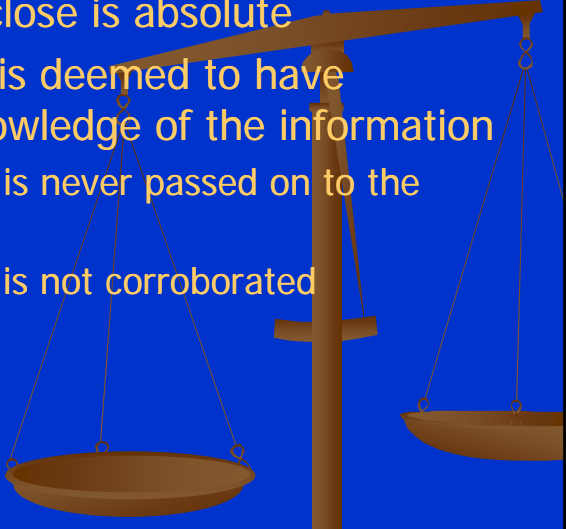


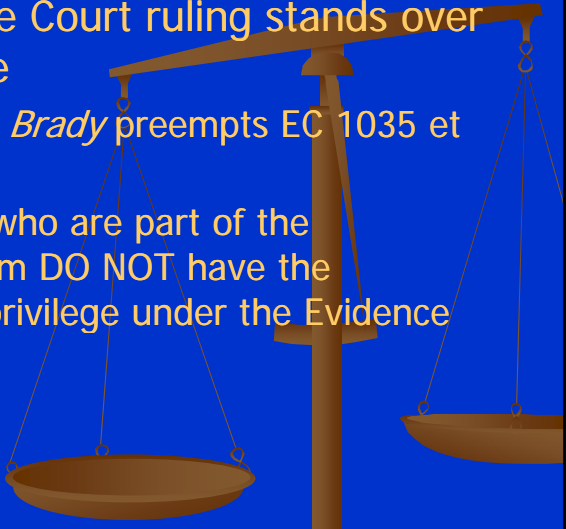
# Confidentiality

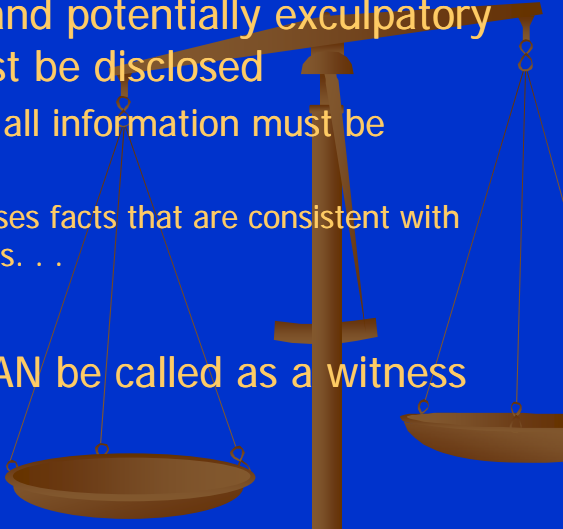
Nancy E. O'Malley  
District Attorney  
Alameda County

## BRADY v MARYLAND

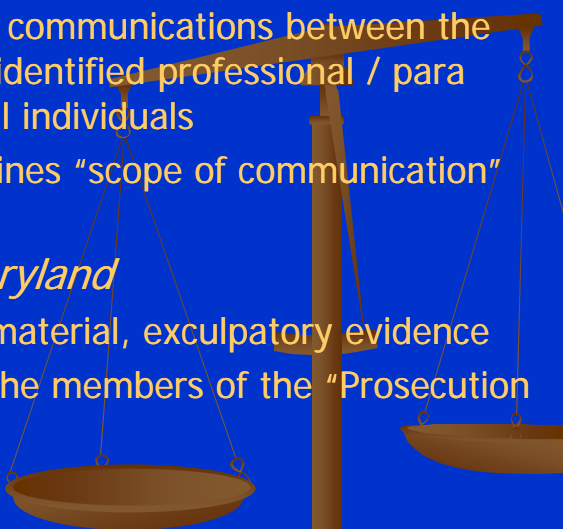
- The Prosecution must turn over to the defense any and all evidence that is material and potentially exculpatory to the defendant
- The Rule applies to all members of the "prosecution team"
  - Prosecution
  - Law enforcement
  - Victim-witness who work for LE or Prosecution

