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Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice

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By Jeffrey R. Baker[1]

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 are creating 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 better outcomes and fruitful service, can be necessary for competent representation and may be critical to her very survival. As the common 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 a client's wider context and ease the client's access to timely, appropriate solutions, but such practices can 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 to serve with mental health professionals or social workers, their exchanges and cooperation can threaten precepts of confidentiality, client identification, zealous advocacy and loyalty.

Current applications of professional privilege do not accommodate multidisciplinary practices adequately, failing to afford sufficient protection for victims of domestic violence and leaving 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 services to certain clients.

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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.

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 through a gauntlet of civil and criminal proceedings. Although the attorney may need information gathered by the counselors, although the counselors long to share intimate information with the attorney, although the client is traumatized by repeating her parade of horribles, although the client may require the counselor in order to function in an interview with the lawyer, both professions' ethics of confidentiality will prevent the exchange, unless the client is willing to sacrifice her privileges with both.

In such a case, strict reading of the confidentiality rules defeats their own purposes. Rather than favoring clients and society, current confidentiality rules may deplete service to the client, aggravate her trauma, disrupt her access 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 the potential exposure of their confidence in court. To promote better client service and access to justice and to promote the policies underlying ethics rules themselves, interpretation of privilege rules should move toward a clearer understanding of these clients, their needs and the roles of professionals who serve them.

This article concludes by proposing two reforms to accommodate the virtues of multidisciplinary practice. First, current evidentiary rules 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 "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. Thus, 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 to obtain civil protection orders and to counsel clients through divorce and child-custody matters, and they 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. The shelter provides office space for the clinic, and most of the clinic's clients are referrals from the shelter. The law school and the shelter are separate entities.

One day in the middle of the semester, during the clinic's intake shift, a shelter counselor came into the students' conference room to inquire for a client in need of a civil protection order. The counselor told them that the client, Katrina, had entered the shelter the previous night after

[3] This hypothetical scenario arises from actual, common experiences in the Faulkner University Jones School of Law Family Violence Clinic. All of the names are fictional.

being raped and beaten by her husband, the father of her 18-month old baby. This incident followed a protracted history of physical and coercive abuse over the course of their relationship, but her husband never had raped her before. This new violation and his detailed threats to murder her and the child drove her to flee to the shelter. Katrina's husband has told her that if she ever left him, he would kill her and turn his violence on her family. The counselor suggested to the client that she seek a civil protection order, and told her that the legal clinic could help her. The counselor said that the client agreed to see them, despite having some legal troubles of her own in her past.

The students told the counselor they were available and ready to meet the client. The counselor left to get the client and soon returned, leading Katrina by the hand. The students noticed bruises and cuts on the client's face, and her hair was wet from a shower. The counselor closed the door behind them as the students and teacher 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 she will be represented by supervised law students, that she agrees that the clinic may represent her and that she understands that her case is a teaching case. One of the students addressed the client to initiate this introduction, but the client stood against the wall and did not respond.

The teacher interjected softly and invited the client to sit at the table, and the counselor guided her by the arm to sit down. The client kept her head down and folded her hands tightly in her lap. The teacher 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 which the student had set out for her.

The teacher 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 teacher 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 teacher 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."

"O.K. 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 teacher 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 escalated 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, accelerating cycle of violence.

Despite persistent, gentle questioning, however, Katrina told them 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 dynamics of communication, evaluation, advocacy, client identification and loyalty. Multidisciplinary responses to clients in trauma and crisis yield remarkably better outcomes than letting them pick their way alone through an 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 their own capacity.[4] Confidentiality is critically necessary for her safety, therapeutic goals and judicial outcome, yet her case and well being demand collaboration among her service providers.

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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).

A. The Client

1. State of the Client in Crisis

At the moment when a client seeks shelter, 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 to strip her of power, esteem and agency.[6] Her very flight is traumatic as she extricates herself from her most intimate partnership and social supports, often severing her only physical and financial resources and beginning to mourn the lost dream of a peaceful, prosperous, loving family. Further, research indicates that a woman is 75% more likely to be murdered when she tries to leave or has fled than if she stays in the violent relationship.[7]

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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.; 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:

> This picture is the *result* of the unhealthy milieu in which she has been living:
>
> - accepts traditional make and female roles
> - is passive and placating: easily dominated
> - accepts male dominance and the myth of male superiority
> - equates dominance with masculinity
> - feels she has no basic human rights - often not even the right not to be hit
> - accepts guilt even where there has been no wrongdoing
> - accepts partner's reality
> - feels that she must help her mate
> - acts as a buffer between her partner and the rest of the world
> - has strong needs to be needed
> - underestimates or downplays the dangerousness of her situation
> - has unshakable faith that things will improve *or* feels that there is absolutelynothing she can do about her situation
> - bases feelings of self worth on her ability to "catch" and hold a man
> - suffers low self-esteem
> - doubts her own sanity

Laura Wetzel & Mary Anne Ross, *Psychological and Social Ramifications of Battering: Observations Leading to a Counseling Methodology for Victims of Domestic Violence*, THE PERSONNEL AND GUIDANCE JOURNAL 423, 425 (Mar. 1983) (emphasis in original). *See also* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, 5 (2007)(discussing the theory of coercive control in domestic abuse: "Although coercive control can be devastating psychologically, its key dynamic involves an objective state of subordination and the resistance women mount to free themselves from domination. . . . Like assaults, coercive control undermines a victim's physical and psychological integrity.")

[7] Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 887, n.5, 22, 30 (2006)(citing Sarah M. Buel, *Fifty Obstacles to Leaving, a/k/a Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19 (citing National Estimates & Facts about Domestic Violence, NCADV Voice, Winter 1989, at 12); 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)).

