

5.10 Rape Crisis Counselor or Domestic Violence Advocate (CPLR 4510)

(a) Definitions. When used in this section, the following terms shall have the following meanings:

1. “Rape crisis program” means any office, institution or center which has been approved pursuant to subdivision fifteen of section two hundred six of the public health law, as added by chapter 432 of the laws of 1993, offering counseling and assistance to clients concerning sexual offenses, sexual abuses or incest.

2. “Rape crisis counselor” means any person who has been certified by an approved rape crisis program as having satisfied the training standards specified in subdivision fifteen of section two hundred six of the public health law, as added by chapter 432 of the laws of 1993, and who, regardless of compensation, is acting under the direction and supervision of an approved rape crisis program.

3. “Client” means

(i) any person who is seeking or receiving the services of a rape crisis counselor for the purpose of securing counseling or assistance concerning any sexual offenses, sexual abuse, incest or attempts to commit sexual offenses, sexual abuse, or incest, as defined in the penal law; or

(ii) any victim of domestic violence as defined in section four hundred fifty-nine-a of the social services law.

4. “Domestic violence program” means a residential program for victims of domestic violence or a non-residential program for victims

of domestic violence as defined in section four hundred fifty-nine-a of the social services law or any similar program operated by an Indian tribe, as defined by section two of the Indian law.

5. “Domestic violence advocate” means any person who is acting under the direction and supervision of a licensed and approved domestic violence program and has satisfied the training standards required by the office of children and family services.

(b) Confidential information privileged. A rape crisis counselor or domestic violence advocate shall not be required to disclose a communication made by his or her client to him or her, or advice given thereon, in the course of his or her services nor shall any clerk, stenographer or other person working for the same program as the rape crisis counselor or domestic violence advocate or for the rape crisis counselor or domestic violence advocate be allowed to disclose any such communication or advice given thereon nor shall any records made in the course of the services given to the client or recording of any communications made by or to a client be required to be disclosed, nor shall the client be compelled to disclose such communication or records, except:

1. that a rape crisis counselor or domestic violence advocate may disclose such otherwise confidential communication to the extent authorized by the client;

2. that a rape crisis counselor or domestic violence advocate shall not be required to treat as confidential a communication by a client which reveals the intent to commit a crime or harmful act;

3. that a domestic violence advocate shall not be required to treat as confidential a communication by a client which reveals a case of suspected child abuse or maltreatment pursuant to title six of article six of the social services law;

4. in a case in which the client waives the privilege by instituting charges against the rape crisis counselor or domestic violence advocate or the rape crisis program or domestic violence program and such action or proceeding involves confidential communications between the client and the rape crisis counselor or domestic violence advocate.

(c) Who may waive the privilege. The privilege may only be waived if the client, the personal representative of a deceased client, or, in the case of a client who has been adjudicated incompetent or for whom a conservator has been appointed, the committee or conservator provides the rape crisis counselor or domestic violence advocate with informed, written and reasonably time-limited consent.

(d) Limitation on waiver. A client who, for the purposes of obtaining compensation under article twenty-two of the executive law or insurance benefits, authorizes the disclosure of any privileged communication to an employee of the office of victim services or an insurance representative shall not be deemed to have waived the privilege created by this section.

Note

This rule is reproduced verbatim from CPLR 4510, as amended by the Laws of 2021, chapter 309, effective July 23, 2021. (*See generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4510.)

The amendment consisted of extending the privilege to a communication with a “domestic violence advocate.”

By its original enactment of CPLR 4510 creating the rape crisis counselor privilege, the legislature sought to ensure that victims of sexual offenses receive needed counseling. (*See* Legislative Mem in Support, Bill Jacket, L 1993, ch 432, 1993 NY Legis Ann at 311 [“Confidentiality in rape crisis counseling is essential in creating trust, the cornerstone of any therapeutic relationship. Unless the victim is guaranteed confidentiality, he or she will be inhibited in discussion and unable to receive the full benefits of counseling”].)

