


To: Chris Collins, Executive Director  
LVPPA Executive Board Members  
From: David Roger, General Counsel   
Date: March 15, 2013  
Re: PEAP and Privileged Communications with Officers

## INTRODUCTION

LVMPD's Police Employee Assistance Program (PEAP) representatives provide valuable services to employees who may need medical, psychological or other personal help. With respect to officer involved critical incidents, PEAP officers periodically discuss what occurred during the event with witness and subject officers. Additionally, PEAP officers host a group debriefing session at which all involved officers meet to discuss the circumstances of the incident and their thoughts about the matter.

This memo addresses whether officers are guaranteed privileged communications, recognizable by the courts, with PEAP. As discussed below, officers discussions with PEAP officers may not be protected from mandatory disclosure.

## PEAP

The Police Employee Assistance Program exists pursuant to LVMPD policy 5/110.22. Director Tom Harmon, according to the most recent organizational chart, reports directly to the Sheriff.<sup>1</sup>

The policy underscores, "PEAP is staffed by LVMPD employees who serve as full-time peer counselors. These peer counselors are not psychologists, nor do they replace professional counseling." Likewise, it does not appear that any of the staff members are licensed Social Workers. The policy further explains, "Various organizations and professionals will be utilized for immediate, intermittent, and aftercare of participants as needed."

While policy requires staff members to maintain the confidentiality of the program participants, the Director must report to the Sheriff if an officer or employee, "...admits to the commission of a felony crime (including illicit drug usage)."

Should an officer make admissions, which would constitute a crime, Director Tom Harmon is obligated to report the information to the Sheriff. Thus, an officer's incriminating statements are admissible against the officer in a criminal case.

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<sup>1</sup> Tom Harmon and his staff provide valuable support to not only our officers, but to PPA board members. We always appreciate their assistance during critical incidents.

Although the policy requires staff members to treat an officer's statements as confidential communications, Nevada law does not recognize them as privileged conversations. Thus, staff members can be compelled to testify, about their communications with officers, notwithstanding policy restrictions.

### NEVADA STATUTORY PRIVILEGES

The Nevada Legislature establishes testimonial privileges.<sup>2</sup> While there are several different privileges in Chapter 49 of the Nevada Revised Statutes, the only arguably applicable to PEAP is the Social Worker and Client privilege.

NRS 49.251 provides, "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing confidential communications among the client, the client's social worker or any other person who is participating in the diagnosis or treatment under the direction of the social worker."

A social worker is defined as a person who is licensed by the State of Nevada.<sup>3</sup> The Nevada Supreme Court has consistently held that statutory privileges must be narrowly construed consistent with the plain meaning of their words. *Rogers v. State*, 127 Nev. Adv. Op. 25, 255 P.3d 1264 (2011); *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 380, 873 P.2d 946 (1994); *McNair v. District Court*, 110 Nev. 1285, 1288, 885 P.2d 576, 578 (1994). It is unlikely that any of our police officers, who staff PEAP, are also licensed social workers.

Additionally, PEAP representatives do not have confidential communications with our officers as set forth by statute. NRS 49.251 (2) provides:

A communication is "confidential" if it is not intended to be disclosed to any third person other than a person:

- (a) Present during the consultation or interview to further the interest of the client;
- (b) Reasonably necessary for the transmission of the communication; or
- (c) Participating in the diagnosis or treatment under the direction of the social worker, including a member of the client's family.

Frequently, PEAP hosts a meeting at which time the involved officers gather to discuss their role in the critical incident and their feelings about the same. Because the PEAP officers are not qualified nor authorized to diagnose or treat the concerned officers, the meetings are not confidential under the statute.

Likewise, the meetings are not protected by the privilege because multiple people, who are not part of the social worker team, are present during the meeting.

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<sup>2</sup> NRS 49.015 specifically limits testimonial privileges to those established by statute and Constitutional privileges- i.e. the Fifth Amendment privilege against self-incrimination.

<sup>3</sup> NRS 49.251 (3) defines "social worker" as a person licensed pursuant to chapter 641B of the NRS.

Because PEAP officers are not licensed social workers, their discussions with our officers are not protected by the Social Worker- Client privilege. Additionally, the group meetings, our officers frequently attend, are not confidential as defined by the statute. Consequently, PEAP officers may be compelled to testify against our officers in a state court proceeding.

### FEDERAL TESTIMONIAL PRIVILEGES

In federal criminal prosecutions, the Federal Rules of Evidence (FRE) govern the admissibility of evidence. FRE 501, which sets forth the scope of privileges, defers to federal common law and federal court decisions interpreting common law privileges.<sup>4</sup>

The federal courts are reluctant to create new testimonial privileges. The United States Supreme Court explained:

“For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.”<sup>5</sup>

Recognizing that many states have enacted licensed psychotherapist and licensed social worker privileges, the United States Supreme Court, in *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923 (1996), adopted a psychotherapist privilege under FRE 501. The psychotherapist, in that case, was a licensed social worker.

