NECESSARY THIRD PARTIES: MULTIDISCIPLINARY COLLABORATION AND INADEQUATE PROFESSIONAL PRIVILEGES IN DOMESTIC VIOLENCE PRACTICE

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I. Introduction

The rise of multidisciplinary practices among public-interest lawyers and other professionals promotes more effective and thorough services for vulnerable clients. Attorneys, counselors, social workers and others are recognizing that clients may present issues that transcend the scope and purpose of a single profession. In various forms, these professionals create formal or *ad hoc* partnerships as they minster to whole clients, not just to a client's peculiar, momentary problem.[2] For victims of domestic violence, these collaborations can yield more

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[2] The nomenclature is not settled in the literature. Here, "multidisciplinary" refers to formal or informal collaborations among professionals from different fields working for a common client.

successful outcomes and fruitful service, can be necessary for competent representation, and may even be critical to her very survival. As the client works to escape a violent and oppressive relationship, her diverse professional servants must address the acute conflation of legal, medical, psychological, emotional and financial crises that beset her.

Multidisciplinary practices embrace the wider context in which clients exist and ease the client's access to timely, appropriate solutions. Such practices, however, can also challenge traditional roles and boundaries among professions. These collaborations can strain ethical standards and the very foundations of a profession's purpose and culture. In particular, this promising movement generates complex problems for attorneys and counselors who are bound by distinct, sometimes contradictory, rules of confidentiality and privilege. As the creative, well-intentioned attorney works alongside mental health professionals or social workers, their exchanges and cooperation threaten precepts of confidentiality, client identification, zealous advocacy and loyalty.

Current applications of professional privilege do not accommodate multidisciplinary practices adequately—they fail to afford sufficient protection for victims of domestic violence and leave clients vulnerable to continued exploitation and coercion by their abusers. The professions' ethical rules exist to protect clients and society, so the value of collaboration should prompt renewed understanding of inter-professional relationships and the rules that govern them. The very policies that justify stark limitations of professional conduct now may justify a new framework for providing services to certain clients.

This Article explores the blurring boundaries of confidentiality and professional privilege in multidisciplinary practices, specifically those serving victims of domestic violence. In domestic violence practice, the problem arises when a victim of domestic violence, running for her life, finds shelter with counselors and victim advocates who engage lawyers to represent her. Although the attorney often needs information gathered by counselors, counselors may wish to share intimate information with the attorney that the client is likely too traumatized to repeat herself. The client may require the

counselor in order to function in an interview with the lawyer, yet both professions' ethics of confidentiality and privilege will forbid such an exchange unless the client is willing to sacrifice her privileges with both.

In such a case, a strict reading of the confidentiality rules defeats their intent to serve and protect the client's interests. Rather than favoring clients and society, current confidentiality rules may deplete services to the client, aggravate her trauma, disrupt her access to the judicial system and compromise her legal outcome. Domestic violence victims should not be made to choose between candid communication with their lawyers and counselors and potential exposure of their confidence in court. To promote better client service and access to justice, as well as to promote the policies underlying ethics rules themselves, interpretation of privilege rules should move toward a clearer understanding of domestic violence victims, their needs and the roles of the professionals who serve them.

This Article first describes the experience of domestic violence victims as they encounter professionals from various disciplines and the potential for interaction and compromise among them. The next section examines the rise, promise and risks of multidisciplinary practice, followed by a critical comparison of the various ethical rules of confidentiality and privilege among the various professions at issue.

This Article concludes by proposing two reforms to accommodate the virtues of multidisciplinary practice. First, current evidentiary rules should permit the presence of "necessary third parties" in interactions between attorneys and clients, whose presence does not destroy attorney-client privilege. In critical situations, domestic violence counselors and victim advocates should be recognized as "necessary third parties" to the attorney's privilege so that their presence and contributions do not expose the client's confidential communication. Second, rules of evidence should permit the privileged professionals to collaborate and communicate on behalf of the common client without destroying their privileges, even if their privileges are not co-extensive. Simply, a client's counselor-client privilege and her attorney-client privilege

should not be compromised if the counselor and attorney work together to address the client's needs.

II. A Day in the Life of Multidisciplinary Domestic Violence Practice

In a law school's family law clinic, students represent domestic violence victims seeking to obtain civil protection orders and counsel clients through divorce and child-custody matters. Students also orient and advise clients when they are called to testify in criminal cases against their abusers.[3] The students meet their clients and conduct intake interviews at an inner-city shelter and counseling center. Most of the clinic's clients are referrals from the shelter. The law school and the shelter are separate entities, but the shelter provides office space for the clinic.

One day in the middle of the semester, during the clinic's intake shift, a shelter counselor came into the students' conference room to discuss whether the clinic could assist a client in need of a civil protection order. The counselor told the students that the client, Katrina, had entered the shelter the previous night after being raped and beaten by her husband, the father of her eighteen-month old baby. This latest incident followed a protracted history of physical and coercive abuse over the course of their relationship, but this was the first time her husband raped her. This new violation, as well as his detailed threats to kill her and the child, drove her to flee to the shelter. Katrina's husband told her that if she ever left him, he would kill

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[3] This hypothetical scenario arises from actual, common experiences in the Faulkner University Jones School of Law Family Violence Clinic; Katrina is a fictional name. In addition, in this paper, "domestic violence" connotes violence between spouses or intimate partners. It does not describe mutual violence but coercive, violent behavior by one partner to subordinate and victimize the other. Although domestic violence can occur in various forms in marriages or other intimate relationships, it occurs most often when men abuse women in intimate partnerships. *See, e.g.*, SHANNAN CATALANO, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf; American Bar Association, Comm'n on Domestic Violence, *Survey of Recent Statistics: Prevalence of Domestic Violence* (2005), http://www.abanet.org/domviol/ statistics.html.) http://www.abanet.org/domviol/ statistics.html. Thus, this Article addresses domestic violence as its victims most often experience it.

her and turn his violence on her family. The counselor suggested that Katrina seek a civil protection order and told her that the legal clinic could help her. The counselor said that the Katrina had agreed to see the students, despite having some legal troubles in her own past.

The students told the counselor they were available and ready to meet the client. The counselor left to get Katrina and soon returned, leading her by the hand. The students noticed bruises and cuts on Katrina's face, and her hair was wet from a shower. The counselor closed the door behind them as the students and professor stood to greet the client. Katrina did not approach the conference table or offer to shake hands. Instead, she leaned against the wall in the corner, behind the counselor. She crossed her arms and looked down at the floor.

According to clinic procedure, the students must introduce themselves and orient the potential new client to the clinic. Then, before they may proceed, the client must sign a consent form in which she acknowledges that supervised law students would represent her, agrees that the clinic may represent her and acknowledges that she understands that her case is a teaching case. One of the students addressed the Katrina directly to initiate this introduction, but the she stood against the wall and did not respond. The professor interjected softly and invited Katrina to sit at the table, and the counselor guided her by the arm to sit down. She kept her head down and folded her hands tightly in her lap. The professor repeated the orientation and asked the client if she understood and whether she would sign the consent form. Katrina looked up at the counselor who nodded her head; then Katrina picked up the pen and signed the form that the student set out for her. The professor said:

> "Katrina, I'm sorry to jump right into lawyer business, but I need to explain something important to you. We just created an attorney-client relationship, so we have to keep everything you tell us in confidence. We have to keep everything we discuss secret. This is called the attorney-client privilege; have you heard of that?"

Katrina nodded, and the professor continued:

> "I have to tell you, though, that the privilege is only good if we have our conversations privately. If anyone else is in the room with us, then you might lose that privilege, and we might have to testify about we what we discuss. Do you understand?"

Katrina looked up with a question on her face but did not answer. She looked apprehensively at the counselor, who explained:

> "Katrina, that means if I stay here while you talk to the attorneys, then we can't be sure that everything will be confidential. We might have to tell what we talk about in here."

> "Don't leave me!"

Katrina pleaded and grabbed her counselor by the hand as tears started falling down her cheeks.

> "Katrina," the professor continued, "she doesn't have to leave, but if she stays, you just need to know that the conversation may not be confidential. We would fight it as much as we could not to disclose what we discuss, but a judge might make us talk about what we all say here. Do you want your counselor to stay?"

> "Yes."

> "Do you still want to talk with us about your situation and a civil protection order?"

> "Yes, if she stays."

> "Okay. The students are going to ask you some questions, and you just tell us whatever you can, the best you can."

After a long, halting, emotional interview, the students and law professor regrouped at the law school. Katrina had told a harrowing story of physical violence, threats, coercion and isolation. She described a youthful romance in which her husband's attention went from sweet obsession and jealously to a systematic, violent, emotionally coercive campaign to control her every movement and relationship. He isolated her from family and friends, disrupted every opportunity she had to work outside the home and battered her in a continuous and escalating cycle of violence.

Despite persistent, gentle questioning Katrina told the students nothing of a rape the previous night and denied her own criminal history. She would not elaborate on her decision to leave her husband, and she refused to discuss her baby.

III. The Nature of Domestic Violence Practice

Representing and counseling clients who are victims of domestic abuse can present lawyers with very specific and unique difficulties in communication, evaluation, advocacy, client identification and loyalty. Multidisciplinary responses to clients in trauma and crisis yield remarkably better outcomes compared to when client are otherwise left to pick their way alone through the often cumbersome and oblique thicket of services and agencies. A thorough and clear understanding of domestic violence victims and the roles of their professional servants is useful to measure the virtue of multidisciplinary collaboration and to craft a better policy of privilege and confidentiality.

Clients in trauma from physical violence, recovering from coercive, emotional abuse, fleeing for their lives and terrified for their children, require special care and understanding. An abusive, coercive relationship can diminish a client's sense of autonomy, independence, moral agency and confidence in her own capacity.[4] Confidentiality is critically necessary for her safety, therapeutic goals and judicial outcome, yet her case and

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[4] *See* Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 44–45 (2008).

general well-being demand collaboration among her service providers.

A. The Client

1. State of the Client in Crisis

At the moment when a client seeks shelter, the point when she takes leave of her abuser, she is in crisis.[5] She probably has been subjected to varied, creative and brutal forms of abuse and violence that have stripped her of power, esteem and agency.[6] Her flight in itself is often traumatic. To leave in the first place she had to extricate herself from her most intimate partnership and social supports, actions that often lead to victims severing themselves from their only physical and financial resources. At

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[5] *See* Janice Humphreys et al., *Psychological and Physical Distress of Sheltered Battered Women*, 22 HEALTH CARE FOR WOMEN INT'L 401 (2001):

> When consideration is given to repeated, often life threatening, episodes of violence experienced by battered women and the sudden flight to an emergency shelter for refuge with her children and themselves, it is not surprising that these women report frequent and intense symptoms [of phobic, paranoiac and obsessive-compulsive behavior]. Rather than reflecting pathology, [the data suggests] reasonable human responses and survival strategies.

Id. at 411. *See also* Stephanie Vitanza et al., *Distress and Symptoms of Posttraumatic Stress Disorder in Abused Women*, 10 VIOLENCE & VICTIMS 23, 24 (1995).

[6] In an early piece addressing counseling methodologies for victims of domestic violence, Laura Wetzel and Mary Ann Ross provide this personality profile of women who have endured battering relationships. They paint a picture that is the "result of the unhealthy milieu in which she has been living." She doubts her own sanity, suffers low self-esteem, underestimates the danger of her situation yet feels she can do nothing to change it. She accepts her partner's view of reality, accepts guilt where she has done no wrong and equates dominance with masculinity. She is passive and placating and acts as a buffer between her partner and the world. *See* Laura Wetzel & Mary Anne Ross, *Psychological and Social Ramifications of Battering: Observations Leading to a Counseling Methodology for Victims of Domestic Violence*, 61 PERSONNEL AND GUIDANCE J. 423, 425 (1983); *see also* EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 5 (2007) (discussing the theory of coercive control in domestic abuse: "Like assaults, coercive control undermines a victim's physical and psychological integrity.").

this point the victim may be beginning to mourn for her dream of a peaceful, prosperous and loving family.

Victims' fears are, unfortunately, well founded. Research indicates that a woman is seventy-five percent more likely to be murdered when she tries to leave or has fled than if she stays in the violent relationship.[7] Beyond lasting threats of future abuse even after she has left her abuser, victims also face other continued difficulties. Physically, the client may have endured recent trauma or routine battering. Victims of domestic violence suffer significant increases in physical health problems, even beyond the immediate effect of a punch or shove.[8] Many studies have reported varied symptoms associated with the abuse suffered by domestic violence victims, most prominent among them: headaches, back pain, gastrointestinal problems, chest pain, pelvic pain, insomnia, fatigue, nightmares, choking sensations and chronic fatigue.[9] In her 2004 study, Kimberly Eby found significantly increased physiological stress among victims of domestic violence and concluded that this likely shows that women who are battered may have increased

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[7] Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 879 n.5, 887 (2006) (citing Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a, Why Abuse Victims Stay*, 28 COLO. LAW., No. 10, 1999, at 19); Sharon L. Gold, Note, *Why are Victims of Domestic Violence Still Dying at the Hands of their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 940 (2003).

[8] Kimberly K. Eby, *Exploring the Stressors of Low-Income Women with Abusive Partners: Understanding Their Needs and Developing Effective Community Responses*, 19 J. FAM. VIOLENCE 221, 222 (2004).

[9] *Id.* (citing Kimberly K. Eby et al., *Health Effects of Experiences of Sexual Violence for Women with Abusive Partners*, 16 HEALTH CARE WOMEN INT'L 563 (1995)); *see also* Diane R. Follingstad et al., *Factors Moderating Physical and Psychological Symptoms of Battered Women*, 6 J. FAM. VIOLENCE 81 (1991); Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY INT. J. 460 (1977); Suzanne Kerouac et al., *Dimensions of Health in Violent Families*, 7 HEALTH CARE FOR WOMEN 413 (1986); Rachel Rodriguez, *Perception of Health Needs by Battered Women*, 12 RESPONSES: VICTIM WOMEN & CHILD. No. 4, 1989, at 22; Evan Stark & Ann Flitcraft, *Medical Therapy as Repression: The Case of Battered Women*, HEALTH MED. 29 (1982); Murray Straus & Richard J. Gelles, *The Costs of Family Violence*, 102 PUB. HEALTH REP. 638 (1987).

susceptibility to illness.[10] In another study Janice Humphreys and her co-authors observed immediate and long term physical and psychological distress resulting from domestic violence including bruises and lacerations, chronic pain, eating disturbances, anxiety, low self-esteem, depression, sleep deprivation and memory loss.[11] They also observed that, "[40%] to 60% of battered women are abused during pregnancy and 8% of pregnant battered women experience obstetrical complications as a direct result of their abuse."[12] Additionally, women who are victims of domestic violence, in the year preceding a protection order, are more likely to have been hospitalized because of self-injury, poisoning, gastrointestinal disorders, assault injuries, psychiatric disorders or attempted suicide.[13]

Psychologically and emotionally, victims of domestic violence have an increased likelihood of diverse mental health complications including depression, anxiety, post-traumatic

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[10] *Id.* at 225, 229. She concludes with a call for collaborative community responses. *Id.* at 231.