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 their abuse, including headaches, back pain, gastrointestinal problems, chest pain, pelvic pain, insomnia, fatigue, nightmares, choking sensations and chronic fatigue.[9] In her 2004 study, Professor Kimberly Eby found significantly increased physiological stress among victims of domestic violence and found that this likely shows that women who are battered may have increased susceptibility to illness.[10] In a consistent study, Dr. Janice Humphreys and her co-authors have observed these physical symptoms among victims of domestic violence:

> Many women suffer both immediate and long-term physical and psychological distress as a result of the abuse. Battering of women has been associated with consequences ranging from bruising and lacerations to fatalities. Forty percent 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. Chronic pain, physical injuries, eating disturbances, anxiety, low self-esteem, depression, listlessness, fatigue, sleep disturbances, and memory loss have been reported as responses to abuse.[11]

Women who are victims of domestic violence, in the year preceding a protection order, are more likely to have been hospitalized for diagnoses of self-injury, poisoning, gastrointestinal disorders, assault injuries, psychiatric disorders or attempted suicide.[12]

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[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 K.K. Eby, et al., *Health Effects of Experiences of Sexual Violence for Women with Abusive Partners*, 16 HEALTH CARE WOMEN INT'L 563-576 (1995); D.R. Follingstad, et al., *Factors Moderating Physical and Psychological Symptoms of Battered Women* 6 J. FAM. VIOLENCE 81 (1978); E. Hilberman & K. Munson, *Sixty Battered Women*, 2 VICTIMOL. INT. J. 460 (1977); S. Kerouac, et al., *Dimensions of Health in Violent Families*, 7 HEALTH CARE FOR WOMEN 413 (1986); R. Rodriguez, *Perception of Health Needs by Battered Women*, 12 RESPONSES: VICTIM WOMEN & CHILD. 22 (1989); E. Stark & A. Flitcraft, *Medical Therapy as Repression: The Case of Battered Women*, HEALTH MED. 29 (1982); M.A. Straus & R. Gelles, *The Costs of Family Violence* 102 PUBLIC HEALTH REP. 638 (1987)).

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

[11] Humphreys, et al., *supra* note 5, at 402 (citing CALIFORNIA DEPARTMENT OF HEALTH SERVICES, EMERGENCY PREPAREDNESS AND INJURY CONTROL BRANCH, *Violent Injuries to Women in California*, EPIC PROPORTIONS (Sept. 1995); J. Fagan, et al., *Violent Men or Violent Husbands: Background Factors and Situational Correlates*, *in* THE DARK SIDE OF FAMILIES (eds. D. Finkelhor, R. Gelles, G. Hotaling & M. Straus) at 49-67 (1983); J. Humphries, et al., *The Trauma History of Sheltered Women*, 20 ISSUES IN MENTAL HEALTH NURSING 319 (1999); S.B. Plichta & C.S. Weisman, *Spouse or Partner Abuse, Use of Health Services, and Unmet Need for Medical Care in U.S. Women*, 4 J. WOMEN'S HEALTH 45 (1995)).

[12] *See* Rose Constantino, Yookyung Kim and Patricia Crane, *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 M.A. Kernic, et al., *Rates and Relative Risk of Hospital Admission Among Women in Violent Intimate Partner Relationships*, 90 AM. J. OF PUBLIC 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.

Psychologically and emotionally, victims of domestic violence have an increased likelihood of diverse mental health complications, including depression, anxiety, posttraumatic stress disorder and suicide ideation.[13] Before entering shelter and therapy, women exposed to domestic violence report higher incidents of intrusive thoughts, ruminations and avoidance, all symptoms of posttraumatic stress disorder. More intense trauma symptoms occur in those who have survived more severe violence.[14] Likewise, a history of abuse has an "enormous impact" on victims' feelings of depression.[15]

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.[16] The researchers making those observations found that the same women also had significantly lower self-esteem.[17] Psychological abuse can erode a victim's assumptions about herself and her world which can promote anxiety and worry.[18]

> Additionally, cognitive failure may be a vulnerability factor that increases the risk that stress [resulting from domestic violence] will have adverse effects. 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.[19]

In the moment of crisis of 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

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[13] *See* Ann Coker, et al., *Social Support Protects Against the Negative Effects of Partner Violence on Mental Health*, 11 J. OF WOMEN'S HEALTH 465, 466 (2002) (citing J. Campbell & LA. Lewandowski, *Mental and Physical Effects of Intimate Partner Violence on Women and Children*, 20 PSYCHIATR. CLIN. NO. AM. 353 (1997); M.P. Koss & L. Hesle, *Somatic Consequences of Violence Against Women*, 1 ARCH. FAM. MED. 53 (1992); B. Bergman, et al., *Utilisation of Medical Care By Abused Women*, 27 BR. MED. J. 154 (1992); S.B. Plichta & C. Abraham, *Violence and Gynecologic Health in Women 50 Years Old,* 174 AM. J. OBSTET. GYNECOL. 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.

[14] *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)).

[15] *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).

[16] *See id.* at 180.

[17] *See id.* at 181.

[18] Vitanza, *supra* note 5, at 25.

[19] *Id.* at 25-26.

physical and psychological hardships.[20] 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 made this finding, justifying a federal psychotherapist-patient privilege:

> 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 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.[21]

The Court observed that patients will be less forthcoming to their psychotherapists, including psychologists and counselors, if they perceive a possibility of disclosure. Empirical data have supported this observation.[22]

Confidentiality and a client's trust in the privilege are necessary and critical to useful and effective psychological counseling.[23] For victims of domestic violence, however, confidentiality

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[20] *See* Humphreys, *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."

[21] *Jaffee v. Redmond*, 518 U.S. 1, 10, 116 S.Ct. 1923, 1928 (1996). "All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists." *Id.* at 15.

[22] *See* Jennifer Evans Marsh, *Empirical Support for the United States Supreme Court's Protection of Psychotherapist-Patient Privilege*, 13 ETHICS & BEHAVIOR 385, 397 (2003)(*erratum* reported at 14 ETHICS & BEHAVIOR 197-199 (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.

