

## Memorandum in Opposition

### COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #12

March 17, 2008

S. 6676

By: Senator Volker  
Senate Committee: Codes  
Effective Date: Immediately

**AN ACT** to amend the civil practice law and rules, in relation to providing a testimonial privilege to critical incident stress management/crisis response team members concerning communications made during critical incident stress management/crisis response services

**LAW AND SECTIONS REFERRED TO:** CPLR 4508-a

**REPORT PREPARED BY:** Committee on Civil Practice Law and Rules

### **THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES** **OPPOSES THIS LEGISLATION**

This bill would establish a privilege for communications between a person who received specialized training in providing “critical incident stress management/crisis response” services as part of a response team, and the recipient of such services. The bill should not become law, for a number of reasons.

First, as our Courts have often noted, every privilege is “a limitation on”, “an obstacle” or an “obstruct[ion]” to the truth-seeking process (see *Madden v. Creative Servs.*, 84 N.Y.2d 738, 745 [1995]; *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 593 [1989]; *Priest v. Hennessy*, 51 N.Y.2d 62, 68 [1980]). Every effort to expand the realm of privilege should therefore be carefully examined to ascertain that the expansion reflects significant public policy concerns.

Second, in assessing need for the proposed privilege, one must recognize that many who might fall within its broad definitions are already the subject of existing statutory privileges, including all forms of physicians (CPLR 4504), clergy (CPLR 4505), psychologists (CPLR 4507), social workers (CPLR 4508) and rape crisis counselors (CPLR 4510). Thus, the only potential need would be for those lay crisis response team members who do not fit within any existing privilege.

Third, and critically, there is nothing in the sponsor's memorandum – no statistical study nor even individual cases or anecdotal references - to indicate any factual foundation for the suggestion that, absent a privilege, recipients of crisis response services need, but are in fact reticent, to discuss confidential matters with lay and otherwise unprivileged crisis response team members.

Thus, on its merits, the bill should not pass.

Beyond that, there are serious flaws in the particulars of this bill. The privilege applies to a “trained member” who has received “specialized training” in “critical incident management/crisis response”. There is no expression of the quantity or quality of such training needed to qualify. Compare that to other privileges, where a license, registration or certification is required (e.g., CPLR 4510 [a][2][rape crisis counselor]; CPLR 4508 [a][social worker]; CPLR 4507 [psychologist]; CPLR 4504 [a][doctors, nurses, etc.]).

Furthermore, certain aspects of critical definitions are so broad as to likely encompass circumstances beyond those intended by the sponsor. Through interlocking definitions, the parameters of those affected by the privilege ultimately must depend on the definition of “critical incident stress management/crisis response”, defined as:

a comprehensive, integrated, strategic and multi-component approach to manage critical incident stress during and following incidents and/or for any issue that may impact work and family life.

The language used here is both overly broad and unduly restrictive. Query: wouldn't the term “integrated” render “multi-component” unnecessary? If an approach were integrated, strategic and multi-component, but not comprehensive, would the privilege be lost? And how would the person receiving such services know, one way or the other, whether all aspects of these requirements were met, so as to be assured of confidentiality?

Of greater import, the term “incident” remains wholly undefined, and neither that word nor the ensuing phrase, “any issue that may impact work and family life,” is limited in any way. Nor do the examples subsequently set forth of services provided, which include “pre-incident education”, “assessment” and “crisis intervention,” serve any limiting function. On the basis of the privilege as defined, ambulance attendants (who are trained as a team to respond to “incidents”) could not recount statements made by a person taken by ambulance, concerning, e.g., how an accident occurred, notwithstanding subsequent fabrication of an alternative cause of the accident.

Additional flaws in the bill include its use of critical terminology in establishing the privilege. The bill states that a “member” of the response team “shall not be required to disclose” communications. On its face, that leaves to the service provider the option of voluntary disclosure. If this were a privilege worth establishing, waiver of the privilege should be wholly within the province of the service recipient.

For similar reasons, the statutory language permitting a Court to direct disclosure where the Court is convinced that the communication at issue was “not germane” to the relationship provides far too vague a standard, leaving applicability of the privilege in doubt, thus undermining the very assurances of confidentiality which supposedly serve as the *raison d’etre* for the bill.

For the above reasons, the Committee on Civil Practice Law and Rules **OPPOSES** this legislation.

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