by or is a volunteer in a domestic violence victims’ program, has undergone a minimum of twenty-five hours of training and who is, or who reports to and is under the direct control and supervision of, a direct service supervisor of a domestic violence victims’ program, and whose primary function is the rendering of advice, counseling, or assistance to victims of abuse.
- (5) A “victim counseling program” is any activity of a domestic violence victims’ program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor’s office, or the department of human services.
- (6) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the provision of counseling or treatment services to the victim or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to a victim counselor for the purpose of counseling or treatment of the victim for the emotional or psychological effects of sexual assault, domestic violence, or child abuse or neglect, and to refuse to provide evidence that would identify the name, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim.

(c) Who may claim the privilege. The privilege may be claimed by the victim, the victim’s guardian or conservator, or the personal representative of a deceased victim. The person who was the victim counselor at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the victim.

(d) Exceptions. There is no privilege under this rule:

- (1) Perjured testimony by victim. If the victim counselor reasonably believes that the victim has given perjured testimony and a party to the proceeding has made an offer of proof that perjury may have been committed.
- (2) Physical appearance and condition of victim. In matters of proof concerning the physical appearance and condition of the victim at the time of the alleged crime.
- (3) Breach of duty by victim counselor or victim counseling program. As to a communication relevant to an issue of breach of duty by the victim counselor or victim counseling program to the victim.
- (4) Mandatory reporting. To relieve victim counselors of any duty to refuse to report child abuse or neglect under chapter 350, domestic abuse under chapter 586, or abuse of a dependent adult under part X of chapter 346, and to refuse to provide evidence in child abuse proceedings under chapter 587.
- (5) Proceedings for hospitalization. For communications relevant to an issue in proceedings to hospitalize the victim for mental illness or substance abuse, or in proceedings for the discharge or release of a victim previously hospitalized for mental illness or substance abuse.
- (6) Examination by order of court. If the court orders an examination of the physical, mental, or emotional condition of a victim, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose of which the examination is ordered unless the court orders otherwise.
- (7) Condition an element of claim or defense. As to a communication relevant to the physical, mental, or emotional condition of the victim in any proceeding in which the victim relies upon the condition as an element of the victim's claim or defense or, after the victim's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.
- (8) Proceedings against the victim counselor. In any administrative or judicial proceeding in which the competency or practice of the victim counselor or of the victim counseling program is at issue, provided that the identifying data of the victims whose records are admitted into evidence shall be kept confidential unless waived by the victim. The administrative agency, board or commission shall close to the public any portion of a proceeding, as necessary to protect the confidentiality of the victim."

SECTION 6. This Act shall not apply to proceedings begun before its effective date.

SECTION 7. Statutory material to be repealed is bracketed. New statutory material is underscored.¹

SECTION 8. This Act shall take effect upon its approval.

(Approved June 12, 1992.)

Note

1. Edited pursuant to HRS §23G-16.5.