[23] *See* Jeffrey N. Younggren and Eric A. Harris, *Can You Keep a Secret? Confidentiality in Psychotherapy*, 64 J. OF CLINICAL PSYCHOLOGY: 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, Note, *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

transcends a desire for fruitful therapy. She may see a threat of disclosure as a threat to her life, safety and freedom.[24]

> [D]omestic violence survivors who cannot be assured confidentiality may forego counseling because of the need to remain invisible to their abusive partners. Battered women fear that admitting to the domestic violence may result in their children being removed from their custody because they "failed to protect" their children from abuse by their partner. Failure to seek counseling often lowers the abused woman's chance of escaping the violence. Abused women harbor many of the same emotions that affect rape victims; however, they are also plagued by conflicting feelings of loyalty, love, and betrayal. Moreover, the extensive services offered by centers for battered women are essential to most domestic violence survivors because they tend to be financially dependent on their abusers.[25]

Without full confidence that her communications, location and secrets will be safe, the domestic violence victim may choose to take her chances alone, to return to the devil she knows or to obfuscate her story, all ultimately to her own detriment.[26]

In 1995, before the Supreme Court established the federal psychotherapist-patient privilege in *Jaffee v. Redmond*, the Violence Against Women Office in the U.S. Department of Justice issued a report to Congress, "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors." The Report promoted a 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."[27]

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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.")

[24] *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 (1995-1996) ("Most victims of domestic violence have been threatened with further assault or even death of 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. OF AM. COLLEGE HEALTH 157, 159 (2006)(an empirical study finding that "confidentiality concerns" is a leading barrier to victims reporting sexual assault on American college campuses.)

[25] Hagen & Rattet, *id.* at 191.

[26] *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 24, at 280-294 (addressing critical necessity to keep a victim's location confidential and extensive tactics to secure a confidential location).

[27] U.S. DEPT. OF JUSTICE, REPORT TO CONGRESS, THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS, FINDINGS AND MODEL LEGISLATION at 17 (Dec. 1995) (hereinafter REPORT TO CONGRESS). "In addition to this inhibiting effect on victims, victim counselors

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 violent, intimate relationship.[28] 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.[29]

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 essential to a battered woman's ability to end the violent relationship and rebuild her life.[30]

In her study of rural women in domestic violence shelters, Professor April Few reports that the clients she interviewed generally experienced the shelter to be a "safe haven from intimate violence," where the "residents and staff became a new family in this stressful time."[31] "[T]he 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."[32]

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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.

[28] 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 & LAW 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, 159-160 (2005); *see also* U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, Bulletin, *Privacy of Victims' Counseling Communications*, No. 8 at 2 (Nov. 2002); 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 27, at App. I (dated analysis of state statutes creating privileges for counselors and victim advocates).

[29] *See* Hagen & Rattet, *supra* note 24, at 189-190; April L. Few, *The Voices of Black and White Rural Battered Women in Domestic Violence Shelters*, 54 FAMILY RELATIONS 488 (2005) (noting and confirming that "shelter stays dramatically reduce the likelihood of new violence").

[30] REPORT TO CONGRESS, *supra* note, at 12-14 (internal quotation marks omitted, citing Lynne A. Marks & Susan H. Rauch, National Center on Women and Family Law, Protecting Confidentiality of Victim-Counselor Communications, 23-29 (1993)).

[31] Few, *supra* note 29, at 494.

[32] *Id.* at 496.

C. Attorneys

The client's attorneys will advocate, counsel, advise, negotiate and represent her in court for protection orders, child custody, divorce and immigration issues, and her attorneys may stand beside her as she testifies against her abuser in criminal proceedings. [33] They meet her in a milieu of physical injury, emotional trauma and psychological distress.[34] Together, they often must rush into court for a civil protection order while she faces police inquiry and examination at her perpetrator's criminal proceedings, even as she strives to recover her life's foundations.

As with any client, her attorney will owe her duties of loyalty, confidentiality, competence, zealous advocacy and every professional obligation arising from their relationship.[35] The attorney must draft well-founded, 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 craft a strategy to achieve it.[36] This work and the necessity of clear, candid and thorough communication are the bases for attorney-client privilege and confidentiality.[37]

Professor 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

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[33] Schmitz, *supra* note 28 (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, 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)); *see also* Conner, *supra* note 7, at 881-882.

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

[35] *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (2008); Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 1.6 (confidentiality).

[36] *See* MOD. R. PROF. CONDUCT 1.6, cmt.:

> 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.

[37] *See id.*

> representative of the legal system is seen as a traitor, the legal system becomes a system to distrust for the battered woman.[38]

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 the client's exchanges with the professionals serving her. The perpetrator suddenly is under the scrutiny of zealous outsiders and is facing criminal penalties, injunctions limiting his life and wounding his reputation, and a divorce which can threaten his power and fortune. If he can pry into her revelations to counselors and attorneys and disclose them in open court, he could continue his abuse through shame, discredit and acquittal.

The Department of Justice noted this dynamic 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.[39]

Opponents may also use the fact of the victim's counseling to "take advantage of the myth that women who make rape reports are unstable and mentally ill."[40] Opponents may try to shift attention from their guilt to the victim's worth.[41]

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[38] Conner, *supra* note 7, at 897-898 (internal citations omitted).

[39] REPORT TO CONGRESS, *supra* note 27, at 21-22. The Report to Congress also explains that opponents also "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.

[40] 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).

[41] *See 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, e.g., In the Matter of Pittsburgh Action Against Rape*, 428 A.2d 126 (Pa., 1981), *superseded by* 42 PA. CONS. STAT. ANN. §5945.1 (West 2001)(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).