[11] Humphreys et al., *supra* note 5, at 402 (citations omitted).

[12] *Id.*

[13] *See* Rose Constantino et al., *Effects of Social Support Intervention on Health Outcomes in Residents of Domestic Violence Shelter: A Pilot Study*, 26 ISSUES IN MENTAL HEALTH NURSING 575, 576 (2005) (citing Mary A. Kernic et al., *Rates and Relative Risk of Hospital Admission Among Women in Violent Intimate Partner Relationships*, 90 AM. J. OF PUB. HEALTH 1416 (2000)); *see also* Jennifer Cole et al., *Intimate Sexual Victimization Among Women with Protective Orders: Types and Associations of Physical and Mental Health Problems*, 20 VIOLENCE & VICTIMS 695, 696 (2005) (noting that women sexually assaulted by their spouses experience associated symptoms like bladder infections, urinary tract infections, vaginal and anal bleeding, dysmenorrhea, miscarriages and sexually transmitted diseases).

stress disorder and suicidal ideation.[14] Before entering a shelter and therapy, women exposed to domestic violence report higher incidents of intrusive thoughts, ruminations and avoidance—all symptoms of post-traumatic stress disorder. More intense trauma symptoms occur in those who have survived more severe violence.[15] Likewise, a history of abuse has an "enormous impact" on victims' feelings of depression.[16]

Victims of domestic violence often lose a sense of control over their circumstances and believe that their situation is subject to the control of "powerful others" and chance.[17] The researchers making these observations find that the same women also have significantly lower self-esteem.[18] Psychological abuse can erode a victim's self-confidence and her world can become

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[14] *See* Ann Coker et al., *Social Support Protects Against the Negative Effects of Partner Violence on Mental Health*, 11 J. WOMEN'S HEALTH & GENDER-BASED MED. 465, 466 (2002) (citing Jacqueline C. Campbell & Linda A. Lewandowski, *Mental and Physical Effects of Intimate Partner Violence on Women and Children*, 20 PSYCHIATRIC. CLINICS. OF N. AM. 353 (1997); Mary P. Koss & Lynette Heslc, *Somatic Consequences of Violence Against Women*, 1 ARCHIVES OF FAM. MED. 53 (1992); B. Bergman et al., *Utilisation of Medical Care By Abused Women*, 305 BRIT. MED. J. 27 (1992); S.B. Plichta & C. Abraham, *Violence and Gynecologic Health in Women Over 50 Years Old*, 174 AM. J. OBSTETRICS & GYNECOLOGY 903 (1996); *see also* Kelly L. Jarvis et al., *Psychological Distress of Children and Mothers in Domestic Violence Shelters*, 20 J. OF FAM. VIOLENCE 389, 400 (2005) (noting that victims with higher levels of depression, anxiety and anger plausibly are experiencing posttraumatic stress disorder).

[15] *See* Kathleen A. Ham-Rowbottom et al., *Life Constraints and Psychological Well-Being of Domestic Violence Shelter Graduates*, 20 J. FAM. VIOLENCE 109, 111 (2005) (citing B.M. Houskamp & D.W. Foy, *The Assessment of Posttraumatic Stress Disorder in Battered Women*, 6 J. INTERPERSONAL VIOLENCE 367 (1991); A. Kemp et al., *Incidence and Correlates of Posttraumatic Stress Disorder in Battered Women: Shelter and Community Samples*, 10 J. INTERPERSONAL VIOLENCE 43 (1995)).

[16] *See* Tammy A. Orava et al., *Perceptions of Control, Depressive Symptomatology, and Self-Esteem of Women in Transition from Abusive Relationships*, 11 J. FAM. VIOLENCE 167, 181 (1996).

[17] *Id.* at 180.

[18] *Id.* at 181.

ridden with anxiety and worry.[19] This is not merely self-doubt; it may be a cognitive failure that interrupts the client's capacity to make legal decisions.[20]

In the moment of crisis, escape and shelter, when the clients first engage their counselors and victim advocates and begin preparing their legal options with attorneys, they are simultaneously coping, accommodating and adjusting with these diverse and complicated physical and psychological hardships.[21] The professionals serving these clients must tread carefully into their lives to seek understanding and information efficiently and therapeutically.

2. The Critical Necessity of Confidentiality for Clients

Confidentiality is essential to useful counseling and effective lawyering for victims of domestic violence. In *Jaffee v. Redmond*, the United States Supreme Court justified finding a federal psychotherapist-patient privilege, staitng that:

> Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals

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[19] Vitanza et al., *supra* note 5, at 25.

[20] *Id.* at 25–26:

> Cognitive failure is a tendency to have perception and memory failures and engage in misdirected action. Everyone has these failures from time to time. However, women in violent or psychologically abusive relationships may be prone to these types of failures because of the stress they live with daily or because they must expend a great deal of effort paying attention to their partner.

Id.

[21] *See* Humphreys et al., *supra* note 5, at 403 ("[S]heltered battered women's experiences appear to occur at the intersection between the woman's biopsychosocial characteristics and her trauma history. The consequent physical and psychological distress may be compounded by the situational characteristics of the woman's environment.").

> consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[22]

The Court observed that patients likely will be less forthcoming to their psychotherapists, including psychologists and counselors, if they perceive a possibility of disclosure. Empirical data support this observation.[23]

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[22] Jaffee v. Redmond, 518 U.S. 1, 10 (1996). The opinion also states that, "All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists." *Id.* at 15.

[23] *See* Jennifer Evans Marsh, *Empirical Support for the United States Supreme Court's Protection of Psychotherapist-Patient Privilege*, 13 ETHICS & BEHAV. 385, 397 (2003) (*erratum* reported at 14 ETHICS & BEHAV. 197–99 (2004) without consequence to the conclusions) (demonstrating a positive correlation between willingness to disclose information to counselor and legal privilege):

> Results indicated that for a sample of the public, the privilege condition was more highly correlated with individuals' ratings of a hypothetical patient's willingness to disclose than were therapy experience, demographic variables, and four dimensions of general disclosiveness (intent, amount, control of depth, honest-accuracy) . . . . [T]hey reinforce the need for legal and mental health professionals to continue to advocate for the protection of sensitive information disclosed in therapy. If the public believes this information will not be held in confidence or treated with respect, they may elect not to disclose such information, thus limiting therapists' abilities to assist their clients in therapeutic ways.

Id.

Confidentiality and client trust in privilege are critical to useful and effective psychological counseling.[24] For victims of domestic violence, however, confidentiality transcends a desire for therapeutic recovery. The victim may see a threat of disclosure as a threat to her life, safety and freedom.[25] A victim who is seeking to escape her abuser may reject counseling so that she may "remain invisible," and may fear accusations that she "failed to protect" her children by enduring the violence.[26] Without counseling and other services, she has a lesser chance of escape, especially if she is financially dependent on her abuser.[27] Without full confidence that her communications, location and

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[24] *See* Jeffrey N. Younggren & Eric A. Harris, *Can You Keep a Secret? Confidentiality in Psychotherapy*, 64 J. CLINICAL PSYCHOL.: IN SESSION 589 (2008) ("Without this privacy, clients cannot be expected to reveal embarrassing, sometimes personally damaging, information in treatment. Further, the privacy of the consulting room and the confidentiality of the therapeutic relationship facilitate trust, empathy, and the working alliance."); O. Brandt Caudill & Alan I. Kaplan, *Protecting Privacy and Confidentiality*, 11 J. OF AGGRESSION, MALTREATMENT & TRAUMA 117 (2005) ("There can be little doubt that confidentiality is an essential prerequisite to effective psychotherapy. Patients frequently assume that the confidentiality of their communications with the psychologist is absolute."); *see also* Rachel M. Capoccia, *Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape Trials*, 68 S. CAL. L. REV. 1335, 1348 (1995) ("The rape victim, often deeply embarrassed, guilt-ridden and stigmatized by society, reveals information to the counselor that is extremely personal and highly sensitive. The ability to speak freely is crucial to the victim's ability to work through her emotional trauma—the ability can only be ensured by protecting the confidentiality of her communication with the rape crisis counselor.").

[25] *See* Leslie A. Hagen & Kim Morden Rattet, *Communications and Violence Against Women: Relevant Michigan Law on Privilege, Confidentiality, and Mandatory Reporting*, 17 T.M. COOLEY L. REV. 186, 190 (2000) ("Beyond feelings of embarrassment and shame, many of these women live with the terror of being hunted down, discovered, assaulted, or even killed."); Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 295 (1995) ("Most victims of domestic violence have been threatened with further assault or even death if they ever reveal what their abusers have done to them."); *see also* Marjorie R. Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. C. HEALTH 157, 159 (2006) (an empirical study finding that "confidentiality concerns" are a leading barrier to victims reporting sexual assault on American college campuses).

[26] Hagen & Rattet, *supra* note 25, at 191.

[27] *Id.*

secrets will be safe, the domestic violence victim may choose to take her chances alone and return to the devil she knows or even to obfuscate her story, all ultimately to her own detriment.[28]

In 1995, before the Supreme Court recognized the federal therapist-patient privilege in *Jaffee v. Redmond*, the Violence Against Women Office in the United States Department of Justice issued a report to Congress entitled "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors." The report promoted maximized testimonial privilege for domestic violence counselors and declared that confidentiality "is essential for effective counseling because without an assurance of confidentiality, victims may avoid treatment altogether or may withhold certain personal feelings and thoughts because they fear disclosure."[29]

B. Counselors and Victim Advocates

Very often, a counselor or victim advocate is the first professional the client will meet as she seeks shelter or flees a

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[28] *See* Leigh Goodmark, *Going Underground: The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, 75 UMKC L. REV. 999 (2007) (exploring the phenomenon of women choosing to flee, change their names and disappear rather than enter a shelter or engage the legal system for protection and outlining an attorney's ethical options for a client who decides to go underground); *see also* Zorza, *supra* note 25, at 280–94 (addressing critical necessity to keep a victim's location confidential and extensive tactics to secure a confidential location).

[29] U.S. DEP'T. OF JUSTICE, REPORT TO CONGRESS, THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS, FINDINGS AND MODEL LEGISLATION 17, (Dec. 1995), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/169588.pdf [hereinafter REPORT TO CONGRESS]). The report also states that "In addition to this inhibiting effect on victims, victim counselors may take otherwise undesirable measures to avoid the risk of disclosure in litigation, such as not keeping notes or other records of counseling sessions." *Id.* at 18.

violent relationship.[30] The domestic violence counselor is essential to the client's emotional and psychological deliverance from the oppressive relationship and is critical to her healing, confidence and competence as she walks through many options for services and the justice system.[31]

In the Report to Congress, the Department of Justice described the work of domestic violence counselors and advocates in shelters:

> Victims of sexual assault and domestic violence experience both emotional and physical trauma. Counseling may be their only source of comfort . . . . Counseling is essential for victims of domestic violence to enable them to escape from abusive relationships. . . . Battered women's shelters and services provide the means to stop the abuse and help the battered woman leave. The counseling offered by battered women's programs is

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[30] Counselors and victims advocates play different but related roles for clients, and the terms are not interchangeable for purposes of this article. *See* Suzanne J. Schmitz, *What's the Harm? Rethinking the Role of Domestic Violence Advocates and The Unauthorized Practice of Law*, 10 WM. & MARY J. WOMEN & L. 295, 299 (2004); *see also* Jennifer Bruno, Note, *Pitfalls for the Unwary: How Sexual Assault Counselor-Victim Privileges May Fall Short of Their Intended Protections*, 2002 U. ILL. L. REV. 1373 (2002). Counselors, usually licensed psychologists, enjoy a firmly established evidentiary privilege, and many jurisdictions are heeding the call for a victim-advocate privilege. *See* Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 159–60 (2005); *see also* U.S. DEP'T. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, Bulletin, *Privacy of Victims' Counseling Communications*, No. 8 at 2 (Nov. 2002), *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin8/ncj192264.pdf; Euphemia B. Warren, *She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 CARDOZO L. REV. 141 (1995). *See, e.g.*, REPORT TO CONGRESS, *supra* note 29, at app. I (dated analysis of state statutes creating privileges for counselors and victim advocates).

[31] *See* Hagen & Rattet, *supra* note 25, at 189–90; April L. Few, *The Voices of Black and White Rural Battered Women in Domestic Violence Shelters*, 54 FAM. REL. 488 (2005) (noting and confirming that "shelter stays dramatically reduce the likelihood of new violence").

> essential to a battered woman's ability to end the violent relationship and rebuild her life.[32]

In the context of rural women in domestic violence shelters, April Few reports that the clients she interviewed generally found the shelter to be a "safe haven from intimate violence," where the "residents and staff became a new family in this stressful time."[33] Further, Few notes that "the majority of women praised staff members in their roles as primary liaisons and advocates for dealing with social services, the workforce, housing and the legal system."[34]

Virtually every jurisdiction has embraced the critical value of counselors and victim advocates by affording testimonial privilege to these relationships, underscoring the necessity of secure confidentiality for victims of domestic violence. As discussed in the following sections, state and federal rules recognize a psychotherapist-patient privilege or a comparable counselor-client privilege.[35] Thirty-seven states have a specific privilege for domestic violence or sexual assault victim advocates.[36]

C. Attorneys

Attorneys will advocate, counsel, advise, negotiate and represent a domestic violence victim in court for protection orders, child custody, divorce and immigration issues. Her attorneys may also stand beside her as she testifies against her

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[32] REPORT TO CONGRESS, *supra* note 29, at 12–14 (internal quotation marks omitted) (citing LYNNE A. MARKS & SUSAN H. RAUCH, NAT'L CTR. ON WOMEN & FAMILY LAW, PROTECTING CONFIDENTIALITY OF VICTIM-COUNSELOR COMMUNICATIONS 23–29 (1993)).