- 
- The duty to disclose is absolute
  - The prosecutor is deemed to have constructive knowledge of the information
    - Even if the info is never passed on to the prosecution
    - Even if the info is not corroborated

- 
- The US Supreme Court ruling stands over the state statute
    - In other words, *Brady* preempts EC 1035 et seq
    - Victim-witness who are part of the prosecution team DO NOT have the confidentiality privilege under the Evidence Code.

- 
- ONLY material and potentially exculpatory information must be disclosed
    - Does not mean all information must be disclosed
      - If victim discusses facts that are consistent with prior statements. . .
  - VW Advocate CAN be called as a witness in the case.

## Confidential Communication

- 
- Evidence Code Section
    - Protections communications between the victim and identified professional / para professional individuals
    - Statute defines "scope of communication"
  - *Brady v. Maryland*
    - Applies to material, exculpatory evidence
    - Applies to the members of the "Prosecution Team"

Under what circumstances are the  
communications of the victim  
confidential?

and

Who holds the privilege of the  
confidential communication?

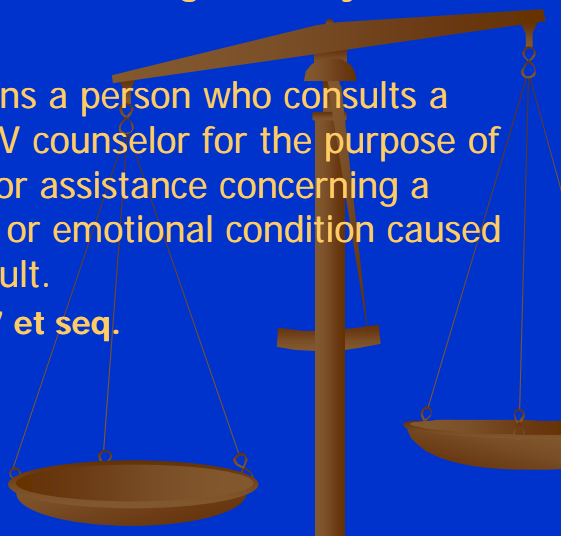
- The Evidence Code controls the types and methods of evidence that is admissible in Court.

- Evidence Code Section 1035 et seq.,
  - specifically carves out a protection regarding confidential communications between the Survivor and the Sexual Assault Counselor.
- Evidence Code Section 1037 et seq.
  - spe specifically carves out a protection regarding confidential communications between the Survivor and the Domestic Violence Counselor.

- Those for whom the confidential communication exists are guided by law

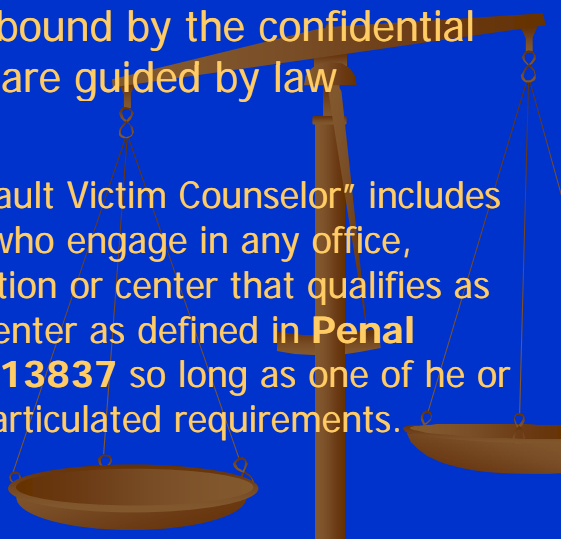
- I.e: "Victim" means a person who consults a sexual assault/DV counselor for the purpose of securing advice or assistance concerning a mental, physical or emotional condition caused by a sexual assault.

