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THE SEXUAL ASSAULT COUNSELOR - VICTIM PRIVILEGE

by Jay C. Howell

Our Florida Statutes, §90.5035, provide that communications between a sexual assault counselor and a victim are confidential. This protection applies as long as the communication is not intended to be disclosed to persons other than those present to further the interest of the victim in the interview, those persons necessary for the transmission of the communication, and those persons to whom disclosure is reasonably necessary to accomplish the purpose for which the sexual assault counselor is consulted.

This same section provides that a victim has a privilege to refuse to disclose and to prevent any disclosure concerning these confidential communications made to a sexual assault counselor. This is an important right of the unfortunate victim of a sexual crime. It is also a right that is often legally challenged by the accused.

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A recent decision of the Florida Fourth District Court of Appeal has analyzed and further explained the impact of this important privilege. In *State vs. Pinder*, (Fourth District Court of Appeal, decided on July 22, 1996), the defendant was charged with attempted first degree murder, kidnapping, burglary, and sexual battery. The defendant moved to compel the testimony of two counselors from the Palm Beach County Victims Services or, in the alternative, for the judge to conduct a hearing to question the counselors and inspect their files. The trial judge ordered the Palm Beach County Victims Services to make its file available to the judge for inspection, and for the two counselors to make themselves available to respond to the court's inquiries regarding the statements made to them by the victim.

The State of Florida appealed the trial judge's order and the Fourth District Court of Appeal ruled that there is no general constitutional right, on behalf of the accused, to discovery in a criminal case. The Court concluded that the privacy of the communication makes the protected relationship between sexual assault counselor and victim meaningful and effective and that routine disclosure of counseling confidences would discourage those in need from seeking help or from using counseling to their maximum benefit. Even disclosures to the trial judge intrude on the rights of the victim and dilutes this statutory privilege.

The Court also ruled that the accused had made no factual showing sufficient to pierce the privilege and to justify an inspection by the Court. The appellate court concluded that if the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected, and that an uncertain privilege is little better than no privilege at all.

Accordingly, the Court granted the state's petition and **reversed** the trial court's order requiring the disclosure.

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This is an extremely significant court decision which examines the historical importance of the confidentiality provisions of our statutes and establishes the legal rationale that serves as the foundation for these protected communications. Because of the careful analysis by the Court and its review of the legal and factual history of privileged communication with sexual assault counselors, this decision will certainly be used in the future to defend against other attempts to challenge this statutory right. Victims and advocates should be familiar with this appellate court decision.