[33] Few, *supra* note 31, at 494.

[34] *Id.* at 496.

[35] *See infra* notes 127–43.

[36] *See infra* note 139.

abuser in criminal proceedings.[37] They will meet her in a milieu of physical injury, emotional trauma and psychological distress.[38] Together, the counselors and attorneys often must rush into court to obtain a civil protection order while the client, still striving to recover her life's foundations, faces police inquiry and examination at her abuser's criminal proceedings.

As with any client, her attorney will owe duties of loyalty, confidentiality, competence, zealous advocacy and every other professional obligation arising from their relationship.[39] The attorney must draft well-founded and artful pleadings, engage in motion and discovery practice, and advocate for her in court, all in accordance with the applicable rules of civil procedure. To accomplish these tasks competently and effectively, the attorney must hear from the client, must learn her stories and know her facts, must discern her will and must craft a strategy to achieve it.[40] This work and the necessity of clear, candid, and thorough communication are the bases for attorney-client privilege and confidentiality.[41]

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[37] Schmitz, *supra* note 30 (citing Kit Kinports & Karla Fisher, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 165 (1993) (noting that victims who are not represented by counsel are "generally unsuccessful" in obtaining civil protection orders, and, if they do, the orders often do not provide all of the available remedies); *see also* Conner, *supra* note 7, at 881–82.

[38] *See supra* Part III.A.1; *see also* Conner, *supra* note 7, at 887.

[39] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl., R. 1.1 (competence), R. 1.3 (diligence), R. 1.4 (communication), R. 1.6 (confidentiality) (2006).

[40] *See* MODEL RULES OF PROF. CONDUCT R. 1.6 cmt. (2010):

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation . . . . The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

[41] *Id.*

Dana Harrington Conner illuminates the unique dynamic between victims of domestic violence and their attorneys:

> An attorney-client relationship is one based on trust and confidence . . . . In contrast, the domestic violence relationship is one of distrust and fear. Victims learn that they cannot rely on those who society suggests should love and protect them. As a result, the victim-client may be slow to believe others who are placed in a position of protecting her interests. In order for a victim to feel safe with her attorney, she must learn to trust counsel and be secure in the knowledge that confidences will not be betrayed . . . . If the victim has learned from past experience that she is unable to trust her attorney, it is unlikely that she will seek assistance from any lawyer in the future. Victims who return to an abusive relationship and then learn that counsel has violated their confidence will quickly learn that the relationship is not one of trust. Further, if the attorney as a representative of the legal system is seen as a traitor, the legal system becomes a system of distrust for the battered woman.[42]

While heeding the virtue of multidisciplinary collaboration, an attorney must guard the client and her interests. If the attorney sacrifices the client's confidence, even for the sake of fruitful collaboration, the client will suffer anew from her abuser's destructive tactics of shame, fear and coercion.

D. Opponents

A client's abuser, now defendant and legal adversary, may have a keen interest in her exchanges with the professionals serving her. The perpetrator is suddenly under the scrutiny of zealous outsiders and facing criminal penalties, injunctions limiting his life and wounding his reputation and possibly a divorce that may threaten his power and fortune. If he can pry

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[42] Conner, *supra* note 7, at 897–98.

into his victim's revelations to her counselors and attorneys and disclose them in open court, he could continue his abuse by shaming and discrediting her, as well as anything else he might do in order to ensure an acquittal.

The Department of Justice noted the above difficulties in its Report to Congress :

> [D]efense counsel routinely file motions seeking access to confidential communications that may reveal that the victim had made contradictory statements during counseling sessions which may show that the victim has a motive to lie about the charge or is biased. Defense counsel seek access to statements made by the victim in therapy that are inconsistent with her in-court statements—for example, statements that raise doubts as to her identification of the perpetrator or statements in which a victim confides in her counselor that she may perjure herself.[43]

Opponents may also use the fact that the victim has sought counseling to "take advantage of the myth that women who make rape reports are unstable and mentally ill."[44]

Opponents may try to shift attention from their guilt to the victim's worth.[45] Major Paul Schimpf of the United States

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[43] REPORT TO CONGRESS, *supra* note 29, at 21–22.The Report also explains that opponents "attempt to use counseling records to cast doubt on a victim's mental health or to question the victim's character." *Id.* at n.45.

[44] Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 331, 332 (2005).

[45] *Id.* (citing Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 795 (1986); *see also In re* Pittsburgh Action Against Rape, 428 A.2d. 126 (Pa. 1981), *superseded by statute*, 42 PA. CONS. STAT. ANN. §5945.1 (West 2010) (permitting disclosure of victim's rape crisis records and victim's statements to counselor to defendant, after rape crisis counselor was held in contempt for refusing to surrender the victim's records under court order, superseded by Pennsylvania's sexual-assault counselor privilege).

Marine Corps illustrated this tactic while exploring privilege issues in the military for victims of domestic violence, imagining a victim's cross examination:

> You just testified that Staff Sergeant _____ did not have any form of permission from you to do what he did. Isn't it true, though, that you told Mrs. _____, YOUR VICTIM ADVOCATE, that you felt responsible for what happened? Isn't it also true that you also told Mrs. _____ that you feel bad about what Staff Sergeant _____'s family is going through right now? And when you told this to YOUR VICTIM ADVOCATE, isn't it true that you two were alone? That you were telling the truth? That you had no reason to lie?[46]

Schimpf explains, that the defense will work to bring the victim advocate into the discovery process to send "the distinct message to the victim that no area of her life is safe from defense examination."[47] The victim's trauma is exacerbated and magnified when the defense attorney realizes that "the psyche of the victim represents another front . . . in the legal campaign to avoid conviction of the accused."[48]

Of course, a defendant has a right to both confrontation and due process, and these rights must be balanced constantly against other societal goals. In his article on a defendant's access to witness' psychotherapy records, Clifford Fishman examines the contours of this balancing and describes the defendant's theories of discovery and admissibility.[49] He specifically discusses the Sixth Amendment Confrontation clause, the Compulsory Process clause and the procedure for proper discovery. In doing so, Fishman confesses the "lamentable"

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[46] Schimpf, *supra* note 30, at 149.

[47] *Id.* at 150.

[48] *Id.*

[49] Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV. 1 (2007).

costs of disclosure of psychotherapy records: that a judge's review of a victim's records might undermine the victim's capacity to cope with the abuse and escape, or "the far-more-upsetting possibility" that the victim's records will be provided to the defendant."[50] The possibility of the defendant gaining access to the victim's records is the worst-case scenario at issue here.

Society and the law promote client disclosure and access to counselors, advocates and attorneys through a patchwork of confidentiality and privilege rules. If these same parties were to collaborate and share this treasured, intimate information for the client's benefit, the victim's abuser would be given a lever to pry apart her progress with these professionals. This is not just lamentable; it is unconscionable. In Katrina's case, her rapist husband's defense team might inquire into the content, or lack of content, in her conversations with the lawyer in the counselor's presence. He might impeach her by her failure to disclose her rape or drug use, or he might compel the counselor to testify about both because of her brief orientation to the lawyer and law students.

IV. The Rise of Multidisciplinary Practice

Multidisciplinary practices and collaborations have arisen in response to a realization that many vulnerable clients present problems and circumstances that necessitate transcending the scope of any single profession. In the hypothetical scenario, Katrina needs counseling as she faces the crises of the rape, her history of abuse, her escape and her husband's threats. The legal clinic can represent Katrina to obtain a civil protection order, can guide her through the divorce proceedings, and can assist her with child support and custody issues. She could need social workers to assist her with housing, day care and life skills training and advocacy before state agencies. She may have need for vocational rehabilitation and career counseling. She almost certainly will interact with the police and child-welfare agents.

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[50] *Id.* at 63.

She will benefit from victim advocates as she engages the criminal justice system as a victim and witness.[51]

In most instances victims like Katrina will interact with each of these services through separate agencies, in separate offices, with separate appointments. Every professional will respond as she is trained to respond, within the scope of her respective field. The pace and culture of each agency will vary. The client will meet each one individually and she will have to recount her nightmare again and again as each professional assesses her needs, evaluates her case and plots their responses.[52]

A. Hopes for Multidisciplinary Practices

Multidisciplinary practices may form in official partnerships or in *ad hoc* collaborations. In law school clinical practices, these collaborations often have been between law students and social work graduate students.[53] These collaborations encourage three generally observed benefits for the students and their clients. First, the partnership provides more comprehensive services and increased attention for the clinic's clients. Second, the law students enjoy the benefits of a

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[51] *See* CASEY GWINN & GAEL STRACK, HOPE FOR HURTING FAMILIES: CREATING FAMILY JUSTICE CENTERS ACROSS AMERICA at 37–42 (2006) Describing the genesis of the first collaborative, multidisciplinary Family Justice Center in San Diego, California, the authors explain the problems arising from proliferating service providers for domestic violence victims. For example, the City Attorney in San Diego conducted a "safety audit" and identified thirty-two separate, uncoordinated agencies providing distinct and necessary services for victims of domestic violence: "Victims of violent crime, including sexual assault victims, victims violated by their most intimate partners, often in shock and suffering severe physical, mental, emotional, and spiritual trauma, were being sent on a scavenger hunt to end all scavenger hunts if they wanted to get help." *Id.* at 41.

[52] *See supra* Part III.A regarding the state of a client in a domestic violence crisis.

[53] *See, e.g.*, Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality,* 7 CLINICAL L. REV. 403, 409–10 (2001) (a description and evaluation of the collaboration between law students and social work graduate students at the University of Denver College of Law's Domestic Violence Civil Justice Project).

new perspective, recognizing the client as an individual in the context of her community, not just as a legal problem to be solved. Third, the attorneys and social workers share the burden of caring for the client's emotional needs.[54]

In an article examining the professional ethics in interdisciplinary collaborative work, Alexis Anderson and her colleagues at Boston College's legal clinics illuminate the advantages of multidisciplinary practice:

> It is a rare legal problem that is in fact purely "legal." As much literature shows, nearly all disputes which end up among lawyers and courts involve complex emotional and interpersonal dynamics, and most involve "industries" other than law. To resolve those disputes successfully, or even to "win" before a tribunal, a lawyer must use skills other than those traditionally taught in law school. Or, perhaps more likely, the lawyer must associate with persons who possess those skills. The benefits of an interdisciplinary law practice are becoming more and more apparent to lawyers and law teachers alike. . . . Because of their specialized training in human behavior, interpersonal dynamics, mental health assessment, psychosocial assessment, and systems theory, social workers and other similar "helping professionals" are able to help lawyers develop their practice knowledge and skills. The potential benefits of collaboration with other disciplines include more effective management of the lawyer-client relationship, more effective interviewing and counseling, increased likelihood of a successful outcome for the client, increased client cooperation, increased efficiency, increased client

[54] *Id.* at 421.

> satisfaction, enhanced client well-being, and reduced lawyer stress.[55]

Multi-professional collaborations may also be a key component to address decaying confidence in the judicial system and its officers. In their article on "therapeutic jurisprudence," Hartley and Petrucci cite empirical polls suggesting that most people do not regard lawyers as trustworthy and do not have confidence in the criminal justice system.[56] They propose that a "comprehensive law approach" should cultivate a "more humane and therapeutic practice of law under the auspices of several theoretical and practice-based approaches."[57] The key component to the comprehensive law movement is an interdisciplinary approach that "does not force a choice of theory or research of one discipline over another" but draws from many pertinent disciplines, including, among others, criminology, sociology, law, social work, psychology and public health.[58]

Often, collaboration among professionals is practically necessary to address confounding social ills like domestic violence.[59] Particularly for lawyers representing children who have been victims of abuse or neglect, collaboration and consultation with mental health and medical professionals may

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[55] Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 660–61 (2007).

[56] *See* Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 133–34 (2004).

[57] *Id.* at 135.

[58] *Id.* at 135, 151.

[59] *See* Theo S. Liebmann, *Confidentiality, Consultation, and the Child Client*, 75 TEMP. L. REV. 821 (2002); *see also* Jay A. Mancini et al., *Changing the Ways Communities Support Families to Prevent Intimate Partner Violence*, *in* PREVENTION OF INTIMATE PARTNER VIOLENCE 203, 224 (Sandra M. Stith ed., 2006) ("A community capacity approach is multi-layered and recognizes that change emerges from resilient community members and from viable institutions in the community, and from the partnerships they develop to prevent [intimate partner violence].").

be necessary for competent legal representation.[60] For instance, a lawyer representing a child victim may require other professionals to determine cognitive or psycho-social capacity in order to advocate appropriately for the client's best interest.[61]

In a study examining stress among women who experience domestic violence, Kimberly Eby calls for multidisciplinary collaboration in crisis intervention and long-term support and advocacy services for victims of domestic violence.[62] She examines the physiological markers of stress and its effect on physical and mental health. Eby confirms, perhaps unsurprisingly, that domestic violence significantly increases stress and adversely affects the short and long term health of women who endure it.[63] She suggests that communities can address these adverse health effects by coordinating various community service providers and by promoting flexibility in their approach to individual clients.[64]

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[60] *See* Liebmann, *supra* note 59, at 822–23.

[61] *Id.*

[62] Eby, *supra* note 8.

[63] *Id.* at 222, 225–29.

[64] *Id.* at 231. *See also* Sally M. Hage, *Profiles of Women Survivors: The Development of Agency in Abusive Relationships*, 84 J. COUNSELING & DEV. 83 (2006):

> [P]erceived professional social support (e.g. clergy, medical personnel, social workers) may be a significant factor in a woman's decision about whether to stay or remain with an abusive partner . . . . The absence of interpersonal and professional social support has also been shown to predict the extent of self-blame held by women survivors and the severity of posttraumatic stress disorder symptoms." (internal citations omitted)

Id.; Danica G. Hays et al., *Advocacy Counseling for Female Survivors of Partner Abuse: Implications for Counseling Education,* 46 COUNS. EDUC. & SUPERVISION 184 (2007) (addressing counselor education and providing advocacy strategies for counselors working with victims of domestic violence: "It is important for counselors to create a strong alliance with other service providers and communities. These may include schools; legal services; hospitals; faith-based organizations; homeless shelters; and lesbian, gay, bisexual and transgender communities.").

