

STORAGE NAME: h1163a.jo.doc
DATE: February 21, 2002

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 1163
RELATING TO: Sexual Assault Counselors
SPONSOR(S): Representatives Fiorentino, Harrell, and others
TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
- (2) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
- (3) COUNCIL FOR SMARTER GOVERNMENT
- (4)
- (5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

Current law defines confidential communications between a victim of sexual abuse or battery and a sexual assault counselor, and provides that such communications, records made in the course of such communications, and any advice by a sexual assault counselor to a victim in the course of their relationship, are privileged.

This bill provides sexual assault victims the same privilege with respect to "trained volunteers" as they currently enjoy with respect to sexual assault counselors, and defines "trained volunteers."

Current law specifies that a public employee or officer may not disclose identifying information or materials regarding a victim of certain statutorily specified sex crimes unless such information or materials are being provided to persons assisting in the investigation or prosecution of the alleged offense, the defendant, the defendant's attorney, a person specified in a court order, or organizations authorized to receive criminal intelligence information.

This bill provides that a public employee or officer may disclose identifying information or materials pertaining concerning alleged victims of sexual assault or battery to a rape crisis center or sexual assault counselor.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain: This bill expands an evidentiary privilege.

B. PRESENT SITUATION:

See Section-by-Section Analysis.

C. EFFECT OF PROPOSED CHANGES:

See Section-by-Section Analysis.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. amending s. 90.5035, F.S., relating to sexual assault counselor-victim privilege.

Present Situation. Rules of evidence determine what information can, and cannot, be admitted for use in civil and criminal trials. Historically, courts developed these rules over time as common law. Among these were various rules called privileges that, for policy reasons, allowed witnesses to refuse to testify about their private communications with someone else with whom they shared a relationship that the courts regarded as important. Examples include the relationship between attorney and client; clergy and penitent; doctor and patient; and husband and wife.

The Florida Evidence Code ("the Code"), ch. 90, F.S., was enacted by the Legislature in 1976 and became effective July 1, 1979.¹ Section 90.501, F.S., specifies that, unless expressly provided for in the Code, no person in a legal proceeding has a privilege to:

- "[r]efuse to be a witness";²
- "[r]efuse to disclose any matter";³
- "[r]efuse to produce any object or writing";⁴ or
- "[p]revent another person from being a witness, from disclosing any matter, or from producing any object or writing."⁵

¹ See s. 1, ch. 76-237, L.O.F.

² Section 90.501(1), F.S.

³ Section 90.501(2), F.S.

⁴ Section 90.501(3), F.S.

Accordingly, the Code provides for those instances in which a person may claim privilege in legal proceedings. For example, the Code defines journalist,⁶ lawyer-client,⁷ psychotherapist-patient,⁸ and husband-wife⁹ privileges (among others).

Section 90.5035, F.S., provides for a sexual assault counselor-victim privilege and defines terms relating to this privilege, including "rape crisis center,"¹⁰ "sexual assault counselor"¹¹ and "victim."¹² Section 90.5035(1)(d), F.S., currently reads:

A communication between a sexual assault counselor and a victim is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the victim in the consultation, examination, or interview.
2. Those persons necessary for the transmission of the communication.
3. Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor is consulted.

Confidential communications between a victim and a sexual assault counselor, records made in the course of such confidential communications, and any advice by the sexual assault counselor in the course of the relationship with the victim "may be disclosed only with the prior written consent of the victim."¹³ This privilege may be asserted by the victim,¹⁴ the victim's attorney,¹⁵ the victim's guardian or conservator,¹⁶ the personal representative of a deceased victim,¹⁷ or the sexual assault counselor.¹⁸ However, the sexual assault counselor may claim the privilege only on behalf of the victim.¹⁹

Effect of Proposed Changes. This bill amends s. 90.5035, F.S., to provide sexual assault victims the same privilege with respect to "trained volunteers" as they currently enjoy with respect to sexual assault counselors.

⁵ Section 90.501(4), F.S.

⁶ See s. 90.5015, F.S.

⁷ See s. 90.502, F.S.

⁸ See s. 90.503, F.S.

⁹ See s. 90.504, F.S.

¹⁰ Section 90.5035(1)(a) defines "rape crisis center" as "any public or private agency that offers assistance to victims of sexual assault or sexual battery and their families."

¹¹ Section 90.5035(1)(b) defines "sexual assault counselor" as "any employee of a rape crisis center whose primary purpose is the rendering of advice, counseling, or assistance to victims or sexual assault or sexual battery."