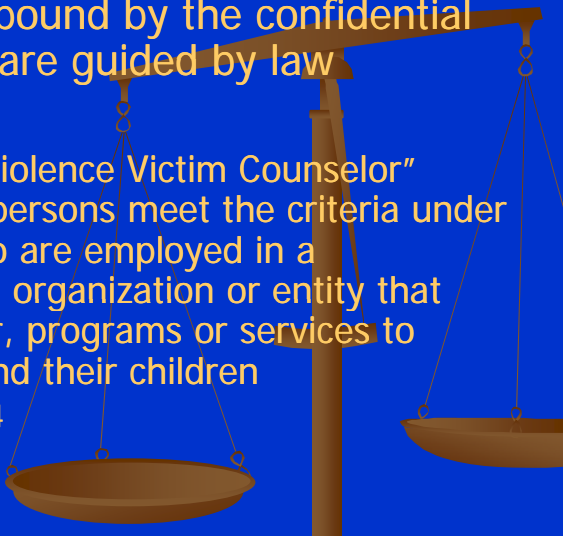
- **EC 1035; 1037 et seq.**

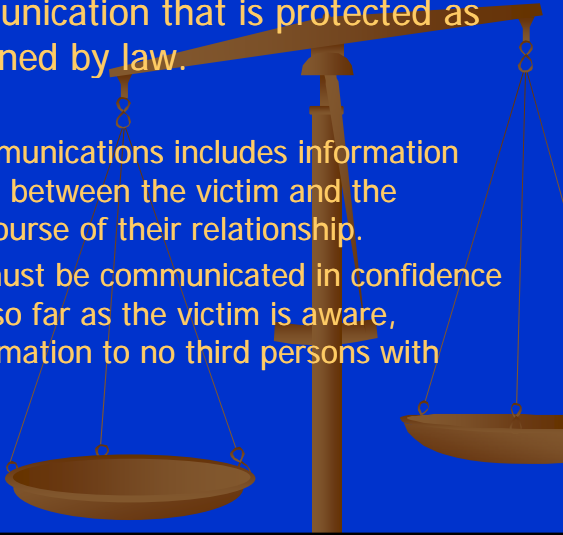


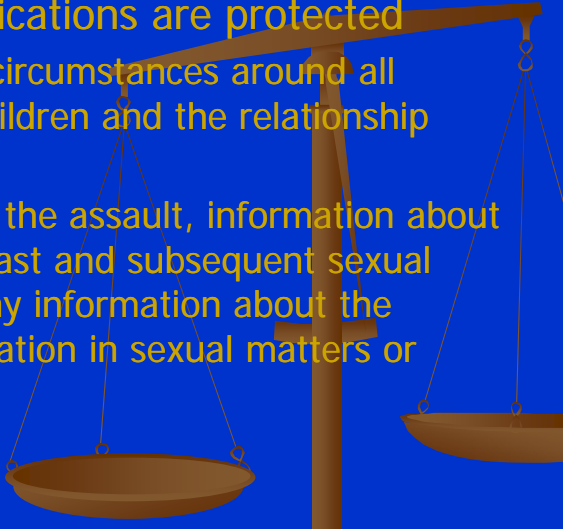
- Those who are bound by the confidential communication are guided by law