In a Report to Congress, the Department of Justice recognized the critical role of co-located, collaborative professional services for victims of domestic violence:

> Centers for battered women provide shelter, counseling, clothing, food, transportation, child care, health care, drug and alcohol abuse education, assistance with obtaining government benefits, and advocacy services related to criminal, civil and administrative proceedings, a range of services more extensive than those usually provided by sexual assault centers. It has been observed that:
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> The counseling services and shelter offered by battered women's programs are the most effective means or protecting battered women and ending domestic violence because of the special nature of domestic violence and the unique combination of services offered by battered women's programs. . . .[65]

Multidisciplinary collaboration among service providers could significantly reduce the stress on a victim of domestic violence when she finally flees to shelter and must confront serial barriers on the way to liberty and safety.

B. Examples of Multidisciplinary Practices for Victims of Domestic Violence

1. Family Justice Centers

A movement toward co-locating professional and social services for victims of domestic violence took root in San Diego, California, in the late 1990s.[66] In San Diego municipal, state and private service providers organized the first Family Justice

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[65] REPORT TO CONGRESS, *supra* note 29, at 13 (quoting LYNN A MARKS & SUSAN H. RAUCH, NAT'L CTR. ON WOMEN & FAMILY LAW, PROTECTING CONFIDENTIALITY OF VICTIM-COUNSELOR COMMUNICATIONS 23–29 (1993)).

[66] *See* GWINN & STRACK, *supra* note 51.

Center.[67] In Family Justice Centers, multidisciplinary professionals offer "one-stop shopping" for domestic violence victims, attempting to ease access to all the services, to minimize the intimating gauntlet of uncoordinated agencies and to avoid "revictimizing" the client as she recounts her story repeatedly.[68] In San Diego, the Family Justice Center brought twenty-five agencies under one roof. The partners included adult protective services, volunteer lawyers, law school clinics, prosecuters, paralegals, clergy, nurses and doctors, victim advocates, police, forensic professionals, the military and administrative professionals.[69]

The founders of the San Diego Family Justice Center created a list of "best practices," including the most effective mix of disciplines to meet the needs of clients who are victims of domestic violence. They suggest that a Family Justice Center should include civil legal services, crisis and individual counseling, victim advocates, limited medical and forensic capacity, spiritual support, access to emergency shelters and access to the police and prosecutors.[70]

2. Law School Clinics

As described above, law school clinics have been at the forefront of multidisciplinary collaborative practice, particularly when it comes to working with social workers. The Family Violence Clinic at Faulkner University Jones School of Law in Montgomery, Alabama, for example, collaborates with an area shelter and counseling center in a model which is common to many law school clinics. The collaboration between students and the domestic violence counselors and victim advocates is less formal and arises from the logistic and geographic necessity of

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[67] *Id.* at 45–59.

[68] *Id.*

[69] *Id.* at 53.

[70] *Id.* at 160–61.

assisting common clients in the shelter.[71] Counselors and victim advocates are the first and primary contacts that most clients have in the shelter before they visit the legal clinic. Often, the counselors make the initial appointment with the law students and introduce the client to the clinic. Other times, a client will walk into the clinic without good knowledge about the counseling services, so the clinic students may identify a client who is in greater need of counseling than legal services. Very often, the counselor becomes the best means of making contact with the client to arrange appointments or ask questions, especially when the client is in a shelter.

As described in Katrina's scenario, the counselor often has full knowledge of the client's case. The counselor can frequently articulate the facts of the client's abuse more completely to the clinic students, because the counselor has more knowledge of the system and is not reacting in the midst of a trauma. The degree of collaboration depends on the client, her state of mind and body and the means and timing of her introduction to the clinic. The students and counselors cannot collaborate directly for a specific client without her informed consent, which probably waives her testimonial privilege.

The Family Violence Clinic also participates in the Montgomery County Task Force on Domestic Violence. By initiative of the Montgomery County District Attorney's Office, the Task Force was formed in 1994 and was composed of

[71] The Author directs the Family Violence Clinic at Faulkner University, which is housed at The Family Sunshine Center in Montgomery, Alabama, and collaborates regularly with the counselors and victim-advocates there. The legal clinic and the counseling center draw conservative boundaries on collaboration to protect the common clients' privileges with the attorneys and the counselors, because the Alabama Rules of Evidence track the Uniform Rules as described in Section V, and Alabama case law does not support a theory to accommodate confidential multidisciplinary collaboration. *See* ALA. R. EVID. 502, 503.

twelve different organizations.[72] In 2009, the Task Force included over one hundred and eighty individuals from over sixty agencies collaborating to confront domestic violence, to make common referrals and to draw on each other's strengths and expertise.[73] Participating organizations include state, county and federal agencies, prosecutors, defenders and police agencies, churches, health-care providers, military services, universities, courts and court administrators, a hotel, a security company, the local humane society, crime victim assistance organizations and scores of non-profits providing advocacy and direct services.[74] The rise and expansion of the Task Force correlates with a dramatic drop in calls to police for domestic violence or family disturbances. In 1999, the first year the Montgomery Police Department began tracking, police responded to 12,750 calls for domestic violence or family disturbances; in 2008, despite an increase in the city's population, police received only 8100 calls for domestic violence matters. Domestic violence homicides have fallen from ten in 1994 to three in 2007, with no domestic violence homicides in Montgomery in 2004.[75]

3. Lawyers and Social Workers

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[72] *See* Memorandum of Understanding from Montgomery Cnty. Task Force on Domestic Violence (Oct. 31, 1994) (on file with the Family Sunshine Center and the Author). The signatories included representatives from law enforcement agencies, warrant clerks and magistrates, prosecutors, the local housing authority, the state Department of Human Resources, the court referral program, the local mental health association, courts and the administrative office of courts, the county bar association, the Family Sunshine Center shelter and counseling program and Montgomery's Family Guidance Center.

[73] *See* Montgomery Cnty. Task Force on Domestic Violence, Member List 3-35-09 (Mar. 25, 2009) (on file with the Author).

[74] *Id.*

[75] Interview with Lt. Steve M. Searcy, Commander of the Montgomery Police Department's Domestic Violence Unit and Past-Chair of the Montgomery County Task Force on Domestic Violence (Mar. 27, 2009). Lt. Searcy credits the reduction in domestic violence calls to the Task Force's "coordinated community response."

Collaborations between social workers and attorneys have enjoyed useful observation in legal academic literature.[76] Paula Galowitz described the experience of collaboration with New York University School of Law's Civil Legal Services Clinic and explained the advantages to lawyers who engage mental health professionals.[77] She writes that social workers "are better equipped than lawyers to provide services such as crisis intervention, evaluation of clients' needs, referrals to appropriate agencies, and direct casework," and that social workers' training can contribute significantly to a lawyer's case evaluation.[78] Galowitz further suggests that the need for collaboration with social workers commonly will arise in legal services and public defender practices because indigent clients present varied problems that contribute to their legal posture, but which are beyond the expertise of lawyers.[79]

C. Challenges of Multidisciplinary Practices

Multidisciplinary practice generates many advantages for clients and practitioners; each profession brings its own expertise, culture, training, goals and systems to the collaboration. These differences provide the great advantages of

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[76] As demonstrated by the citations here, collaborations among lawyers and social workers have received more attention in legal scholarship than collaborations among lawyers and other mental-health professionals. While this Article addresses collaboration among lawyers and domestic violence counselors and victim advocates, the lessons learned from the social worker partnerships are instructive. *See* Anderson et al., *supra* note 55 (describing ethical tensions and resolutions in the interdisciplinary practice among law students and social work graduate students in a legal clinic at Boston College); St. Joan, *supra* note 53 (assessing the collaborative venture between law students and social work graduate students at the University of Denver); *see also* Maryann Zavez, *The Ethical and Moral Considerations Presented by Lawyer/Social Worker Interdisciplinary Collaborations*, 5 WHITTIER J. CHILD & FAM. ADVOC. 191 (2005) (discussing the ethical problems presented by contradictory mandatory reporting requirements in a similar enterprise at the University of Vermont).

[77] Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2126 (1999).

[78] *Id.*

[79] *Id.* at 2130.

multidisciplinary practice, but they may not always be in constructive accord.

1. Cultural Differences Among Professions

Mental health professionals and lawyers inhabit cultures that approach, identify and address problems from distinct, often contradictory perspectives. For instance, social workers pursue outcomes from a different economy of values than lawyers: "The lawyer's responsibility is to advocate zealously for the client's wishes, while the social worker's is to safeguard the client's best interests," and these are potentially inconsistent ethical obligations.[80]

The differences among these professions manifests in client identification, especially when a mental health professional would perceive multiple clients, while a lawyer may have only one client at a time in a given case.[81] A social worker responds to a client in a social context and has a burden to society at large, but a lawyer must view an individual as the sole client or conform to strict rules governing multiple clients.[82] Galowitz provides an example: "in a family situation, the social worker might see conflicting, or potentially conflicting, interests of various members of the family and weigh those interests in assessing the best interests of the client."[83] By contrast, so long as a client's goals are within the law, an attorney can and should represent that client zealously, even if the client's goals would have a negative effect on society. A social worker's

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[80] Galowitz, *supra* note 77, at 2140 (citing Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, KY. CHILD. RTS. J., Mar. 1991, at 18) (describing collaborations within the NYU Civil Legal Services Clinic).

[81] *Id.* at 2142 (citing Randye Retking et al., *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 FORDHAM URB. L.J. 533, 538–39 (1997)).

[82] *Id.*

[83] *Id.*

responsibility to society at large, however, might supersede their primary responsibility to an individual client.[84]

This professional divide is similarly evident in the American Psychological Association's Code of Ethics, setting out principles and guidelines for counselors and therapists. The APA recognizes the psychologist's obligations to society while pursuing the best interests of their clients, not their obligation to vindicate a client's rights.[85] According to the American Counseling Association (ACA), "[c]ounselors encourage client growth and development in ways that foster the interest and

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[84] Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REV. 1, 60–61 (2006). Kisthardt's article details several facets of the complicated relationship among attorneys and social workers, including differences in role, approach, education, points of view, language and measurements of success:

> The difference between social workers' and lawyers' orientations ultimately stems from drastically different ethical perspectives. Systems thinking underlies contemporary social work; holism, interactionism and interdependence characterize the philosophy of social work. Social workers view a child abuse and neglect case from a systems perspective. They understand that the problem is not with an identified "client" but with the family as a system. The law's emphasis on individual rights and responsibilities is inherently inconsistent with the social worker's family systems worldview. The law's devotion to single-minded advocacy for the client stands in stark contrast to the social worker's holistic view of acting in the best interests of the client broadly defined.

Id.

[85] *See* AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS & CODE OF CONDUCT, princ. B (2002) [hereinafter APA CODE OF ETHICS]:

> Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work . . . . Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work.

Id.

welfare of clients and promote healthy relationships."[86] Counselors' primary responsibility is "to respect the dignity and to promote the welfare of clients."[87]

The APA and ACA both recognize that family or group therapy is sometimes appropriate, and, while cognizant of conflicts of interest, both encourage therapy to several related people at once.[88] Psychologists and counselors may also provide services to other mental health providers' clients where it is therapeutically appropriate and in consultation with the other professionals.[89] These are admirable and necessary dynamics for psychological counseling and therapy, but they run up against lawyers' engrained sense of strict client identification, client loyalty and zealous advocacy even when potentially contrary to a client's best interests or the interests of their neighbors or families.

Multidisciplinary collaborators must also confront differences in language and context.[90] Kisthardt describes one such instance: "Social workers use a 'helping' language, while lawyers' language is one of 'rights.' The language of social work stresses interdependence and relationships, whereas the language of lawyers is focused on individualism and the vindication of individual positions."[91] This difference in language is consistent with the distinction between the professions' views of conflict and counseling. "Although social workers recognize that conflict may be inevitable, they use strategies to avoid conflict. Adversarial actions are reserved for extreme situations. Lawyers,

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[86] AM. COUNSELING ASS'N, ACA CODE OF ETHICS § A (2005) [hereinafter ACA CODE OF ETHICS].

[87] *Id.* at § A.1.a.

[88] *See* APA CODE OF ETHICS, *supra* note 85, at §§ 10.02, 10.03; ACA CODE OF ETHICS, *supra* note 86, at §§ A.8, B.4.

[89] *See* ACA CODE OF ETHICS, *supra* note 86, at § B.3.b.

[90] *See* Kisthardt, *supra* note 84, at 48.

[91] *Id.*

on the other hand, are much more comfortable with conflict, and are less likely to see it as a negative."[92]

Lawyer's adversarial role may itself create a barrier to collaboration with other professionals. Lawyers serve and negotiate within the adversarial system of American justice, and the legal system requires due process and individual advocacy within the framework of confrontation.[93] This adversarial footing can frustrate social workers and family counselors who work with a "systems perspective," accounting for an individual's social environment, family, community, resources and pressures, all oriented within larger society.[94] "Social workers have the skills and resources to address the non-legal barriers to long-term resolution of the crises families face in the legal system."[95]

This is evident also in a movement toward "advocacy counseling" for victims of domestic violence, with "counselors leaving their offices to promote individual, social and institutional changes through both direct and indirect services."[96] Advocacy counseling seeks interventions that empower clients and create sociopolitical changes.[97] These aspirations require far-reaching efforts to address a client's whole range of concerns:

> [C]ounselors may want to reconnect survivors with families and friends, because survivors may have become estranged from their support systems because of shame and fear associated with the cycle of violence. To foster individual viability, counselors might attempt to alter

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[92] *Id.* at 61.

[93] *Id.* at 15.

[94] *Id.* at 18 (quoting Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUB. POL'Y 1, 3 (1996)).

[95] *Id.*

[96] Hays et al., *supra* note 64.

[97] *Id.* at 185.