Major Paul Schimpf of the United States 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 is 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?[42]

Major 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."[43] 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."[44]

Of course, defendants have rights to confrontation and due process, and these rights are balanced constantly against other societal goals. In his article on a defendant's access to witness's psychotherapy records, Professor Clifford Fishman examines the contours of the balancing and describes the defendant's theories of discovery and admissibility.[45] He discusses the Sixth Amendment Confrontation clause, the Compulsory Process clause and the procedure for proper discovery, but he confesses the costs of disclosure of psychotherapy records:

> The possibility that a judge might review a witness's therapy or counseling records may undermine the witness's ability to cope with whatever experiences or difficulties led to the witness to therapy or counseling the first place. The far-more-upsetting possibility is the fear that such information will be provided to the defense may diminish the witness's willingness to engage in therapy or counseling at all. Each of these results is lamentable.[46]

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 transcend the useful scope of a single profession. In the hypothetical scenario, the client, Katrina, needs counseling as she faces the crises of the rape, her history of abuse, her escape and her husband's threats. Her child, only 18 months old, will need comprehensive services as she adjusts to a new reality. The legal clinic

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[42] 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 (2005).
[43] *Id.* at 150.
[44] *See id.*
[45] Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV. 1 (2007).
[46] *Id.* at 63.

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 also likely will need medical care. 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. She will benefit from victim advocates as she engages the criminal justice system as a victim and witness.[47]

In most places, she will engage 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 must meet each one individually, and she must recount her nightmare again and again as each agency assesses her needs, evaluates her case and plots their responses.[48]

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.[49] These collaborations encourage three generally observed benefits for the students and their clients. First, the partnership provided more comprehensive services and increased attention for the clinic's clients. Second, the law students enjoyed the benefits of a new perspective, recognizing the client's individuality and community context, not just as a legal problem to be solved. Third, the attorneys and social workers shared the burden of caring for the client's emotional needs.[50]

In an article examining the professional ethics in interdisciplinary collaborative work, Professor 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,

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[47] *See* CASEY GWINN AND 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 32 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.

[48] *See* section III.A, *supra*, regarding the state of a client in a domestic violence crisis.

[49] *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, 409-410 (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).

[50] *See id.* at 421.

> 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 satisfaction, enhanced client well-being, and reduced lawyer stress.[51]

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," Professors 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.[52] 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."[53] 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 criminology, sociology, law, social work, psychology and public health, among others.[54]

Often, collaboration among professionals simply is practically necessary to address confounding social ills like domestic violence.[55] Particularly for lawyers representing children who have been victims of abuse or neglect, collaboration and consultation with mental health and medical professionals may be necessary for basic, competent legal representation.[56] For instance, a lawyer representing a child victim may require other professionals to determine cognitive or psycho-social capacity to advocate appropriately for the client's best interest.[57]

In a study examining stress among women who experience domestic violence, Professor Kimberly Eby calls for multidisciplinary collaboration in crisis intervention and long-term support and advocacy services for victims of domestic violence.[58] She examines the physiological markers of stress and its effect on physical and mental health and confirms,

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[51] Alexis Anderson, et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 661 (2007).
[52] *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).
[53] *See id.* at 135.
[54] *See id.* at 135, 151.
[55] *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 (ed. Sandra M. Stith) at 203, 224 (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].").
[56] *See* Liebman, *supra* at 822-23.
[57] *See id.*
[58] Eby, *supra* note 8.

perhaps unsurprisingly, that domestic violence significantly increases stress and adversely affects short and long term health of women who endure it.[59] In response, 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.[60] 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.

In the 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:
>
> > 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. . . .[61]

B. Examples of Multidisciplinary Practices for Victims of Domestic Violence

1. Family Justice Centers

A movement toward co-locating professional and social services of victims of domestic violence took root in San Diego, California, in the late 1990s.[62] There, municipal, state and private service providers organized the first Family Justice Center.[63] In Family Justice Centers,

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[59] *See id.* at 222, 225-229.

[60] *See id.* 231. *See also* Sally M. Hage, *Profiles of Women Survivors: The Development of Agency in Abusive Relationships*, 84 J. OF 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). *See also* Danica G. Hays, et al., *Advocacy Counseling for Female Survivors of Partner Abuse: Implications for Counseling Education,* 46 COUNSELOR 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."

[61] REPORT TO CONGRESS, *supra* note 27, at 13 (citing LYNN A MARKS & SUSAN H. RAUCH, NATIONAL CENTER ON WOMEN AND FAMILY LAW, PROTECTING CONFIDENTIALITY OF VICTIM-COUNSELOR COMMUNICATIONS, at 23-29 (1993)).

[62] *See* CASEY GWINN & GAEL STRACK, HOPE FOR HURTING FAMILIES: CREATING FAMILY JUSTICE CENTERS ACROSS AMERICA (2006).

[63] *See id.* at 45-59.

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.[64] In San Diego, the Family Justice Center brought 25 agencies under one roof. The partners included adult protective services, volunteer lawyers and law school clinics and paralegals, clergy and chaplains, nurses and doctors, prosecutors, victim advocates, police, forensic professionals, the military and administrative professionals.[65]

The founders of the Family Justice Center set out some best practices, including the most effective mix of disciplines to meet the needs of clients who are victims of domestic violence:

> Each Center needs to provide as many services for victims and their children as possible and in the easiest way possible. The following are just some of the services that should be considered to be part of the one-stop shop approach:
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> - Prosecution.
> - Law enforcement.
> - Civil legal services (temporary restraining orders, court representation for contested hearings related to custody support, protective orders or contempt hearings, and immigration).
> - Crisis and/or individual counseling as well as support groups in various languages.
> - Forensic documentation of injuries.
> - Limited medical services.
> - Spiritual support from faith-based organizations.
> - Military advocacy.
> - Access to child protective service professionals.
> - Access to adult protective service professionals.
> - Access to victim witness services and restitution recovery.
> - Child care.
> - Parenting programs.
> - Sexual assault advocacy.
> - Access to mental health and substance abuse professionals.
> - Access to emergency shelter and housing.
> - Transportation assistance.
> - Food and clothing.
> - Access to workforce partnership/job training programs.[66]