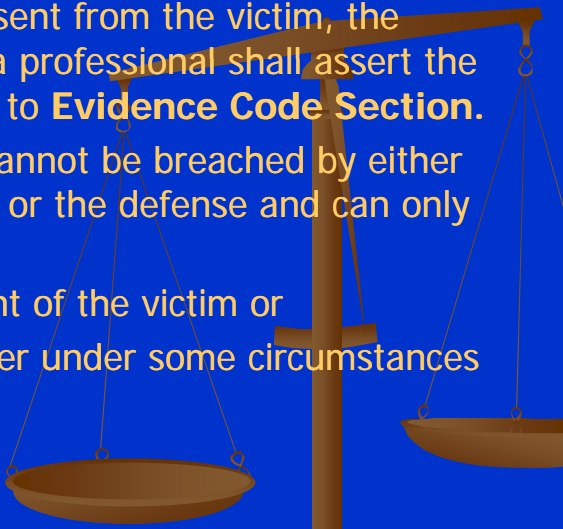
- I.e: "Sexual Assault Victim Counselor" includes those persons who engage in any office, hospital, institution or center that qualifies as a Rape Crisis Center as defined in **Penal Code Section 13837** so long as one of he or she meets the articulated requirements.



- 
- Those who are bound by the confidential communication are guided by law
    - I.e: "Domestic Violence Victim Counselor" includes those persons meet the criteria under 1037.1 and who are employed in a nongovernment organization or entity that provides shelter, programs or services to victims of DV and their children
      - See W&I 18294

- 
- The type of communication that is protected as confidential is defined by law.
    - I.e: Protected communications includes information that is transmitted between the victim and the counselor in the course of their relationship.
    - The information must be communicated in confidence by a means that, so far as the victim is aware, discloses the information to no third persons with limited exception.

- 
- Not all communications are protected
    - DV: facts and circumstances around all assaults, the children and the relationship with the abuser
    - SA: facts about the assault, information about the survivors' past and subsequent sexual contacts and any information about the survivors' reputation in sexual matters or sexual conduct

- 
- Absent actual consent from the victim, the professional / para professional shall assert the privilege pursuant to **Evidence Code Section**.
    - That privilege cannot be breached by either the Prosecution or the defense and can only be excused by
      - actual consent of the victim or
      - by Court Order under some circumstances

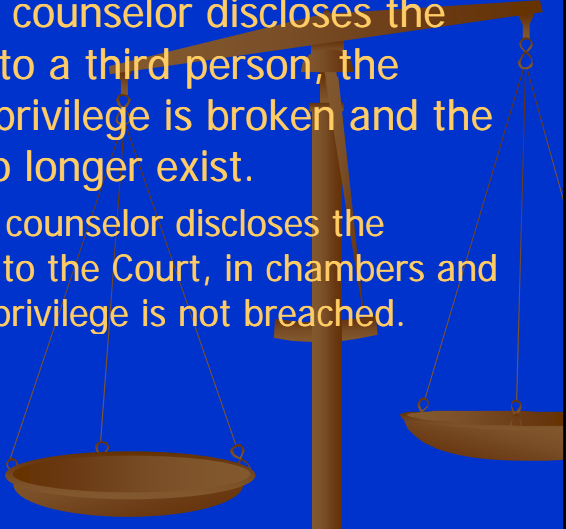
## Third Party Disclosure

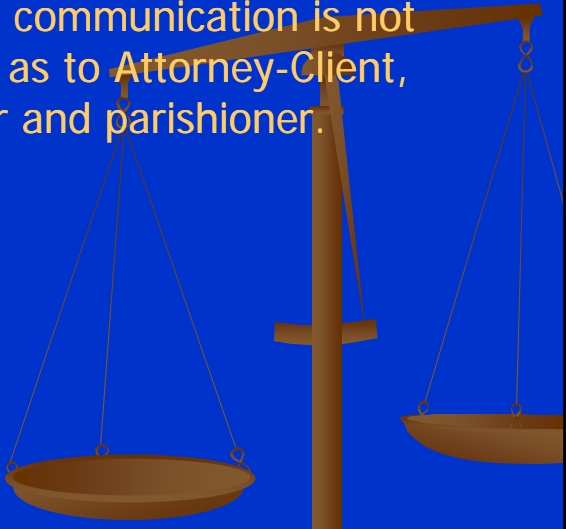
- Confidentiality is not destroyed by disclosure of the communication to third persons **IF (and only IF)**
  - "who are present to further the interests of the victim in the consultation