> survivors' perceptions of belongingness to the outside community," [including collaboration for career counseling, substance abuse treatment, education and legal reform].[98]

Another cultural contrast arises within the adversarial system when professionals need to share information: "Attorneys are restrained by ethical rules that require the protection of confidentiality in a context where the judge needs information to ascertain the best interests of the child. The rules of evidence require a kind of strategizing and information hiding that would appear nonsensical outside the adversarial context."[99]

Despite the cultural conflicts, Kisthardt praises the virtue of collaboration and suggests systemic changes to courts, legal education and conversations between attorneys and other professionals to maximize thorough and appropriate service and advocacy for common clients.[100]

Anderson and her colleagues agree that the potential harvest from multidisciplinary practice outweighs the frustrations:

> While lawyers and social workers may initially approach their work from different starting points, we maintain that any fear of irreconcilable professional conflict is

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[98] *Id.* at 187–88.

[99] Kisthardt, *supra* note 84, at 57 (citing Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 95 (1997); Bridget Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J.L. & POL'Y 131, 150–51 (2001)).

[100] *Id.* at 18–20:

> Research indicates that collaboration is the best problem-solving strategy when the problem to be addressed is too large for one organization to resolve independently . . . .Both lawyers and social workers have much to gain from the professional perspective of the other. Lawyers have little expertise in dealing with families in crisis.

Id.

> overblown. Instead, the collaboration between the two professions offers the clients the potential for an enhanced exploration of the client's goals and options during a comprehensive legal counseling session undertaken before the lawyers embark on their zealous advocacy with third parties.[101]

Rules of professionalism and evidence presently do not adequately create environments conducive to collaboration, especially with the manifestly different cultures among these helping professions. As proposed below, even conservative reforms to anachronistic rules could promote greater collaboration and better outcomes for domestic violence clients. The social benefits are worth encouraging cooperation.

2. Ethical Barriers Among Collaborating Professions Generally

Attorneys are bound by state ethical codes.[102] Codes of ethics, like those from the American Psychological Association or the American Counseling Association, guide licensed counselors and psychologists.[103] Social workers abide by the Code of Ethics of the National Association of Social Workers.[104] These ethical codes and attendant state laws often are not consistent in their duties and assumptions. These competing ethical codes can prevent effective collaboration among diverse professionals.

For example, several scholars have addressed the conflict created by rules that mandate reporting of suspected child abuse. Mental health professionals, medical professionals and social workers usually are "mandatory reporters," bound by statute to

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[101] Anderson et al., *supra* note 55, at 665–66.

[102] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT (2010).

[103] *See* APA CODE OF ETHICS, *supra* note 85; ACA CODE OF ETHICS, *supra* note 86.

[104] *See* NAT'L ASSOC. OF SOCIAL WORKERS, CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS (rev. 2008) (1996).

report suspected child abuse when they learn of it in the course of their work. Attorneys are not usually mandatory reporters and may even be prohibited from reporting child abuse to a government agency if they learned of the abuse in confidence from a client who does not want to disclose the allegations.[105] In such a case, the duty to report or the prohibition on reporting often turns on both the structure of the collaboration and a determination of which professions' rules will apply.[106]

Galowitz also addressed the problem of competing confidentiality standards for lawyers and social workers: "Confidentiality is a core value of both professions. Because legal and mental health professionals have different standards for privilege and confidentiality, however, potential conflicts can arise when determining the range and degree of confidentiality

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[105] This problem has received significant attention in legal scholarship, and a detailed exploration of this particular issue is not within the scope of this Article. *See, e.g.*, St. Joan, *supra* note 53, at 428–29; Anderson et al., *supra* note 55, at 690–17; Galowitz, *supra* note 77, at 2137–40; *see also* Zavez, *supra* note 76, at 192–01; Ellen Marus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509 (1998); Linda Taylor & Howard S. Adelman, *Confidentiality: Competing Principles, Inevitable Dilemmas*, 9 J. EDUC. & PSYCHOL. CONSULTATION 267 (1998) (focusing on client consent as solution to the dilemma); Donald C. Mappes, George P. Robb & Dennis W. Engles, *Conflicts Between Ethics and Law in Counseling and Psychotherapy*, 64 J. COUNSELING & DEV. 246, 249 (1985). Sarah Buel and Margaret Drew explore yet another privilege problem in domestic violence cases: the tension between confidentiality and reporting when a client has made threats of domestic violence or has indicated a likelihood of hurting their intimate partners. They discuss the crime-fraud exception and propose a standard like *Tarasoff* for attorneys. Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447 (2006).

[106] *See* St. Joan, *supra* note 53, at 430–36. St. Joan has identified three approaches to clarify the ethical response to the conflict between confidentiality and mandatory reporting duties: the Consultant Model, the Law Firm Employee Model and the Consent Model. Most pertinent to this Article is the Consultant Model, in which the collaborative relationships "tend to be arms-length, with each professional providing services from his or her own locale and perspective. In such collaboration, with client consent, the attorney may share confidential information either in the course of consulting on a social work issue or on a legal issue." In this model, the mental health professional and attorney more likely are cooperating for the client, but neither is subordinate to the other or bound to the other's ethical standards. *See also* Zavez, *supra* note 76, at 217–18 (also including and describing a "confidentiality wall" model).

owed to the client."[107] She suggests that rules of professional conduct interfere with multidisciplinary practices by prohibiting the kind of communication necessary for a "true [a] multiprofessional office . . . despite the fundamental appeal of the concept of holistic problem solving centers."[108]

3. Collaborating Through Competing Professional Privileges

Katrina, for example, would enjoy a counselor-client privilege with her domestic violence counselor at the shelter.[109] She also would enjoy an attorney-client privilege with the attorney and law students in the legal clinic. However, Katrina risks destroying privileges with both by inviting them to directly collaborate on her behalf.[110]

Because the counselor and attorney are not in practice together, and because the counselor is not subordinate to the attorneys or hired to prepare for litigation, the attorney and the counselor are third-parties with respect to each others' privilege. Their presence in the interview likely destroys both privileges for the duration of the meeting. If the client consented, as she probably did in this situation, then she likely waived the privilege binding both professionals. Her husband, a potential defendant in criminal proceedings as well as in Katrina's petition for a civil protection order, might then compel the attorneys or the counselor to testify about the interview and any information they gleaned, or did not glean, from Katrina. St. Joan identifies the problem in her discussion of collaboration between attorneys and social workers, asking,

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[107] Galowitz, *supra* note 77, at 2136 (citing Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communication*, 27 J. MARSHALL L. REV. 617, 626 (1994)).

[108] *Id.* (quoting Heather A. Wydra, Note, *Keeping Secrets Within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client*, 62 FORDHAM L. REV. 1517, 1533 (1994); Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 573 (1992)).

[109] *See, e.g.*, UNIF. R. EVID. 503, discussed more fully *infra* Parts V. B, D.

[110] *See, e.g.*, UNIF. R. EVID. 502, discussed more fully *infra* Parts V. A, C.

"But would the courts extend the attorney client privilege to social workers who were not primarily employed as consultants for trial preparation, but who provide services, referrals, emotional support and a broader perspective on the case for the client's benefit?"[111] St. Joan does not answer the question.

In his discussion of inter-professional consultation on behalf of abused children with mental health issues, Liebmann likewise frames the quandary:

> As the use of interdisciplinary consultation becomes increasingly common, however, lawyers for children must recognize that they may not engage in unrestricted consultation with mental health professionals. A lawyer whose case indicates a need for interdisciplinary consultation must conscientiously consider how the consultation impacts her ethical duty to preserve the confidentiality of all information relating to the representation of the client. On at least two levels, consultation poses serious risks that confidential information will be exposed to third parties improperly. Not only does the consultation by its nature typically involve the disclosure of confidential information, but the party being consulted may have a different confidentiality duty and different standards for any further disclosure of the information, thereby creating risks of even further exposure.[112]

Liebmann concludes that client consent is probably the best means to navigate this situation, apparently despite the waiver of

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[111] *See* St. Joan, *supra* note 53, at 431–32; *see also* Hagen & Rattet, *supra* note 25, at 269 ("Sometimes a coordinated community response approach has led to the mistaken conclusion that information can be readily shared by all parties at the table. A coordinated community response to domestic violence and sexual assault does not do away with confidentiality . . . . ").

[112] Liebmann, *supra* note 59, at 823–24.

professional privilege, unless the client cannot consent because of minority or incapacity.[113] In such a case, he concludes that:

> [D]isclosure of confidential information [even without consent] to a mental health consultant is ethical if it is necessary to meet an explicit representational responsibility of the lawyer, and if is it done in a manner which respects to the maximum degree possible the client's developing interest in maintaining the confidentiality of the information.[114]

In their books explaining practices at the San Diego Family Justice Center, founders Casey Gwinn and Gael Strack, both attorneys, also depend on client consent to resolve the barrier to collaboration presented by privilege rules. Partners and staff at the Centers may strive to ensure client confidentiality within each participating agency and to reassure clients of the confidentiality of the proceedings, but these are only functional aspirations. California rules permit the presence of third parties to "further the interests" of the clients, so this may support the assurance of the Family Justice Center, but the rules do not provide firm guarantees.[115] Gwinn and Strak write that the Family Justice Centers rely on client consent to share information among participating agencies and explain that "a clearly worded informed consent form and a clear advisory to clients about the limits of confidentiality at the Center can alleviate most client concerns."[116] While the clients may be willing to consent to sharing information among their collaborating professionals and while this may ease collaboration, consent does not prevent the destruction of

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[113] *Id.* at 824.

[114] *Id.* at 825, 854, *et seq.*

[115] GAEL STRACK & CASEY GWINN, HOPE FOR HURTING FAMILIES II: HOW TO START A FAMILY JUSTICE CENTER IN YOUR COMMUNITY 101 (2007) [hereinafter STRACK & GWINN, HOPE FOR HURTING FAMILIES II]. Strack and Gwinn note that "only a handful of clients have declined to sign a consent form to authorize the sharing of information between agencies for the benefit of the client being served."

[116] *Id.*

evidentiary privilege. The client's consent to permit the sharing of otherwise confidential information probably waives the privilege for that information, and if the collaborating professionals are present together with the client to discuss confidential information, then they likely destroy each others' privilege.[117] Good intentions to ensure that "what happens at the Center stays at the Center" may not persuade a judge to create an exception to the rules of evidence.[118]

This Article proposes a path through this barrier to effective collaboration: the danger that cooperation and communication among the client's professional servants will compromise the privileges she enjoys with each of them. These proposed reforms of evidence rules and the common law could protect the client's confidential information from exposure to third parties and accommodate the need for consultation among a common client's professionals across disciplines.

Professional privileges are meant to protect a client, but under current interpretation, the rules create an unnecessary barrier to healthy and useful collaboration. As discussed in the following sections, the public policies that support the professional privileges should accommodate this situation without compromising the client's confidentiality and privileged trust in her attorneys and counselors. The law and rules should promote, not discourage, collaboration between the disciplines so that clients in need will seek the able help of professionals.

V. The Privileges

Attorney's rules of professional conduct provide for attorney-client evidentiary privilege and confidentiality. However, despite the virtue of possible collaboration with other professionals or the potential expediency achieved by disclosing a client's business to third parties, the attorney is bound to keep the client's secrets. If the collaboration risks disclosure of

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[117] *See, e.g.*, UNIF. R. EVID. 502, 503, discussed at length *infra* Part VI.

[118] STRACK & GWINN, HOPE FOR HURTING FAMILIES II, *supra* note 115, at 102. Gwinn and Strack and the Family Justice Center may have reason for optimism under California's more lenient evidence rule, discussed *infra* note 159.

privileged communication the attorney cannot ethically collaborate.

The client also enjoys the counselor-client privilege, rooted in the psychotherapist-patient privilege. Every state has recognized some form of therapist-patient testimonial privilege, including for counselors in general, victim counselors, as well as sexual assault and rape counselors. As explained in the following sections, these professional privileges are valuable and spring from compelling public policy concerns. Courts construe and interpret these privileges differently and more leniently than the attorney-client privilege. If, for example, the counselor is not an agent of or subordinate to the attorney, then their collaboration for a common client or their mutual presence in a meeting with the common client likely destroys both privileges.

A. History and Rationale of the Attorney-Client and Counselor-Client Privileges

Wigmore provides the standard and lasting explanation of the attorney-client privilege: "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent."[119] Wigmore articulated the persistent elements of the privilege:

> (1)Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[120]

The attorney-client privilege is the oldest, longest recognized testamentary privilege in legal history. Tracking

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[119] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (John T. McNaughton ed., rev. 1961) [hereinafter WIGMORE].

[120] *Id. at* § 2292.

Wigmore's authoritative narrative, the privilege appears in many historic and modern treatises.[121] The privilege even existed in primitive form among the advocates of Rome.[122]

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[121] *See, e.g.*, JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 1057 (1826); THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 394 (4th ed. 1832); EDWARD P. WEEKS, TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW § 144 (1878); FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES § 576 (1879); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1 (1986); EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 6.2.4 (2002); *see also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 369 (John L. Wendell ed., 1858) (positing that "no counsel, attorney or other person intrusted with the secrets of the cause by the party himself shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy as came to his knowledge by virtue of such trust and confidence.")

[122] M. TULLIUS CICERO, THE ORATIONS OF MARCUS TULLIUS CICERO, 24 n.1 (C.D. Yonge trans., George Bell & Sons 1903) ("Are not my witnesses ignorant of many circumstances which you are acquainted with? Is it not owing, not to the innocence of your client, but to the exception made by the law, that I am prevented from summoning you as a witness on my side on this charge?"); *see also* A.H.J. GREENIDGE, THE LEGAL PROCEDURE OF CICERO'S TIME, 484 (1901):

> There was, further, a class of people who could not be made to give evidence against their will . . . . The relationship of client and patron [advocate at law], in the loose form in which it prevailed in Cicero's time, was also a bar to compulsory testimony . . . . It is possible that the exemption of *publicani* from compulsory evidence existed in Cicero's day, since even at this time their position was so far privileged that their books could not be sealed and taken into court.

In early English law, the privilege was premised upon a lawyer's own theory of oath and honor.[123] By the late 1700s, the doctrine shifted to the client and the client's fear of disclosure, looking to "the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal advisor."[124] This theory is the root of the privilege in America—recognizing a cost to truth-seeking, but balancing it against the necessity of free, unguarded communication between client and attorney.[125] The theory assumes privilege imposes no real cost on truth seeking because, without a promise of confidentiality vested in the lawyer, the client would not make the statements or admissions at all.[126]

This theory of privilege remains in American law, but a "humanistic" theory also has arisen, based in concerns of privacy and autonomy.[127] Because the attorney-client relationship bears on the client's life and decisional autonomy,

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[123] *See* WIGMORE, *supra* note 119, § 2290:

> It was an objective, not a subjective [theory]—a consideration for the *oath and honor* of the attorney rather than for the apprehension of the client. . . . Clearly the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed." The first duty of an attorney," it has been said, "is to keep the secrets of the clients." If the "point of honor" was to be recognized at all as a ground for exemption, then surely the attorney fell within the exemption. And no doubt this was, in the beginning, and so long as any countenance was given to that general doctrine, the theory of the attorney's exemption.

