
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 331 **Hearing Date:** March 21, 2017
Author: Jackson
Version: February 13, 2017
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Evidentiary Privileges: Domestic Violence Counselor-Victim Privilege*

HISTORY

Source: University of California

Prior Legislation: AB 267 (Chau), Ch. 123, Stats. 2013
AB 729 (Hernandez), 2013-14 Legislative Session, vetoed
SB 407 (Romero), Ch. 206, Stats. 2007
AB 1133 (Harman), 2005, failed Sen. Judiciary Committee
AB 22 (Lieber), Ch. 240, Stats. 2005
SB 2061 (Morrow), Ch. 72, Stats. 2002

Support: Unknown

Opposition: None known

PURPOSE

The purpose of this bill is to include within the definition of “domestic violence victim service organization” a public or private institution of higher education.

Existing law generally provides that no person has a privilege to refuse to be a witness or to refuse to disclose any matter or to refuse to procedure any writing, object or other thing. (Evid. Code, § 911.)

Existing law provides that communications made in the context of specified relationships (husband-wife, lawyer-client, physician-patient, clergy member-penitent, sexual assault victim-counselor, domestic violence victim-counselor, human trafficking caseworker-victim) are privileged, entitling the holder of the privilege to refuse to disclose, and to prevent another from disclosing, the communication. (Evid. Code, §§ 954, 980, 994, 1014, 1033, 1037.5, 1038.)

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. (Evid. Code, § 912, subd. (a).)

Existing law requires a domestic violence counselor who received or made a communication subject to this privilege to claim the privilege whenever he or she is present when the communication is sought to be disclosed. (Evid. Code, § 1037.6.)

Existing law defines “confidential communication” as any information, including but not limited to, written or oral communication, transmitted between the victim and the counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses to information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosure is necessary for the transmission of the information or an accomplishment of the purposes for which the domestic violence counselor is consulted. The term includes all information regarding the facts and circumstances involving all incidences of domestic violence, as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser. (Evid. Code, § 1037.2, subd. (a).)

Existing law defines “domestic violence counselor” to mean a person who is employed by a domestic violence victim service organization, as defined, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of domestic violence and who has at least 40 hours of training, as specified. (Evid. Code, §1037.1, subd. (a)(2).)

Existing law defines “domestic violence victim service organization to mean a nongovernmental organization or entity that provides shelter, programs, or services to victims of domestic violence and their children, including, but not limited to the following:

- Domestic violence shelter-based programs; and
- Other programs with the primary mission to provide services to victims of domestic violence whether or not that program exists in an agency that provides additional services. (Evid. Code, §1037.1, subd. (b).)

This bill adds a public or private institution of higher learning to the definition of a “domestic violence victim service organization.”

COMMENTS

1. Need for This Bill

According to the author of this bill:

SB 331 would provide consistency for campus-based counseling services by amending Evidence Code §1037.1 to include public and private institutions of higher education in the definition of a domestic violence counselor. Campus-based counselors will be subject to the privilege a victim of domestic violence holds to refuse to disclose, and to prevent another from disclosing, a confidential communication between herself and her counselor.

The special relationship of trust developed between a victim of domestic violence and a domestic violence counselor is supported by the confidential nature of their communications and preserved through counselor-victim privilege. Currently, this privilege is provided for campus sexual assault counselors in California’s colleges and universities, but it does not exist for campus domestic violence counselors.

In order to preserve the integrity of this relationship of trust between survivors of domestic violence and their on-campus counselors, an assurance of confidentiality must be present, and this confidentiality must be protected in law as a counselor-victim privilege. Absent an assurance of confidentiality, communications may be chilled or guarded, thus impacting the effectiveness of counseling and the progression of healing.

2. Evidentiary Privileges

In general, a person who is subject to a legal proceeding must disclose any matter or produce any writing, object or other thing requested of the person. There are exceptions which include the constitutional right not to incriminate oneself (U.S. Const., 5th Amend.; Pen. Code, §§ 930, 940) and confidential communications between persons with certain professional relationships, such as communications made between a lawyer and his or her client.

