Ohio Prosecuting Attorneys Association

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Senate Bill 196
Opponent Testimony
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Chairman Eklund, Vice-Chair Manning, Ranking Member Thomas and members of the Senate Judiciary Committee, thank you for the opportunity to provide opponent testimony today on Senate Bill 196. As you all know, part of the mission of the OPAA is to advocate for public policies that strengthen prosecuting attorneys' ability to secure justice for the victims of crime. We do not take our opposition to this bill lightly given that it is well intentioned to help victims. And we very much appreciate the good intentions of the sponsors and the hard work that has gone into the bill. Nonetheless, we opposed to the creation of new testimonial privileges. Prosecutors are ministers of justice who are ethically bound not just to seek convictions but to ensure that defendants are accorded justice. Testimonial privileges hinder our ability to do that.

The Supreme Court of the United States has said that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Privileges "contravene the fundamental principle that the public has a right to every man's evidence" and should be "accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980).

There are already numerous avenues for victims to have privileged conversations with individuals who can provide support in Ohio. The Ohio Revised Code provides for privileged communications with lawyers, doctors, clerics, licensed professional clinical counselors, licensed professional counselors, social workers, independent social workers, and persons registered as social work assistants. How can it be said that the need for a qualified advocate privilege transcends the need to utilize all rational means to ascertain truth when a victim can already talk to a lawyer, doctor, counselor, social worker, or a registered social work assistant and achieve the same ends?

As Justice Scalia noted in his dissent in *Jaffe v. Redmond*, 518 U.S. 1 (1996), when privileges are considered, there is much discussion about their benefits and usually little attendant discussion of the cost. The "cost of every rule which excludes reliable and probative evidence" is "occasional injustice." *Jaffe* at 29. The victim of a rule such as the one proposed in Senate Bill 196 is "likely to be some individual who is prevented from proving a valid claim – or (worse still) prevented from establishing a valid defense." *Jaffe* at 29. Testimonial privileges hinder the ability of the prosecutor to ferret out the truth and therefore to ensure that defendants, victims, and the state are accorded justice.

Given these concerns, we strongly urge the committee to reject any new testimonial privilege including the one in Senate Bill 196. The cost of them is simply too high. If, however, the committee weighs the costs and determines that a privilege for qualified advocates does transcend the need to utilize all rational means to ascertain the truth, we encourage the inclusion of an exception a privilege for qualified advocates must be adopted, we encourage the inclusion of a provision in the bill that would allow a court to compel the disclosure of information that is the subject of a criminal proceeding if the court determines that the probative value outweighs the need to keep the information privileged.