In March, 2009, thirty-seven Family Justice Centers operated in twenty-one states, with at least three more centers in development.[67] Five Family Justice Centers operated in Canada, Mexico and England.[68]

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[64] *See id.*
[65] *See id.* at 53.
[66] *Id.* at 160-161.
[67] *See* FAMILY JUSTICE CENTER ALLIANCE, Family Justice Centers (downloaded March 25, 2009) <http://www.familyjusticecenter.org/index.php/family-justice-centers/fjcs/index.php >. Family Justice Centers currently operate in these states: Alaska, California, Florida, Idaho, Illinois, Indiana, Louisiana, Maryland,

2. Law School Clinics

As observed above, law school clinics have been at the forefront of multidisciplinary collaborative practice, particularly with social workers. A further example, the Family Violence Clinic at Faulkner University Jones School of Law in Montgomery, Alabama, collaborates with an area shelter and counseling center, in a model 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 assisting common clients in the shelter.[69] Counselors and victim advocates are the first and primary contact most clients have in the shelter before they meet 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, especially when a client is in shelter, the counselor becomes the best means of making contact with the client to arrange appointments or ask questions.

As described in Katrina's scenario, the counselor often has a full knowledge of the client's case and can articulate it more completely to the clinic students, because the counselor is oriented to the system and not reacting in the midst of a trauma. The extent 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, however, do not 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, Alabama, District Attorney's Office, the Task Force formed in 1994, with 12 organizations.[70] In 2009, the Task Force included over 180 individuals from over 60 agencies collaborating to confront domestic violence, to make common referrals and to draw on each others' strengths and expertise.[71] These organizations include state, county and federal agencies, prosecutors, defenders and police

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Massachusetts, Minnesota, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah and Washington. New centers are pending in South Carolina, Texas and Wisconsin.

[68] *See id.*

[69] 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.

[70] *See* MONTGOMERY COUNTY TASK FORCE ON DOMESTIC VIOLENCE, Memorandum of Understanding (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.

[71] *See* MONTGOMERY COUNTY TASK FORCE ON DOMESTIC VIOLENCE, Member List 3-25-09 (Mar. 2009) (on file with the author).

agencies, churches, health-care providers, military services, universities, courts and court administrators, a hotel, a security company, the local humane society, crime victim assistant organizations and scores of non-profits providing advocacy and direct services.[72] 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, the police responded to 12,750 calls for domestic violence or family disturbances; in 2008, the police received 8,100 calls for these matters, while the population of the city rose. Domestic violence homicides have fallen from 10 in 1994 to 3 in 2007, with no domestic violence homicides in Montgomery in 2004.[73]

3. Lawyers and Social Workers

Collaborations between social workers and attorneys have enjoyed useful observation in legal academic literature.[74] Professor Paula Galowitz described the experience of collaboration in the New York University Law School's Civil Legal Services Clinic and explained the advantages to lawyers who engage mental health professionals:

> As a result of social workers' training and education, they are better equipped than lawyers to provide services such as crisis intervention, evaluation of clients' needs, referrals to appropriate agencies, and direct casework. With respect to evaluation, a social worker's training in assessing personality and mental status "contributes significantly to the lawyer's appraisal of the facts."[75]

Professor Galowitz observes 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.[76]

C. Challenges of Multidisciplinary Practices

Although multidisciplinary practice generates many advantages for clients and practitioners, each profession brings its own culture, training, goals and systems to the

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[72] *See id.*

[73] 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."

[74] 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 paper 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 51 (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 49 (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).

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

[76] *See id.* at 2130.

collaboration. These differences supply the great advantages of 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.[77]

> These differences between the approaches of the two professions are even more accentuated when there are, from the social worker's perspective, multiple clients. The lawyer views the individual as the client, and is under certain restraints and guidelines with respect to multiple clients, while the social worker "enhances a client's well being in a social context, as well as the well-being of society as a whole." For 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.[78]

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 work a negative effect on the greater goals of society. A social worker's responsibility to the larger society, however, might supersede their primary responsibility to an individual client.[79]

This cultural nuance is also evident in the American Psychological Association's ("APA") Code of Ethics, setting out principles and guidelines for counselors and therapists. The APA recognizes the psychologist's obligations to society while seeking the best interests of their clients, not to vindicate their client's rights.[80] According to the American Counseling

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[77] Galowitz, *supra* note 75 at 2140 (describing collaborations within the NYU Civil Legal Services Clinic, 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. CHILDREN'S RTS. J., Mar. 1991, at 18).

[78] *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, 538-539 (1997)).

[79] Mary Kay Kisthardt, *Working in the Best Interest if Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1, 60-61 (2006). Professor 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.

[80] *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS & CODE OF CONDUCT (hereinafter APA CODE OF ETHICS), Principle B: Fidelity & Responsibility (2002):

Association ("ACA"), "Counselors encourage client growth and development in ways that foster the interest and welfare of clients and promote healthy relationships."[81] Counselors' primary responsibility is "to respect the dignity and to promote the welfare of clients."[82]

The APA and ACA both recognize that family or group therapy is appropriate, and while cognizant of conflicts of interest, both encourage therapy to several related people at once.[83] 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.[84] These are admirable and necessary dynamics for psychological counseling and therapy, but they run up against lawyers' engrained sensibilities of strict client identification, client loyalty and zealous advocacy, even when 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.[85] Kisthardt provides this example: "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."[86] This 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, on the other hand, are much more comfortable with conflict, and are less likely to see it as a negative."[87]

The lawyer's adversarial system itself may 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.[88] This 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.[89] "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."[90]

> 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.