See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. C (2008) [hereinafter RESTATEMENT].

[124] *Id.*; *see also* WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 201–03 (1944).

[125] *See* IMWINKELRIED, *supra* note 121, at § 6.2.4(a) (citing Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999)).

[126] *Id.*

[127] *Id.* at § 6.2.4 (b) (citing David Louisell, *Confidentiality, Conformity and Confusion, Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956)).

the client "has a right to make choices with respect under the existing legal regime, including the justice system. . . . When the person forms a relationship with an attorney to obtain advice about those choices, that relationship should be left largely 'unmolested . . . by the state'."[128]

According to the Restatement (Third) of the Law Governing Lawyers, "[t]he rationale for the privilege is that confidentiality enhances the value of the client-lawyer communications and hence the efficacy of legal services."[129] This rationale rests on three related assumptions. First, because of the complexity and uncertainty of rights, obligations and modern legal procedure, clients need lawyers.[130] Second, a client who consults with a lawyer needs to disclose all of the facts to the lawyer and receive advice reflecting those facts to realize adequate legal assistance.[131] Third, without the privilege, clients would be reluctant to disclose personal, embarrassing or unpleasant facts.[132] These assumptions are consistent with and heightened in domestic violence cases. Confidentiality is more than a matter of strategy or embarrassment for a victim of domestic violence. Confidentiality is a matter of life, death, and liberation.[133]

Although the counselor-client privilege is not as old as the attorney-client privilege, it is commonly accepted and rests on similar pillars as attorney privilege: "Counselors recognize that trust is a cornerstone of the counseling relationship. Counselors aspire to earn the trust of clients by creating an ongoing partnership, establishing and upholding appropriate boundaries, and maintaining confidentiality."[134]

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[128] *Id.*

[129] RESTATEMENT, *supra* note 123, at § 68 cmt. c (2008).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *See supra* notes 24–26.

[134] ACA CODE OF ETHICS, *supra* note 86, at § B intro.

Most states recognized a therapist-patient or counselor-client privilege before the Supreme Court recognized it in federal common law. In a report to Congress, the Department of Justice measured and evaluated state efforts to protect client communications with domestic violence and sexual assault counselors.[135] Between 1980 and the end of 1995, twenty-seven states established a statutory privilege for communications between victims and counselors, in varying forms.[136] The Report promoted increased protection of confidentiality because "violence against women is a serious threat to society . . . [so society] must provide support and protection for women who are the victims of violence."[137] As emphasized above, "counseling may be their only source of comfort [and] is essential for victims of domestic violence to enable them to escape from abusive relationships."[138]

The Department of Justice offered the following as a reason for recognizing a testimonial privilege specific to domestic violence counselors:

> Sexual assault and domestic violence counselors perform many services for victims similar to the services provided by attorneys, social workers, psychotherapists, psychologists, or clergy. Most states recognize the need for confidentiality in these relationships and have codified attorney-client, social worker-client, psychotherapist/ psychologist-patient and priest-communicant

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[135] *See* REPORT TO CONGRESS, *supra* note 29. The Department of Justice was directed by a section of the Violence Against Women Act which stated in part that the Attorney General must "study and evaluate the manner in which states have taken steps to protect the confidentiality of communications between sexual assault or domestic violence victims and their counselors, and to develop model legislation that provides *the maximum protection possible for the confidentiality of such communication within applicable constitutional limits.*" *Id.* at 1 (emphasis added).

[136] *Id.* at 3.

[137] *Id.* at 10–12.

[138] *Id.* at 12–13; *see supra* note 30.

> privileges in their statutes. A victim who seeks counseling from a rape crisis center or battered women's shelter rather than from a private psychologist may do so because of her economic circumstances. The victim's economic status should not result in a victim having less protection from disclosure for her communications to her counselor.[139]

The Department of Justice further underscored the importance of recognizing the privilege Alsoby underscoring the necessity of making victims feel safe so that they can fully disclose to counselors:

> Confidentiality is essential for effective counseling because without an assurance of confidentiality, victims would avoid treatment altogether or may withhold certain personal feelings or thoughts because they fear disclosure. Experience has shown that communication between victims and counselors are so extremely personal that the mere possibility of exposure to just one individual other than one's personal counselor may inhibit a victim.[140]

Among other recommendations, the Department of Justice encouraged states "to adopt legislation to protect these important communications to the extent permissible under those states' constitutions, statutes and case law," and suggested that "[e]fforts should be made to raise awareness of victims, advocates, counselors, attorneys and judges about the existence of state statutes."[141]

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[139] *See* REPORT TO CONGRESS, *supra* note 29, at 16.

[140] *Id.* at 18.

[141] *Id.* at 29.

In *People v. Turner*, the Colorado Supreme Court offers an instructive history of that state's victim-counselor privilege.[142] As the Court described, the state legislature enacted legislation that provided for victim-counselor privilege in 1994. The Court observed that:

> Domestic violence often does not consist of a single incident; it is recognized instead as a continual state of victimization that involves several crimes . . . . Significantly, for purposes of this case, and contrary to common understanding, most victims of domestic violence attempt to flee their abusers but are hampered by enormous economic hurdles, particularly if they have minor children . . . . Domestic violence organizations also help to reduce the economic gap between abuse victims who can and those who cannot afford to secure the services of paid therapists . . . . It is within this unique societal setting that the General Assembly acted to create the victim-advocate privilege.[143]

Now, as observed by the United States Supreme Court in *Jaffee*, all fifty states as well as the District of Columbia have enacted some form of a therapist-patient privilege.[144] Additionally, thirty-four states and the District of Columbia

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[142] 109 P.3d 639, 642–44 (Colo. 2005).

[143] *Id.* at 642–43.

[144] *Jaffee*, 518 U.S. at 12.

provide specific testimonial privilege for domestic violence victim advocates or sexual assault victim advocates.[145]

Despite some progress at the state level and in Washington, D.C., federal common law and the Federal Rules of Evidence do not recognize a specific counselor-client or victim advocate-client privilege. Yet, the federal psychotherapist-patient privilege, as established in *Jaffee*, almost certainly includes licensed counselors in domestic violence practices.[146] In *Jaffee* the Court, tracking "reason and experience" as demanded by Rule 501 of the Federal Rules of Evidence, and balancing the public good against a desire for probative evidence, held that:

> Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment . . . . As to experience, the court observed that all 50 states have adopted some form of psychotherapist-patient

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[145] *See* ALA. CODE § 30-6-8 (2010); ALASKA STAT. §§ 18.66.200-250 (2010); ARIZ. REV. STAT. §§ 12-2239, 13-4430, 8-409 (2010); CAL. EVID. CODE §§ 1035.4, 1037 (2010); COLO. REV. STAT. § 13-90-107 (2009); CONN. GEN. STAT. § 52-146(k) (2010); D.C. CODE ANN. § 14-310 (2010); FLA. STAT. ANN. §§ 90.5035-5036 (2002); HAW. REV. STAT. R. EVID. 505.5; 750 ILL. COMP. STAT. 60/227 (domestic violence); 735 ILL. COMP. STAT. 5/8-802.1 (sexual assault); IND. CODE §35-37-6-9; IOWA CODE ANN. § 915.20A; KY. R. EVID. 506(d)(2); LA. REV. STAT. ANN. § 46:2124.1; ME. REV. STAT. ANN. tit. 16 §§ 53-A, 53-B; MASS. GEN. LAWS ANN. ch. 233, § 20K (domestic violence); MASS. GEN. LAWS ANN. ch. 233, § 20J (sexual assault); MICH. COMP. LAWS § 600.2157(a); MINN. STAT. ANN. § 595.01(k), (l); MONT. CODE ANN. § 26-1-812; NEB. REV. STAT. § 29-4301-4304; NEV. REV. STAT. § 49.2541; N.H. REV. STAT. ANN. §§ 173-C:1 to C:10; N.J. STAT. ANN. §§ 2A:84A-22.13-16; N.M. STAT. ANN. §§ 31-25-1-6; N.Y. C.P.L.R. 4510; N.C. GEN. STAT. § 8-53.12; N.D. CENT. CODE §14-07.1-18; 23 PA. CONS. STAT. ANN. § 6116; TEX. GOV'T CODE ANN. § 420.075; UTAH CODE ANN. §§ 78-3c-1-4; VT. STAT. ANN. tit. 12, § 1614(b); VA. CODE ANN. § 63.2-104.1(B); WASH. REV. CODE § 5.60.060; WIS. STAT. ANN. § 905.045; WYO. STAT. ANN. § 1-12-116(b)(i). *See also* AMERICAN BAR ASSOC., COMM'N ON DOMESTIC VIOLENCE, SUMMARY OF DV/SA ADVOCATE CONFIDENTIALITY LAWS (Aug. 2007), *available at* http://www.abanet.org/domviol/statutorysummarycharts.html (summarizing each state's statutory provisions for testimonial privileges for domestic violence and sexual assault victim advocates and other mental-health professionals).

[146] *See Jaffee*, 518 U.S. 1.

> privilege . . . . The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering from the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.[147]

The therapist-patient privilege covers confidential communications made to licensed psychiatrists and psychologists, and the Court had "no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy."[148] The court reasoned that "their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist. . . but whose counseling services serve the same public goals."[149]

B. Attorney-Client Privilege: Sources and Limitations on Third-Party Presence

Presently, the attorney-client privilege is codified in state codes of professional conduct and in rules of evidence. While confidentiality is the professional duty to keep a client's

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[147] *Jaffee*, 518 U.S. at 6–7, 11.

[148] *Id.* at 15.

[149] *Id.* at 16.

communications secret,[150] privilege is the right to keep that confidence in court—specifically, the privilege to refuse to testify regarding the confidential communication despite compulsory discovery and evidentiary rules.[151] Attorney-client privilege in the federal context extends from Rule 501 of the Federal Rules of Evidence, which refers to the privilege as it exists and evolves in the common law as well as based in part on

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[150] State codes of ethics recognize and impose a duty of confidentiality on attorneys, in form similar to the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (6) to comply wiht other law or a court order.

MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010).

[151] Regarding confidentiality, *see id.* Regarding privilege, *see* UNIF. R. EVID. 502.

the "reason and experience" of the courts.[152] However, in *United States v. Zolin*, an early Supreme Court case construing the attorney-client privilege under Rule 501, the Court recognized that the privilege has limits:

> The attorney-client privilege is not without its costs. "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection— the centrality of open client and attorney communication to the proper functioning of our adversary system of justice —"ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing,* but to *future wrongdoing.*" It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy" between lawyer and client does not extend to communications

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[152] FED. R. EVID. 501:

> Except as otherwise provided by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to its statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id. In adopting the current rule, in 1972, Congress rejected the recommendations of the Judicial Conference Advisory Committee on Rules of Evidence, which included nine specific, exclusive testimonial privileges, including the attorney-client privilege and the psychotherapist-patient privilege. *See Jaffee*, 518 U.S. at 9 n.7 (citing Trammel v. United States, 445 U.S. 40 (1980) (recognizing a spousal testimonial privilege in the common law for Rule 501 and vesting the privilege exclusively in the witness-spouse)).

> "made for the purpose of getting advice for the commission of a fraud" or crime.[153]

In contrast, state rules are more explicit and usually list specific classes of privileged professional relationships, including the attorney-client privilege.[154]

At issue in this Article is whether limits on the attorney-client privilege can accommodate collaboration among privileged professionals working for common clients. Although contemporary attorney-client privilege safeguards the ancient, sacrosanct purposes of the profession, it does not accommodate the evolving dynamic of multidisciplinary practices and the particular problem identified here. In *Jaffee*, the Court explained the rationale of Rule 501's deference to federal common law:

> The Rule thus did not freeze the law governing privileges of witnesses at federal trials at a particular point in our history, but rather directed courts "to continue the evolutional development of testimonial privileges . . . . Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[155]

Here the question is whether multidisciplinary collaboration on behalf of a domestic violence victim such a public good as to justify the expanded privileges.

Under current federal common law and state rules construing the attorney-client privilege, the presence of the domestic violence counselor in the attorney's interview with their common client will probably destroy her privilege. Only scant federal case law suggests that collaborating attorneys,

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[153] 491 U.S. at 562 (1989) (citations omitted) (construing the crime-fraud exception).

[154] *See, e.g.*, UNIF. R. EVID. 502.

[155] *Jaffee*, 518 U.S. at 8–9 (citing *Trammel*, 445 U.S. at 47).

psychotherapists, counselors or victim advocates might enjoy the same testimonial privileges that would protect their client if they were working individually. The First Circuit hints at an expansion that could accommodate the proposals in this Article, but then it draws a skeptical line around a "magic circle" of privilege among third parties:

> Although decisions often describe such situations in which the client "intended" the disclosure to remain confidential . . . the underlying concern is functional: that the lawyer be able to consult with others needed in the representation and that the client be allowed to bring closely related persons who are appropriate, even if not vital, to a consultation . . . . *An intent to maintain confidentiality is ordinarily necessary to continued protection, but it is not sufficient.* . . . On the contrary, where the client chooses to share communications outside this magic circle, the courts have usually refused to extend the privilege. The familiar platitude is that the privilege is narrowly confined because it hinders the courts in the search for truth . . . . Fairness is also a concern where a client is permitted to choose to disclose materials to one outsider while withholding them from another.[156]

Rejecting the subjective ingredient of client intent, Wigmore states the basic rule that likely would inform the "reason and experience" necessary to expand privileges under Rule 501:

> One of the circumstances by which it is commonly apparent that the communication is not confidential is the presence of a third person who is not the agent of either the client

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[156] United States v. Mass. Inst. of Tech., 129 F.3d 681, 684–85 (1st Cir. 1997) (emphasis added) (citations ommited) (addressing a large corporate client in complex tax litigation, rejecting MIT's argument that its disclosure of documents to an auditing agency did not waive its attorney-client privilege, finding the auditors outside the "magic circle," among other reasons).