¹² Section 90.5035(1)(c) defines "victim" as "a person who consults a sexual assault counselor for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by a sexual assault or battery, or an alleged or attempted sexual assault or battery."

¹³ Section 90.5035(2), F.S.

¹⁴ See s. 90.5035(3)(a), F.S.

¹⁵ See *id.*

¹⁶ See s. 90.5035(3)(b), F.S.

¹⁷ See s. 90.5035(3)(c), F.S.

¹⁸ See s. 90.5035(3)(d), F.S.

¹⁹ See *id.*

This bill defines a "trained volunteer" as a person who:

- volunteers at a rape crisis center;
- has completed 30 hours of training by the rape crisis center in assisting victims of sexual violence and related topics;
- is supervised by members of the staff of the rape crisis center; and
- is included on a list of volunteers that is maintained by the rape crisis center.

Section 2. amending s. 794.024, F.S., relating to governmental disclosure of information or materials relating to specified sex crimes.

Present Situation. Section 794.011(1)(h), F.S., defines "[s]exual battery" as:

oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

Chapter 794, F.S., defines a number of different crimes involving sexual battery. Chapter 800, F.S., defines the crimes of "unnatural and lascivious act," "exposure of sexual organs," "lewd or lascivious battery," "lewd or lascivious molestation," lewd or lascivious conduct" and "lewd or lascivious exposure." Section 827.03, F.S., defines the crimes of "[a]buse, aggravated abuse and neglect of a child. Section 827.04, F.S., defines crimes involving "[c]ontributing to the delinquency or dependency of a child." Section 827.071, F.S. defines crimes involving "[s]exual performance by a child."

Under s. 794.024(1), F.S.,

[a] public employee or officer who has access to the photograph, name, or address of a person who is alleged to be the victim of an offense described in this chapter, chapter 800, s. 827.03, s. 827.04, or s. 827.071 may not willfully and knowingly disclose it to a person who is not assisting in the investigation or prosecution of the alleged offense or to any person other than the defendant, the defendant's attorney, or a person specified in an order entered by the court having jurisdiction of the alleged offense, or to organizations authorized to receive such information pursuant to s. 119.07(3)(f).

Violation of s. 794.024(1), F.S., is a second-degree misdemeanor.²⁰

Effect of Proposed Changes. This bill amends s. 794.024(1), F.S., to provide that a public employee or officer may disclose identifying information or materials regarding an alleged victim of any of the sex crimes specified in that section to a rape crisis center or sexual assault counselor.

Section 3. provides an effective date of July 1, 2002.

²⁰ See s. 794.024(2), F.S.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This act does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This act does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The Fourteenth Amendment to the United States Constitution provides that a state may not “deprive any person of life, liberty, or property, without due process of law[.]” In *Brady v. Maryland*,²¹ the

²¹ 373 U.S. 83 (1963).

Supreme Court of the United States ruled that due process requires a state to turn over evidence in its possession to a criminal defendant that is both favorable to the defendant and material to the defendant's guilt or punishment (so-called "*Brady* material"). Hence, as with other privileged information, if communications between a "trained volunteer" and a victim of sexual assault or battery are already in state custody, the privilege may have to yield. However, the Court has also suggested that absolute privileges, and specifically absolute sexual assault counselor-victim privileges analogous to that in s. 90.5035, F.S., are more likely to withstand *Brady* scrutiny than privileges that allow for exceptions.²²

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill excludes from the definition of "trained volunteer" someone with 30 or more hours of training in assisting victims of sexual violence, if less than 30 hours of that person's training was provided by the rape crisis center where he or she currently volunteers.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 12, 2002, the Committee on State Administration adopted an amendment clarifying that identifying information or materials on victims of specified sex crimes may be provided by public employees or officers to only those rape crisis centers or sexual assault counselors that provide "treatment to the victim."

On February 21, 2002, the Committee on Judicial Oversight adopted an amendment to the Committee on State Administration's traveling amendment. This amendment changes "treatment to the victim" to "services to the victim."

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Lauren Cyran, M.S.

Staff Director:

J. Marleen Ahearn, Ph.D., J.D.

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

David L. Jaroslav, J.D.

Staff Director:

Nathan L. Bond, J.D.

²² See *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (citing 42 Pa. Cons. Stat. § 5945.1(b), Pennsylvania's absolute sexual assault counselor-victim privilege) (dicta).