[81] AMERICAN COUNSELING ASSOCIATION, ACA CODE OF ETHICS (hereinafter ACA CODE OF ETHICS), §A (2005)
[82] *Id.* at § A.1.a.
[83] *See* APA CODE OF ETHICS, *supra* note 80, at §§10.02, 10.03; ACA CODE OF ETHICS, *supra* note 80, §§A.8 and B.4.
[84] *See* ACA CODE OF ETHICS, *supra* note 81, §B.3.b.
[85] *See* Kisthardt, *supra* note 79, at 48.
[86] *Id.*
[87] *Id.* at 61.
[88] *Id.* at 15.
Id. at 56.
[89] *See id.* at 18 (citing Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUBL. POL'Y 1, 3 (1996)).
[90] *Id.*

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."[91] Advocacy counseling would seek interventions that empower clients and create sociopolitical changes.[92] These aspirations require far-reaching efforts to address a client's whole context: "[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 assist to alter survivors perceptions of belongingness to the outside community," including collaboration for career counseling, substance abuse treatment, education and legal reform[93]

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."[94]

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.[95] Professor 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 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.[96]

2. Ethical Barriers Among Collaborating Professions Generally

Attorneys are bound by state ethical codes.[97] Codes of ethics like those from the American Psychological Association or the American Counseling Association guide licensed

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[91] Hays, et al., *supra* note 60.
[92] *See id.* at 185.
[93] *See id.* at 187-188.
[94] Kisthardt, *supra* note 79, 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)).
[95] *See 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."
[96] Anderson, et al., *supra* note 51 at 665-66.
[97] *See, e.g.,* AM. BAR ASSOC., MODEL CODE OF PROF. CONDUCT (2008).

counselors and psychologists.[98] Social workers abide by the Code of Ethics of the National Association of Social Workers.[99] These ethical codes and attendant state laws often are not consistent in their duties and assumptions, and these competing ethical codes also can prevent effective collaboration among diverse professionals.

For example, several scholars have addressed the conflict created by rules mandating reporting of suspected child abuse. Mental health professionals, medical professionals and social workers usually are "mandatory reporters," bound by statute to report suspected child abuse when they learn of it in the course of their work. Attorneys usually are not mandatory reporters, and may 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.[100] In such a case, the duty to report or the prohibition on reporting often turns on the structure of the collaboration and a determination of which professions' rules will apply.[101]

Professor 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 owed to the client."[102] She suggests that rules of professional conduct actually interfere with

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[98] *See* APA CODE OF ETHICS, *supra* note 80; ACA CODE OF ETHICS, *supra* note 81.

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

[100] 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 49at 428-29, *et seq.;* Anderson, et al., *supra* note 51 at 690-717; Galowitz, *supra* note 75, 2137-40; *see also, e.g.*, Maryann Zavez, *The Ethical and Moral Considerations Presented by Lawyer/Social Worker Interdisciplinary* Collaborations, 5 WHITTIER J. CHILD & FAM. ADVOC. 191, 192-201 (2005); Ellen Marus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509 (1998); Linda Taylor and Howard S. Adelman, *Confidentiality: Competing Principles, Inevitable Dilemmas*, 9 J. EDUCATIONAL & PSYCHOLOGICAL CONSULTATION 267 (1998) (focused on client consent as solution to the dilemma); Donald C. Mappes, George P. Robb and Dennis W. Engles, *Conflicts Between Ethics and Law in Counseling and Psychotherapy*, 64 J. COUNSELING AND DEVELOPMENT 246, 249 (1985). Professors 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. *See also* 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).

[101] *See* St. Joan, *supra* note 49 at 430-436. Professor 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 paper 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 100, at 217-218 (also including and describing a "confidentiality wall" model).

[102] Galowitz, *supra* note 75, at 2136 (citing Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communication*, 27 J. MARSHALL L. REV. 617, 626 (1994)).

multidisciplinary practices by prohibiting communication necessary for a "true multiprofessional office. . . despite the fundamental appeal of the concept of holistic problem solving centers."[103]

3. Collaborating Through Competing Professional Privileges

In Katrina's story, she would enjoy a counselor-client privilege with her domestic violence counselor at the shelter.[104] She also would enjoy an attorney-client privilege with the attorney and law students in the legal clinic, but she would risk destroying her privileges by inviting their direct collaboration for her sake.[105]

As explained in detail below, because the counselor and attorneys are not in practice together, because the counselor is not subordinate to the attorneys or hired to prepare for litigation, the attorneys and the counselor are third-parties 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 and in Katrina's petition for a civil protection order, then might compel the attorneys or the counselor to testify about the interview and the information they gleaned, or did not glean, from Katrina.

Professor St. Joan identifies the problem as she discusses collaboration between attorneys and social workers: "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?"[106] She does not answer the question.

In his discussion of inter-professional consultation on behalf of abused children with mental health issues, Professor 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

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[103] *Id.* (citing and 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) and Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification,* 61 FORDHAM L. REV. 559, 573 (1992)).

[104] *See, e.g.,* UNIF. R. EVID. 503, discussed more fully in sections V, B, D, *infra*.

[105] *See, e.g.,* UNIF. R. EVID. 502, discussed more fully in sections V, A, C, *infra*.

[106] *Id.* at 431-432; *see also* Hagen & Rattet, *supra* note 24, 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. . . .").