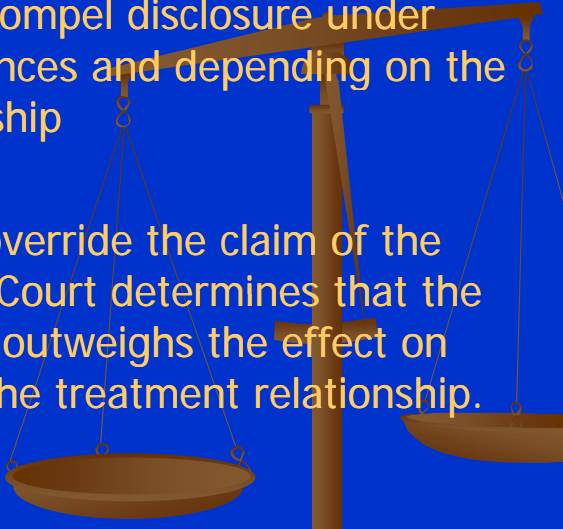
## Third Party Disclosure

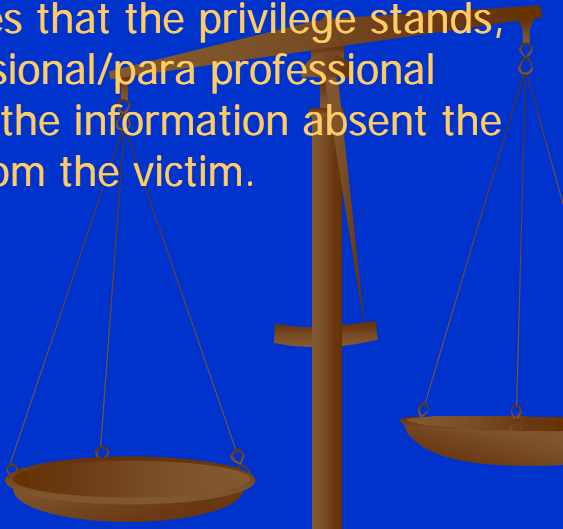
- **Confidentiality is not destroyed by disclosure of the communication to third persons**
  - To whom disclosure is reasonably necessary for the transmission of the information
  - Accomplishment of the purpose for which the sexual assault counselor is consulted



- 
- Generally, if the counselor discloses the communication to a third person, the integrity of the privilege is broken and the privilege may no longer exist.
    - However, if the counselor discloses the communication to the Court, in chambers and in camera, the privilege is not breached.

- 
- The confidential communication is not absolute except as to Attorney-Client, Religious Leader and parishioner.

- 
- The Court can compel disclosure under some circumstances and depending on the type of relationship
  - The Court can override the claim of the privilege, if the Court determines that the probative value outweighs the effect on the victim and the treatment relationship.

- 
- If the Court rules that the privilege stands, then the professional/para professional cannot disclose the information absent the authorization from the victim.

If the laws allow, and IF the Court is entertaining disclosure, it must conduct an EC 352 analysis.

- When ruling on the claim of the privilege, the Court may require the professional/para professional or the victim or both, to disclose the information in chambers and in camera (out of the presence of the other parties).

## KEY POINT

- The victim, or if a minor, the guardian of the victim, holds the privilege of confidential communication. As holder of the privilege, the victim can refuse to disclose and can prevent the professional / para professional from disclosing the communication.

## Constructive Knowledge

- If the VWAC is located in a DA's Office, or law enforcement, there is no "confidential communication protection."
- Advocate has actual knowledge of *Brady* material, the Prosecution may be deemed to have constructive knowledge

## Actual / Constructive Knowledge

COMMUNICATION WITH YOUR  
PROSECUTOR

The Prosecutor's Duty is YOUR duty