> or attorney. Here, *even if we might predicate a desire for confidence by the client*, the policy of the privilege would still not protect him . . . . The presence of a third person (other than the agent of either) is obviously unnecessary for communications to the attorney as such, however useful it may be for communications in negotiation with the third person . . . . It follows, *a fortiori*, that communications to the third person in the presence of the attorney are not within the privilege.[157]

The client's desire for confidentiality, however pronounced and critical, simply does not justify extending the privilege under present and ancient rules. Thus, Wigmore, and the rules that rely on his propositions, would deny Katrina protection for her counselor's presence in the attorney's interview or for the counselor sharing with the attorney any necessary background regarding her rape and drug use.

The Second Circuit underscored this lesson when it rejected attorney-client privilege for communications between a corporate client's attorney and an investment banker who had advised the client:

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[157] WIGMORE, *supra* note 119, § 2311 (emphasis added). *But see In re* Himmel, 533 N.E.2d 790, 794 (Ill. 1988) (holding that presence of mother and fiancé at meeting between client and attorney destroyed the privilege, unless they were agents of the client or attorney); *cf.* Kevlik v. Goldstein, 724 F.2d 844, 849 (1st Cir. 1984) (holding that where non-client father was "acting in a normal and supportive parental fashion," his presence did not destroy the confidentiality of his adult son's communication with son's attorney because of the son's, father's and attorney's intent that the consultation be privileged and confidential). *See also* United States v. Evans, 113 F.3d 1457, 1461–66 (7th Cir. 1997) (holding that presence of family friend and former attorney in initial interview between criminal defendant and defense attorney destroyed the privilege, because former attorney attended as family friend and for moral support). *But see* Rosati v. Kuzman, 660 A.2d 263, 266–67 (R.I. 1995) (finding that presence of parents at conference between client and criminal defense attorney did not breach privilege because they were "invaluable confidants," and because the relevant inquiry is "whether the client reasonably understood the conference to be confidential notwithstanding the presence of third parties").

> [T]he privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client. Thus, a communication between an attorney and client may be privileged even if it turns out to be unimportant to the legal services provided .... Conversely, a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves to be important to the attorney's ability to represent the client.[158]

In contrast to Wigmore, the *Restatement (Third) of the Law Governing Lawyers* suggests that if the third party also has an evidentiary privilege, then the three-way communication remains privileged. This sustained confidentiality is the hope of the proposals in this paper, but the common law does not yet support the premise reliably. Without citing any authority, the Restatement comments:

> The presence of a stranger to the lawyer-client relationship does not destroy confidentiality if another privilege protects the communications in the same way as the attorney client privilege. Thus, in a jurisdiction that recognizes an absolute husband-wife privilege the presence of a wife at an otherwise confidential meeting between the husband and the husband's lawyer does not destroy the confidentiality required for the attorney-client

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[158] United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999) (quoting the preceding passage from WIGMORE, *supra* note 119, at § 2317).

privilege.[159]

As explained below, the psychotherapist-patient privilege and counselor-client privilege are not co-extensive with the attorney-client privilege, in construction or interpretation, so the *Restatement*'s proposition probably does not help the common domestic violence victim and her collaborating professionals.[160] The reporter's note in the *Restatement* for this comment states, "[t]he approach of modern evidence codes varies," on this point. The note goes on to claim that "[i]n their actual decisions, courts almost invariably inquire into whether a reasonable person would have expected the communication to reach only other privileged persons in the circumstances and not into the actual, subjective state of mind of the communication person."[161]

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[159] RESTATEMENT, *supra* note 123, at § 71 cmt. b (2000). The Restatement's optimistic example is suspect as well. *See, e.g.*, Wesp v. Everson, 33 P.3d 191, 199 n.13 (Colo. 2001) (finding that a defendant's suicide note and communications with his attorney were not privileged because of the presence of his wife at the meeting). In a footnote, the Colorado court explained that it would not take up this particular issue because the parties did not raise it, all agreeing that the communication was not privileged because of the wife's presence:.. "We observe, however, that the effect of a spouse's presence on a communication between attorney and client is not entirely clear." *Id.* (citing United States v. Rothberg, 896 F.Supp. 450, 454 n.7 (E.D. Pa. 1995) (noting without discussion that the trial court held that the privilege applies to statements made in a third party spouse's presence); Charal v. Pierce, No. CV 810042, 1981 U.S. Dist. LEXIS 17497, at *28–30 (E.D.N.Y. Nov. 3, 1981) (concluding that a conversation between attorney and client, in the presence of the client's spouse, was privileged because the client reasonably understood the conference to be confidential and the spouse's presence was reasonably necessary for the protection of the client's interests); People v. Allen, 104 Misc.2d 136, 427 N.Y.S. 2d 698, 699-700 (App. Div. 1980) (holding that a three-way conversation among an attorney, his client, and the client's spouse was not privileged)). *Cf.* State v. Rhodes, 627 N.W.2d 74, 85 (Minn. 2001) (finding that presence of wife at meeting in which defendant discussed financial aspects of divorce with attorney prevented privilege from attaching to the communication: "The attorney-client privilege does not apply to confidences given in presence of third parties . . . . Because [the wife] was a non-client third party, her presence prevented the attorney-client from attaching.")

[160] *See infra* Part V.D. (illustrating the more lenient common law treatment for the psychotherapist-patient privilege, compared to the stricter attorney-client privilege on the issue of third parties).

[161] RESTATEMENT, *supra* note 123, at § 71, cmt. b.

Though the *Restatement*'s approach is consistent with the proposals in this Article a case-by-case inquiry into a "reasonable person's" expectation is not sufficient to promote and protect robust, multidisciplinary professional collaboration for domestic violence victims. Thus this Article calls for reform that would make inter-professional privileges in multidisciplinary practices consistent and predictable to promote a client's confidence in her professional ministers and to promote the public good cultivated by these fruitful, liberating services. In *Jaffee*, the Supreme Court opted in favor of predictability over a case-by-case balancing analysis:

> Making the promise of confidentiality contingent on a trial judge's later evaluation of the patient's relative interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege . . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely ranging application by the courts, is little better than no privilege at all.[162]

The federal common law should recognize that counselors are "necessary third parties" when assisting domestic violence clients and their attorneys, or the federal common law should accommodate a common-client theory across privileged disciplines. Such reforms would promote a predictable, sound privilege across professions in a multidisciplinary practice, serving clients who are victims of domestic violence or sexual assault.

State rules are generally more explicit than federal rules because they tend to more clearly enumerate particular evidentiary privileges. For example, many rules are modeled off of Rule 502 of the Uniform Rules of evidence. What may be

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[162] *Jaffee*, 518 U.S. at 17–18 (citations omitted).

deemed a "confidential" communication under Rule 502 is strictly limited such that, "A communication is [only] 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[163] Rule 502s "general rule of privilege" further restricts the kinds of communications that are privileged stating that:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
>
> (2) between the lawyer and a representative of the lawyer;
>
> (3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (4) between representatives of the client or between the client and a representative of the client; or
>
> (5) among lawyers and their representatives representing the same client.[164]

State rules, especially those modeled after the Uniform Rules, would likely find that both the counselor's presence in the

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[163] UNIF. R. EVID. 502(a)(2) (rev. 2005).

[164] UNIF. R. EVID. 502(b).

attorney's client interview and the attorney's consultation with the client's counselor destroyed or violated the client's attorney-client privilege.[165] The mere fact that the client enjoys privilege with both professions does not mean that there is automatically a privilege that covers their collaboration.[166] For example, under Uniform Rule 502(a)(5), if the counselor were a "representative of the lawyer," then the privilege would cover her presence in the interview and their subsequent consultation. However, in Katrina's scenario and often in multidisciplinary collaborations, the counselor is not subordinate to the lawyer and is not hired for purposes of litigation. Instead, counselors and attorneys are most often cooperating professionals with a common client, both serving their respective ends and both bound by distinct ethical obligations.

Under Uniform Rules 502(a)(2) and (4), unless the counselor is necessary for the client's life or ability to function, the counselor's presence likely destroys privilege. A "necessary third party" within the context of Rule 502 is usually someone

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[165] California is an exception. *See* CAL. EVID. CODE § 952 (West 2010):

> [C]onfidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence as a means which, so far as the client is aware, discloses the information to no third persons other than those *who are present to further the interest of the client in the consultation* or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purposes for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

Id. (emphasis added). This lenient and broad rule may explain why the San Diego Family Justice Center can be confident in its declarations of confidentiality within its multidisciplinary, collaborative "one stop shop" for domestic violence victims. *See supra* note 115.

[166] *See supra* note 161, regarding the presence of privileged spouses in attorney-client meetings; *see also* Zimmerman v. Nassau Hosp., 76 A.D.2d 921, 922 (N.Y. App. Div. 1980) (finding that medical report from physician was not privileged where attorney was present at infant's medical examination with parents, where report was not prepared for litigation because parents took child to physician "for a thorough examination, diagnosis and treatment").

like a language interpreter or medical professional.[167] While a counselor may not be needed for a victim's physical well-being like a nurse in intensive care, counselors can be needed for the client's emotional well-being—to facilitate clear advice from the attorney, to ease fact-finding and to help the client process her own traumatized psyche. Currently, most privilege rules do not recognize this notion of necessity. No clear authority creates an exception to the basic rule regarding helpful, collaborating third parties. For Katrina this means that, under contemporary constructions of the privilege rules, her insistence that her counselor remain is a waiver of both her attorney-client privilege and her counselor-client privilege.[168]

The proposals that follow would not drastically change the current privilege rules. Instead, they would better encapsulate the well-intentioned public policy reasons behind establishing privileges in the first place by promoting useful collaboration among professionals serving a common, vulnerable client. In Katrina's case, her counselor would be a "necessary third party," a person necessary for "rendition of professional legal services to the client" and "reasonably necessary for the transmission of the communication."[169] The counselor is necessary in this

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[167] Third persons properly involved in rendering the attorney's legal services, the "circle of intimates," includes other lawyers in the firm, non-lawyer staff, subordinate investigators, experts or other agents retained by the lawyer to assist in the representation, and they also include interpreter or other communicating agent necessary to facilitate communication between the attorney and the client. *See* GEOFFREY C. HAZARD ET AL., THE LAW OF LAWYERING § 9.9 (2008 Supp.); *see also* Hofman v. Conder, 712 P.2d 216, 217 (Utah 1985) (holding that presence of nurse in hospital room during attorney-client conference did not destroy the privilege, given the client's "helpless physical condition and the intensive hospital care he had been receiving throughout the evening and during this incident," because her presence was reasonably necessary under all the circumstances).

[168] *See, e.g.*, Doe v. Poe, 700 N.E.2d 309, 310 (N.Y. 1998) (holding communication of bank employee to attorneys was not privileged because of the presence of another attorney employed by the bank but who was present in a "nonrepresentative capacity" and not as agent of the bank), *aff'd*, 244 A.D.2d 450, 451 (N.Y. App. Div. 1997) ("The attorney-client privilege must be narrowly construed . . . and generally does not extend to communications between a client and his or her counsel which are made in the known presence of a third party."); *see also* cases cited for this proposition, *supra* notes 157–59.

[169] UNIF. R. EVID. 502(a)(2).

context not because of a physical impairment or language barrier, but rather because of the client's need for emotional and moral support and comfort without which she may otherwise feel unable to overcome her abuser's campaign of subjugation, coercion and violence.

C. Counselor-Client Privilege: Sources and Limitations On Third-Party Presence

States have established privilege for counselor-client communications or for communications between clients and victim-counselors in various statutory forms.[170] As a whole, these statutes suggest that common privileges are not parallel to the attorney-client privilege and probably would accommodate limited multidisciplinary collaboration if the communication has a therapeutic purpose. For purposes of discussion and analysis in this Article, most state statutes track the elemental form of Rule 503 of the Uniform Rules of Evidence:

> **RULE 503. PSYCHOTHERAPIST—OR MENTAL-HEALTH PROVIDER–PATIENT PRIVILEGE.**
>
> (a) Definitions. In this rule:
>
> (1) A communication is "confidential" if it is not intended to be disclosed to third persons, except those present *to further the interest of the patient in the consultation, examination, or interview*, those reasonably necessary for the transmission of the communication, and *persons who are participating in the diagnosis and treatment of the patient under the direction of a psychotherapist or mental-health provider, including members of the patient's family.*
>
> (b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential

[170] *See supra* note 146 (providing specific state citations).

> communications made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including addiction to alcohol or drugs, among the patient, the patient's psychotherapist or mental-health provider and *persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the psychotherapist or mental-health provider.*[171]

As emphasized, Rule 503 protects the participation of third parties who are present to "further the interests" of the client, even if they are not necessary to the rendering of services, like an attorney's staff, or necessary for communication, like an interpreter. Such testimonial privilege for psychotherapists or mental-health professionals enforces the ethical standards of their professions.[172] The *APA Ethics Code*, in contrast, provides that: "When indicated and professionally appropriate, psychologists cooperate with other professional in order to serve their clients/patients effectively and appropriately."[173] Such a rule provides for more liberal collaboration among other professionals and professions, for the sake of the client The *APA Ethics Code* goes so far as to specifically provide for disclosures unauthorized by a client if the disclosure serves a therapeutic purpose:

> Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2)

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[171] UNIF. R. EVID. 503(a)(1), (b) (emphasis added, edited by the author for clarity and application to psychotherapists and mental health professionals).

[172] *See* AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 4.01 (2002) ("Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship.").

[173] *Id.* at § 3.09.

> *obtain appropriate professional consultations;* (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.[174]

These ethical codes guiding psychologists, therapists, and counselors anticipate inter-professional collaboration to serve, protect and promote the client's wellbeing. The law of professional privileges, however, likely limits appropriate consultation in multidisciplinary practices by threatening the destruction of confidentiality and testimonial privilege.