> 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.[107]

Professor Liebmann concludes that client consent is probably the best means to navigate this situation, apparently despite the waiver of professional privilege, unless the client cannot consent because of minority or incapacity.[108] In such a case, he concludes that "disclosure 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."[109]

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:

> Clients should be assured in advance that their case and the services they receive while at the Center will remain confidential. Partners and staff work together in a concerted effort to ensure client confidentiality is maintained by each agency providing services. . . .
>
> Though controversy continues to swirl around confidentiality and sharing client information, this has not been a major issue at the San Diego Center. When clients feel safe, wrapped in services, advised of their rights and informed about how information will be shared, they are comfortable giving consent knowing how, when and why their information will be distributed. . . . [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.[110]

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 their 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.[111] 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.[112]

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[107] Liebmann, *supra* note 55 at 823-24.
[108] *See id.* at 824.
[109] *Id.* at 825; *see also id.* at 854, *et seq.*
[110] GAEL STRACK & CASEY GWINN, HOPE FOR HURTING FAMILIES II: HOW TO START A FAMILY JUSTICE CENTER IN YOUR COMMUNITY at 101 (2007). 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." *Id.*
[111] *See, e.g.,* UNIF. R. EVID. 502 and 503, discussed at length in Section VI, *infra.*
[112] STRACK & GWINN, HOPE FOR HURTING FAMILIES II, *supra* note 110, at 102. Gwinn and Strack and the Family Justice Center may have reason for optimism under California's more lenient evidence rule, discussed *infra* at note 159.

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 contemporary interpretation, the rules may create an unnecessary barrier to healthy and useful collaboration. As discussed in the following sections, the very 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, this sort of collaboration so that clients in need will seek the able help of these professionals, for their own sakes and for the sake of society.

V. The Privileges

The client enjoys the attorney-client evidentiary privilege and confidentiality through the attorney's rules of professional conduct. Despite any virtue in collaboration with other professionals or any expediency achieved by disclosing a client's business to third parties, the attorney is bound to keep the client's secrets secret. If the collaboration risks disclosure of privileged communication, then 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 psychotherapist-patient testimonial privilege, including for counselors in general or victim counselors, sexual assault or rape counselors. As explained in the following sections, these professional privileges are valuable and spring from compelling public policy, but courts construe and interpret them differently and more leniently than the attorney-client privilege. If the counselor is not an agent or subordinate to the attorney, then their collaboration for a common client or their presence with each other in a meeting with the common client likely destroys both privileges.

A. Attorney-Client Privilege: History and Rationale

Dean John 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."[113]

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

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

> 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.[114]

The attorney-client privilege is the oldest, longest recognized testamentary privilege, and its history, tracking Dean Wigmore's authoritative narrative, appears in many treatises, old and modern.[115] The privilege existed in primitive form even among the advocates of Rome.[116]

In early English law, the privileged rested in a theory of oath and honor for the lawyers themselves.[117] By the late 1700s, this 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."[118] This instrumental 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.[119]

> The basic thrust of the argument in favor of the privilege is that its recognition does not impose any cost on the justice system because, absent the privilege, the evidence in the form of the client's potential admissions would not come into

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[114] *Id.*at § 2292.

[115] *See, e.g.,* JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 1057, *et seq.* (1826); THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 394, *et seq.* (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) ("And 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.")

[116] "It was forbidden by the Roman law, as by our own, for the advocates to give evidence against his clients of matters which had come to his knowledge by confidential communications." 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.

[117] *See* WIGMORE, *supra* note 113, at §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).

[118] *See id; see also* WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 201-203 (1944).

[119] *See* IMWINKELRIED, *supra* note 115, at §6.2.4 (a) (citing Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999)).

> being. The argument presumes that without the assurance of confidentiality furnished by the privilege, the average client could not make the statements constituting the admissions.[120]

How much more for a victim of domestic violence, running for her life, steeped in distrust, ill and worried for the fate of her children?

The instrumental theory of the privilege remains secure in American law, but a "humanistic" theory also has risen, based in concerns of privacy and autonomy.[121] Because the attorney-client relationship bears on the client's life and decisional autonomy, 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.'"[122]

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."[123] This rationale rests on three related assumptions. First, because of the complexity and uncertainty of rights, obligations and modern legal procedure, clients need lawyers.[124] 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.[125] Third, without the privilege, clients would be reluctant to disclose personal, embarrassing or unpleasant facts.[126]

B. Counselor-Client Privilege: History and Rational

"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."[127]

Most states provided a psychotherapist-patient or counselor-client privilege before the Supreme Court recognized it in federal common law. In its Report to Congress, the Department of Justice measured and evaluated state efforts to protect client communications with domestic violence and sexual assault counselors.[128] Between 1980 and the end of 1995, twenty-seven

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[120] *Id.*
[121] *See 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)).
[122] *Id.*
[123] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (hereinafter RESTATEMENT) § 68 cmt. c (2008).
[124] *See id.*
[125] *See id.*
[126] *See id.*
[127] ACA CODE OF ETHICS, *supra* note 81, § B Introduction.
[128] *See* REPORT TO CONGRESS, *supra* note 27. The Department of Justice undertook the report in compliance with a section of the Violence Against Women Act directing "the Attorney General to 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).

states had provided a statutory privilege for communications between victims and counselors, in varying forms.[129] The Report promoted increased confidentiality protection because, "Violence against women is a serious threat to society," so "[s]ociety must provide support and protection for women who are the victims of violence."[130] As emphasize above, "Counseling may be their only source of comfort," and "[c]ounseling is essential for victims of domestic violence to enable them to escape from abusive relationships."[131]

The Department of Justice offered this foundation for a testimonial privilege for 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 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.[132]

Also,

> 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.[133]

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 suggest that "[e]fforts should be made to raise awareness of victims, advocates, counselors, attorneys and judges about the existence of state statutes."[134]

In 2005, the Colorado Supreme Court offered an instructive history of that state's victim-counselor privilege.[135] The state legislature enacted the privilege in 1994 during a season when

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[129] *See id.* at 3.
[130] *Id*. at 10-12.
[131] *Id.* at 12-13; *see* note 30, *supra.*
[132] *Id.* at 16.
[133] *Id.* at 18.
[134] *Id.* at 29.
[135] *See People v. Turner*, 109 P.3d 639, 642-644 (Colo. 2005).