By the addition to the statute in 2021 of the “domestic violence advocate” privilege, the legislature sought to provide the victim of domestic violence the same degree of confidential counseling provided the victim of a sex offense. (*See* Legislative Mem in Support of 2021 NY Senate-Assembly Bill S1789, A2520, enacted as L 2021, ch 309 [“Domestic violence is as serious an issue as sexual assault. In both situations, the victim is traumatized and often reluctant to speak candidly about their experience. Providing a domestic violence advocate-victim privilege - as we already provide a rape crisis counselor-victim privilege - will encourage more open, honest and healthy communication between domestic violence victims and their counselors”].)

The privilege by its terms applies to confidential communications disclosed by a client to a rape crisis counselor or domestic violence advocate and includes advice given during the counseling.

A “client” is separately defined for each privilege.

CPLR 4510 (a) (3) (i) defines a “client” as a person seeking or receiving counseling concerning any sexual offense, including sexual abuse, incest, or attempts to commit any of those offenses as defined in the Penal Law.

CPLR 4510 (a) (3) (ii) defines a “client” as a “victim of domestic violence” as that term is defined in Social Services Law § 459-a. Subdivision (1) of that section states:

“ ‘Victim of domestic violence’ means any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person’s child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal

obstruction of breathing or blood circulation, strangulation, identity theft, grand larceny or coercion; and
“(i) such act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person’s child; and
“(ii) such act or acts are or are alleged to have been committed by a family or household member.”

The terms, “family or household members,” and “parent” are separately defined in Social Services Law § 459-a (2) and (3), respectively.

A “rape crisis counselor” is defined in CPLR 4510 (a) (2) as a person who is certified by an approved rape crisis program after completing a training program specified by Public Health Law § 206 (15), and who is being directed and supervised by an approved rape crisis program.

A “domestic violence advocate” is defined in CPLR 4510 (a) (5) as “any person who is acting under the direction and supervision of a licensed and approved domestic violence program and has satisfied the training standards required by the office of children and family services.” A “domestic violence program” is defined in CPLR 4510 (a) (4).

Once the privilege attaches to a confidential communication, the client, to maintain the privilege, and a rape crisis counselor or domestic violence advocate, and any person working for the rape crisis program or domestic violence program are prohibited from disclosing the communication and any records or recordings made in the course of the counseling. Nor may those parties be compelled to disclose the communications or records.

CPLR 4510 (b) sets forth four exceptions to the privilege: (1) the client authorizes disclosure; (2) the communication reveals the client’s intent to commit a crime or other harmful act; (3) the communication to a domestic violence advocate reveals a case of “suspected child abuse or maltreatment” per Social Services Law article 6, title 6; and (4) the client waives the privilege by filing charges against the counselor or the rape crisis program and the charges relate to the confidential communication. In addition to these exceptions, Family Court Act § 1046 (a) (vii) provides that the privilege may not be invoked in child abuse or neglect proceedings.

The 2021 legislation added a significant condition to a waiver of the privilege by a person entitled to its protection by requiring that person to provide the rape crisis counselor or domestic violence advocate with “informed, written and reasonably time-limited consent.” (CPLR 4510 [c].)

In recognition that the privilege may be breached in a criminal case when necessary to enforce a constitutional right of a defendant, CPL 60.76 establishes a

procedure for an in camera review of the privileged information and disclosure as may be required. (See *Pennsylvania v Ritchie*, 480 US 39 [1987]; *People v Bridgeland*, 19 AD3d 1122, 1125 [4th Dept 2005] [where a witness’s credibility was “crucial” and there was a good faith basis to believe that her testimony was false, the psychologist privilege “must yield to defendant’s constitutional right of confrontation”]; *People v Jaikaran*, 95 AD3d 903, 904 [2d Dept 2012]; Peter Preiser, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11A, CPL 60.76; cf. *People v McCray*, 23 NY3d 193, 198 [2014] [the trial court properly denied disclosure of confidential mental health records after the court conducted an in camera review of the records and determined the “defendant’s interest in obtaining the records to be outweighed by the complainant’s interest in confidentiality; and defendant’s interest could be outweighed only if there was no reasonable possibility that the withheld materials would lead to his acquittal”].)