Under existing law, communications between specified counselors and victims are confidential communications, and may not be disclosed to third persons unless the privilege is waived or the court compels disclosure. These privileges apply to communications between a counselor or caseworker and a victim of sexual assault, domestic violence, or human trafficking. A victim may refuse to disclose and may prevent another from disclosing a confidential communication if the privilege is claimed by the holder of the privilege or a person authorized to claim the privilege or by the counselor. (Evid. Code, §§ 1035 et seq. and 1037 et seq.) In order to establish this privilege, the counselor or caseworker must have completed the required training and must be employed by a qualifying organization that provides specified services. (Evid. Code, § 1037.1.)

Generally, evidentiary privileges are disfavored because it prevents the disclosure of otherwise relevant and admissible information in a criminal case. "For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." (*Jaffee v. Redmond* (1996) 518 U.S. 1 (citing *United States v. Bryan* (1950) 339 U.S. 323, 331).) Because it creates exceptions to the general rule that information cannot be withheld from being disclosed, privileges must be narrowly construed. (*Sullivan v. Superior Court for San Mateo County* (1972) 29 Cal.App.3d 64.)

The Legislature has recognized that certain relationships should be protected under statutory privilege, generally a professional who provides counseling services with a person who receives those services. The purpose of this privilege is to foster the effective rendering of the professional service offered by the counselor. Relevant to this bill, in 1986 the Legislature created a privilege between victims and domestic violence counselors. (SB 2040, Morgan, Ch. 854, Statutes of 1986). The Senate Judiciary Committee analysis of the bill explained the purpose of the bill was to encourage full and free disclosure between a victim and counselor in domestic violence situations. Victims who are aware that the counselor cannot guarantee confidentiality may not use the service.

3. Effect of This Legislation

This bill would specify that a public or private institution of higher education may qualify as a domestic violence victim service organization for purposes of establishing privilege between a

domestic violence counselor and a victim. Under existing law, the definition of a domestic violence victim service organization applies to “a nongovernmental organization or entity that provides shelter, programs, or services to victims of domestic violence and their children. . . .” (Evid. Code, § 1037.1, subd. (b).) The term “nongovernmental” indicates that the organization or entity is unassociated with government and is non-profit, therefore public and private institutions may not qualify as a domestic violence victim service organization. Because evidentiary privileges must be narrowly construed (*Sullivan v. Superior Court, supra*, 29 Cal.App.3d 64), this definition may exclude governmental organizations or private for-profit organizations that otherwise meet the requirements under Evidence Code section 1037.1. As stated by the author, this similar restriction is not found in the Evidence Code section related to privilege between a sex assault counselor and victim. (Evid. Code, § 1035.2.)

This bill expands the qualifying employment to a private or public institution of higher education but retains the other requirements for training of the counselor and services provided by the organization. Extending the privilege to organizations or entities that are essentially the same as those in the existing domestic violence counselor-victim privilege statute would be reasonable.

Do colleges and universities who provide counseling and services to domestic violence victims serve the same function as nongovernmental organizations and entities whose main purpose is to aid domestic violence victims? Could extending this privilege have a negative impact on the ability of accused students to defend themselves in administrative hearings related to the domestic violence incident or incidents conducted by the school?

4. Support

The University of California is the sponsor of this bill and writes in support stating:

As a result of recent changes in federal and state law and University policy, the University has additional obligations to respond to cases of sexual violence and domestic violence, and protect the confidentiality of those involved. Seeking to be a standard bearer in sexual violence prevention and response, the University established on each campus an independent CARE: Advocate Office for Sexual and Gender-Based Violence and Sexual Misconduct. The CARE offices include confidential advocates serving University students, faculty and staff who have experienced sexual violence, including domestic violence and sexual assault. Existing state law (Evidence Code §§ 1035.2) allows the University’s CARE advocates and other counselors to qualify as sexual assault counselors who can hold privilege, but the current statutory definition does not allow them to qualify as domestic violence counselors who enjoy the same benefit.

Privileged communication is of the utmost importance in both types of cases. The University believes that SB 331 will encourage more students, faculty, and staff at the UC and other public institutions of higher education to seek assistance for domestic violence issues. Providing all members of our campus communities with statutorily guaranteed confidentiality will alleviate many of the fears and concerns that victims may have in seeking assistance, including concerns that their private information will be disclosed or used in an unauthorized manner.