Subsequently, the Ninth Circuit Court of Appeals extended the psychotherapist privilege to unlicensed counselors employed by an Employee Assistance Program.<sup>6</sup> Recognizing that none of the EAP counselors were licensed, the Court explained:

“Although no one on the staff is a licensed psychiatrist, psychologist, or social worker, all of the consultants have backgrounds in psychology or social work, including relevant clinical and/or field experience. In addition, all SCIF EAP staff members regularly participate in ongoing training and education on EAP-related issues.”<sup>7</sup>

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<sup>4</sup> See, *Trammel v. United States*, 445 U.S. 40, 47, 100 S.Ct. 906, 910 (1980). The Ninth Circuit Court of Appeals has refused to recognize state privileges in federal civil cases involving state claims. *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir.2005)

<sup>5</sup> *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, (1950) (quoting 8 J. Wigmore, Evidence § 2192, p. 64 (3d ed.1940)).

<sup>6</sup> *Oleszko v. State Compensation Ins. Fund*, 243 F.3d 1154 (9<sup>th</sup> Cir. 2001).

<sup>7</sup> *Id.* at 1156.

In an attempt to distinguish *United States v. Schwensow*,<sup>8</sup> in which the Seventh Circuit Court of Appeals refused to extend the psychotherapist privilege to unlicensed social workers, the Court explained,

“In *Schwensow*, the Seventh Circuit held that statements made to volunteer telephone operators at an Alcoholics Anonymous office were not protected by the psychotherapist-patient privilege because the volunteers did not act or hold themselves out as counselors, were not licensed or trained in counseling, and did not confer in a fashion resembling a psychotherapy session. Unlike the telephone operators in *Schwensow*, the EAP’s purpose is to provide counseling. EAP personnel are trained as counselors, are held out as counselors in the workplace, and, like psychotherapists, their job is to extract personal and often painful information from employees in order to determine how best to assist them.”<sup>9</sup>

Based upon the facts set forth in *Olesko*, it is questionable whether our PEAP officers qualify for protection under this privilege. First, it is unlikely that the officers have degrees in psychology or social work. Likewise, the officers probably are not licensed counselors. Their work history is likely void of any clinical work. Indeed, LVMPD’s policy suggests that PEAP officers are required to triage officer’s issues and refer them to the appropriate professionals.

Additionally, the privileges created in *Jaffe* and *Olesko*, only apply to “confidential communications between the [professional] and her patients in the course of diagnosis and treatment or in the course of psychotherapy.”<sup>10</sup> Because PEAP officers are more like facilitators, and not professional counselors, a court would likely conclude that an officer’s discussions with a PEAP representative are neither diagnosis and treatment nor psychotherapy.

With respect to PEAP’s group debriefings, in addition to the aforementioned reasons, such discussions are not be covered by the privilege because they are not confidential. The meetings conducted by PEAP, and attended by several officers, can hardly be considered confidential or private. While the officers may be sworn to secrecy, their discussions are witnessed by other officers who are not necessary parties to the diagnosis or treatment of patients.

Finally, it is important to note that the U.S. Supreme Court has reversed Ninth Circuit Court of Appeals decisions more often than any other Circuit Court. The Ninth Circuit is the only appellate court to extend the psychotherapist privilege to Employee Assistance Programs.

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<sup>8</sup> 151 F.3d 650 (7th Cir.1998)

<sup>9</sup> *Oleszko*, at 1157.

<sup>10</sup> *Jaffee v.Redmond*,518 U.S. at 15.

The U.S. Supreme Court typically considers important issues when the Circuit Court decisions conflict.<sup>11</sup> Accordingly, there is a distinct possibility that the U.S. Supreme Court could review this issue, in the future, and overrule the Ninth Circuit Court of Appeals.

### CONCLUSION

Without question, PEAP representatives provide important services to the men and women of the Las Vegas Metropolitan Police Department. Their compassion for members of the Department is remarkable.

That said, our officers must know that their communications with PEAP representatives are not legally confidential and that PEAP officers could be compelled to disclose the contents of their discussions with our officers.

Nevada state law does not protect their communications; and it is unlikely that federal law would shield their conversations from a federal grand jury.

Our officer's should limit their factual revelations to those professionals, such as doctors, lawyers, psychologists, psychiatrists, licensed social workers and ministers, who can guarantee their conversations will be confidential.

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<sup>11</sup> See, *Jaffee v. Redmond*, 518 U.S. at 8.