Like the attorney-client privilege, courts have not applied consistently the psychotherapist or counselor privileges. Regarding the instant question of whether the presence of a privileged third-party destroys the professional privilege, courts have been more lenient and expansive in their permission of third parties for mental-health and medical professionals than for lawyers. For example, a Connecticut court held that a spouse's presence at a counseling session with a psychotherapist did not destroy the privilege, not because of a common privilege but because of the client's intent and therapeutic value:

> While it is true that where a disclosure to a physician is made "publicly and freely" in the presence of a third person that communication is generally not considered privileged, the presence of a third person is not a waiver if that person is present to aid the patient. The presence of a third person for that purpose does not demonstrate the patient's intent to

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[174] *Id.* at § 4.05(b) (emphasis added). The American Counseling Association crafts its confidentiality ethics slightly differently but still accommodates disclosure for particular cultural, ethical and therapeutic reasons. *See* ACA CODE OF ETHICS, *supra* note 86, at § B.1.a (stating that "[c]ounselors maintain awareness and sensitivity regarding cultural meanings of confidentiality and privacy. Counselors respect different views toward disclosure of information. Counselors hold ongoing discussions with clients as to how, when and with whom information is to be shared."); *id.* at § B.3.b (regarding treatment teams); *id.* at § B.4.a (regarding group work); § B.4.b (regarding couples counseling).

> renounce the secrecy to which she is statutorily entitled . . . . An implied or express waiver of the privilege cannot occur unless it is the intelligent waiver of a known right, implying the existence of a patient's active decision or consent to waive her privilege.[175]

If the third person is helpful to the medical or mental health professional, and if the client-patient does not intend to waive privilege, then the presence of the third person typically does not destroy the privilege regardless of the third-party's status or relationship to the client-patient.[176] Consistently, psychotherapist-patient and counselor-client privileges accommodate group therapy sessions without sacrificing confidentiality.[177]

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[175] Cabrera v. Cabrera, 580 A.2d 1227, 1234 (Conn. App. Ct. 1990); *see also* Ellis v. Ellis, 472 S.W.2d 741, 745–46 (Tenn. Ct. App. 1971) ("In the instant case, there are actually two confidential relationships. One is the psychiatrist and patient confidential relationship . . . and the other is the confidential relationship of husband and wife . . . . We are of the opinion that communications made to a psychiatrist, when the confidential relationship of psychiatrist and patient exists, even though made in the presence of a spouse, are privileged . . . . *This Court cannot treat a spouse as a stranger or third party to communications which would be privileged without the spouse's presence. To do so would be to ignore reality and weaken the marital relationship.*") (emphasis added).

[176] *See, e.g.*, Cox v. State, 849 So.2d 1257, 1271 (Miss. 2003) (construing Mississippi's Rule 503 to hold that presence of third party—patient's paramour —did not destroy privilege where doctor relied on the third party to assess the patient's medical history).

[177] *See, e.g.*, Doe v. Oberweis Dairy, 456 F.3d 704, 718 (7th Cir. 2006) (rejecting sexual harassment plaintiff's claims of confidentiality because her emotional and mental state were at issue, but protecting privilege interest of others in a joint therapy session because of their "substantial privacy interest"); Ferrell L. v. Superior Court, 203 Cal. App. 3d 521, 527 (1988) (rejecting criminal defendant's appeals to the Confrontation Clause and his motion to reveal statements from his victim-daughter's group therapy sessions, holding that "the communication with the other participants in the group therapy is reasonably necessary for the accomplishment of the purpose for which the psychotherapist was consulted. . . ."); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:43 (3d ed. 2007); JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE, §504.08[4] (Joseph M. McLaughlin, ed., 2d ed. 2009).

In an articlefor the *Illinois Law Review*, Jennifer Bruno identifies the outer limits of the privilege for victim-counselors as the point at which collaboration would threaten the common client's confidence.[178] However, given the uncertain rules of privilege when it comes to third parties to the victim-counselor relationship, counselors must be conservative and cautious, which often excludes the counselor when she is needed most. As Bruno explains, without their counselors present, "victims may be forced to face police officers, nurses, doctors, forensic examiners, prosecuting attorneys, partners, parents and friends alone, without the benefit of advocates specifically trained to intervene in these intimidating situations."[179]

Even considering the rather lenient application of therapist-patient and counselor-client privileges when it comes to third parties, Bruno is likely correct in her concern. In the cases she describes, the relationships and conversations are not therapeutic *per se*, nor are they formalized therapy sessions. Rather, they are relationships where the victim-counselor accompanies her client on the dizzying journey from service provider to service provider in her attempt to flee from abuse. This is exactly the sort of problem faced by Katrina and many other domestic violence victims seeking help. Katrina's case therefore identifies the great problem of multidisciplinary collaboration for domestic violence victims.

Despite the public good undergirding the counselor-client privilege, courts are unlikely to recognize the privilege as covering collaboration between a victim's attorney and counselor. In Katrina's scenario the meeting is not therapeutic or prescribed by the counselor; it is a meeting with the attorney to assess her case and render legal counsel. Katrina insisted on her counselor's presence Because the counselor is not a non-lawyer assistant, subordinate employee, retained expert, or a common client, the counselor becomes a third-party to the attorney's privilege. Likewise, the attorney and law students becomes third parties to the counselor's privilege, because they are neither family, common clients, group therapy participants nor helpful

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[178] Bruno, *supra* note 30, at 1375.

[179] *Id.*

sources of information about her plight. The proposals that follow address this problem.

VI. Policy and Call for Reform

Wigmore crafted four "fundamental conditions" necessary to establish a new testimonial privilege in the common law:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
>
> Only if these four conditions are present should a privilege be recognized . . . . These four conditions must serve as the foundation of policy for determining all such privileges, whether claimed or established.[180]

In *Jaffee*, recognizing the psychotherapist-patient privilege, the Supreme Court confirmed these elements as necessary to establish a new or expanded evidentiary privilege in the common law:

> The common-law principles underlying the recognition of testimonial privileges can be stated simply. "For more than three centuries it

[180] WIGMORE, *supra* note 119, at § 2285 (emphasis in original).

> 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 exemption which may exist are [sic] distinctly exceptional, being so many derogations from a positive general rule . . . . Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "public good transcending the normally predominant principles of utilizing all rational means for ascertaining truth."[181]

Here, the problem is not a need for a new privilege; the necessary privileges exist for attorneys and counselors serving victims of domestic violence and sexual abuse. The problem is that the victims' lawyers and counselors cannot collaborate effectively without threatening their privileges and confidentiality. The call for reform is, first, to reinterpret the roles in collaboration for common clients and the understanding of "necessary third parties" and, second, to establish firmly that their respective privileges can accommodate the other when both counselor and lawyer are present with the client or collaborating for her. These reforms satisfy both Wigmore's concerns and the Supreme Court's standards for expanding the privileges.

A. Necessary Third Parties

Usually, under the attorney-client privilege, "necessary third parties" are people required for the rendition of legal services or required for the transmission of communication.[182] These people are usually law partners, non-lawyer staff,

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[181] *Jaffee*, 518 U.S. at 9 (1996) (quoting United States v. Bryan, 339 U.S. 323 (1950); quoting WIGMORE, supra note 119, § 2192 (3d ed. 1940)); Trammel v. U.S., 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234 ,(1960) (Frankfurter, J., dissenting) (citing U.S. v. Nixon, 418 U.S. 683, 709 (1974)).

[182] *See, e.g.*, UNIF. R. EVID. 502(a)(2).

investigators, retained experts, language interpreters or intimate family members who are necessary to bridge physical communication barriers.[183] Usually a person lending moral support or practical assistance to a client does not qualify as a necessary third-party and their presence will destroy the attorney-client privilege.[184]

Although the collaborating counselor is not subordinate to or retained by the attorney, and although she is not interpreting the client for the attorney, privilege laws should recognize her as a necessary third party. The victim of domestic violence faces compounding crises as she resolves to flee her abuser. Physically, the client may have endured recent trauma, rape or threats on her life.[185] She likely has been hospitalized within the previous year, suffers from chronic ailments and is more susceptible to illness than the average woman.[186] Psychologically, she is probably depressed, distrustful, anxious, and her self-confidence, esteem, and cognition are likely suppressed and wounded. She doubts herself and has adapted to survive with skepticism and appeasement.[187] Financially, she may be effectively destitute after leaving her sole source of income, food and shelter, as her abuser, up to this point, has kept her isolated and unproductive.[188] She has probably a single parent without a job. She may be laboring under threats of violence upon leaving her abuser and she is at a much greater risk for domestic violence and even homicide in the time immediately following her flight.[189]

As the client engages her counselor and the domestic violence shelter, she faces a daunting array of services and

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[183] *See* UNIF. R. EVID. 502(a)(5), (b); *see generally supra* note 169.

[184] *See supra* note 158.

[185] *See supra* Part III.A.1.

[186] *See id.*

[187] *See id.*

[188] *See id.*

[189] *See id.*

professionals all dedicated to her well being but presenting a new set of faces, all insisting that she recount again and again the most horrible and embarrassing details of her life.[190] She will engage the police, prosecutors as well as a court system, social workers, counselors, lawyers, advocates, all while trying to settle into a temporary home, look for work, care for children, worry about her future, repair old ties and heal.[191]

When she sits down with her lawyer, her counselor is, indeed, necessary for her to function and communicate well, to think clearly and to bear up under the strain of investigation, issue identification, case evaluation, legal analysis and trial preparation.[192] She needs her counselor.

To that end, privilege rules should recognize domestic violence counselors and victim advocates as third parties necessary for the rendition of legal services and the transmission of communication. In Katrina's case, without her counselor, she would not endure the interview with her lawyers, and she would not be able to articulate her history, facts and needs well enough to assist her legal counsel. Her counselor can empower and encourage her and collaborate with her attorney to promote her interests and effectuate a positive outcome.

B. Inter-professional Common Client Privilege

As noted, the Restatement optimistically suggests, without citation or authority, that "[t]he presence of a stranger to the lawyer-client relationship does not destroy confidentiality if another privilege protects the communication in the same way as the attorney-client privilege."[193] Although this is not the law in most jurisdictions, it should be. In Katrina's case, however, even this would be insufficient to protect her confidentiality and privilege because the counselor's privilege does not protect the communication in the same way as attorney-client privilege. The

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[190] *See* GWINN & STRACK, *supra* note 51.

[191] *See id.*; *supra* Part II.B.

[192] *See supra* Parts III.A., B.

[193] RESTATEMENT, *supra* note 123, at § 71 cmt. b.

attorney-client privilege is to be narrowly construed and only permits the presence of third parties who are retained agents or subordinates of the attorney or client or, alternatively, who are necessary for rendition of legal services or for the transmission of communication.[194] The counselor-client privilege, by contrast, permits the presence of third parties necessary "to further the interest of the patient in the consultation, examination, or interview" or where the third-party contributes some therapeutic or diagnostic value.[195]

Not only do both privileges offer distinct protection, but they also likely violate each other's principles. While the attorney might "further the interest" of the client, the attorney's presence is not therapeutic or diagnostic for her mental health. Likewise, the counselor is not an agent of the attorney or the client and is not necessary to translate across language barriers or physical impairment. Rather, the counselor is serving the client by empowering her to endure the lawyer's interview, by assisting the lawyer in understanding the client's situation and well being, by articulating what the client cannot utter and by giving her courage in the crises of escape.

While the law of privilege does not yet accommodate these roles, they satisfy the elements imposed for the expansion of both privileges in four ways. First, the client's communication with the counselor and the lawyer originates in a confidence that they will not be disclosed.[196] As thoroughly cited, every state, as well as the federal courts, has recognized that confidentiality is a bedrock for both legal and mental-health counsel. Without assurances and expectations of confidentiality, clients and especially victims of domestic violence, likely would not speak for fear of exposure and continued abuse.

Second, such secure confidentiality in collaboration is essential to the full and satisfactory maintenance of the relations

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[194] *See supra* Parts V.A., C.

[195] *See supra* Parts V.B., D.

[196] *See* WIGMORE, *supra* note 119, at § 2285(1).

among the parties.[197] Without confidentiality, the client's communications with either the attorney or the counselor would chill, frustrating both in their attempts to serve the client. Professional confidentiality is essential to meaningful counseling and effective lawyering for victims of domestic violence. For these clients, confidentiality can even transcend a desire for redressing the abuse they have just escaped. These clients may see a threat of disclosure as a threat to life, safety and their very freedom. Without confidence that her counselors and lawyers will keep her secrets safe, the domestic violence victim may choose to take her chances alone, to return to her abuser or obfuscate her story.

Third, these relationships, in the opinion of the community, ought to be sedulously fostered.[198] The attorney-client privilege is the oldest of the professional privileges, dating to Roman law, and the confidentiality imperative in the attorney-client relationship is firmly established in American law. Society has sealed these relationships with the imprimatur of confidentiality and privilege by specifically providing for it in every state and at the federal level. Since both professional relationships are already "sedulously fostered," collaboration between counselors and attorneys for a common vulnerable client should be fostered as well.

Fourth, permitting a defendant perpetrator, experienced in the tactics of shame, exploitation and abusive coercion to invade professional confidences would work a much greater injury to society than placing limits on "every man's evidence" and disposing of litigation.[199] In *Jaffee*, the United States Supreme Court confirmed the wisdom of all fifty states, finding "that a psychotherapist-patient privilege will serve a public good transcending the normally predominant principle of using all rational means for ascertaining truth."[200] The unsettled question

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[197] *See id. at* § 2285(2).

[198] *See id.* at § 2285(3).

[199] *See id.* at § 2285(4).

[200] *Jaffee*, 518 U.S. at 15 (1996).

is whether protecting multidisciplinary collaboration with privilege is worth the cost to fact-finding and confrontation.

CONCLUSION

The law extends testimonial privilege to both counselors and lawyers serving victims of domestic violence, acknowledging that confidence in these relationships is more valuable than adversarial discovery. However, not expanding privilege further is a disservice to domestic violence victims. In order to more adequately serve victims, privilege rules should permit the collaboration between privileged professionals working in their respective capacities for a common client. The law should recognize a testimonial privilege covering the client's communications with her attorney and her counselor, in each other's presence, and their collaboration with each other for her sake.

Victims of domestic violence should not be made to choose between permitting professionals to collaborate and their confidentiality. Collaboration across the professional divide affords their common clients more thorough and efficient services and effects greater access to justice and community resources alike. Competing professional privileges, however, can undermine public policy and hinder client communication and candor. While these different privileges protect clients' need for confidentiality with their counselors and attorneys, the current rules should be expanded so that they may better accommodate multidisciplinary practice. Reforming the rules of privilege and confidentiality will promote collaboration, ensure client trust and generate more favorable outcomes for clients and society.