domestic violence was recognized as "a disease of epidemic proportions eating at the fabric of our society."[136]

> Moreover, 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.[137]

Now, as observed by the U.S. Supreme Court in *Jaffee*, fifty states and the District of Columbia have enacted some form of a psychotherapist-patient privilege.[138] Thirty-four states and the District of Columbia provide specific testimonial privilege for domestic violence victim advocates or sexual assault victim advocates.[139]

Federal common law and the Federal Rules of Evidence do not include a specific counselor-client or victim advocate-client privilege, but the federal psychotherapist-patient privilege, established with *Jaffee*, almost certainly includes licensed counselors in domestic violence practices.[140] There, the court tested the proposed privilege by "reason and experience," as demanded by Rule 501 of the Federal Rules of Evidence, balancing the public good against the desire for probative evidence, and affirmed:

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[136] *Id.* at 642 (quoting Dale R. Harris, *The CBA Addresses Family Violence Issues*, 26 COLO. LAW. 27 (1997)).
[137] *Id.* at 642-643.
[138] *See Jaffee*, 518 U.S. at 12.
[139] *See* ALA. CODE § 30-6-8; ALASKA STAT. §§ 18.66.200-250; ARIZ. REV. STAT. §§ 13-440; 13-4430; 8-409; CAL. EVID. CODE §§ 1035.4; 1037; COLO. REV. STAT. § 13-90-107; CONN. GEN. STAT. § 52-146k; D.C. CODE ANN. § 14-310; FLA. STAT. ANN. §§ 90.5035-5036; 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 § 600.2157a; MINN. STAT. ANN. § 595.03(k); 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 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)(downloaded March 19, 2009) <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).

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

> 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 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.[141]

The psychotherapist-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."[142] The court reasoned, "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."[143]

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

Presently, the attorney-client privilege rests in state codes of professional conduct and in rules of evidence. Confidentiality is the duty to keep a client's communications secret as a matter of professional duty.[144] Privilege is the right to keep that confidence in court, the privilege to refuse to testify regarding the confidential communication despite compulsory discovery and evidentiary rules.[145]

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[141] *Id.* at 6-7, 11.
[142] *Id.* at 15.
[143] *Id.* at 16.
[144] 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 with other law or a court order.

[145] Regarding confidentiality, *see* Model Rule 1.6, *supra.* Regarding privilege, *see* UNIF. R. EVID. 502, *infra* note 158.

1. Federal Rules of Attorney-Client Privilege

Federal Rule of Evidence 501 recognizes professional privileges for federal courts:

> 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.[146]

The U.S. Supreme Court has 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."[147]

Since the adoption of Rule 501, the U.S. Supreme Court has restated the classic justification for the attorney client privilege, quoting Dean Wigmore and a century's worth of its own cases:

> We have recognized the attorney-client privilege under federal law, as "the oldest of the privileges for confidential communications known to the common law." Although the underlying rationale for the privilege has changed over time. . . courts long have viewed its central concern as one "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." That purpose, of course, requires that clients be free to "make full disclosure to their

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[146] FED. R. EVID. 501 (2008)(quoted in its entirety). 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. 9, n. 7 (citing *Trammel v. United States,* 445 U.S. 40, 47, 100 S.Ct. 906, 910 (1980)(recognizing a spousal testimonial privilege in the common law for Rule 501 and vesting the privilege exclusively in the witness-spouse)).

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

> attorneys" of past wrongdoings, in order that the client may obtain "the aid of persons having knowledge of the law and skilled in its practice."[148]

In *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 "made for the purpose of getting advice for the commission of a fraud" or crime.[149]

At issue in this paper is whether the limits on the attorney-client privilege can accommodate collaboration among privileged professionals working for common clients. Although the 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.

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 probably will destroy her privilege. Only scant federal case law suggests that collaborating attorneys, psychotherapists, counselors or victim advocates might enjoy the same testimonial privileges that would protect their client if they were working alone. The First Circuit hints at such an expansion which 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.*

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[148] *U.S. v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625-2626 (1989)(quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 137, 32 L.Ed. 488 (1888) and WIGMORE, §2290).

[149] *Id.* at 562-563 (construing the crime-fraud exception and quoting *Trammel,* 445 U.S. at 50, 100 S.Ct. 912, 63 L.Ed.2d 186; *Fisher*, 425 U.S. at 403, 96 S.Ct. at 1577; *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933); *O'Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.) and WIGMORE, § 2298, p. 573)).

> On the contrary, were 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.[150]

Rejecting the subjective ingredient of client intent, Dean 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 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.[151]

How much less communication between the attorney and the client's collaborative counselor? Wigmore answers, "It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client nor that it came from some particular *third person* for the benefit of the client."[152]

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[150] *United States v. Massachusetts Institute of Technology,* 129 F.3d 681, 684-685 (1st Cir. 1997) (emphasis added)(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)(citing *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984)(noted *infra*); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3rd Cir. 1991); *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); *Permian Group v. United States*, 665 F.2d 1214, 1221 (D.C.Cir. 1981) and WIGMORE §2291).

[151] WIGMORE, *supra* note 113, § 2311 (emphasis added). *Compare 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)*, with Kevlik,* 724 F.2d at 849 (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, 1461-1466 (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, 266-267 (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).

[152] WIGMORE, *supra* note 113, § 2317(2) (emphasis in original)(citing *United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357, 359 (D. Mass. 1950)(communications giving "legal or other advice upon the basis of facts disclosed to the attorney by a person outside the organization of the defendants and its affiliates" held not privileged. . .)). *See also Cooney v. Booth,* 198 F.R.D. 62, 65-66 (E.D. Pa. 2000)(rejecting claim of attorney-client privilege for

The Second Circuit underscores 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:

> [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.[153]

Taking another tack, the Restatement (Third) of the Law Governing Lawyers disagrees with Wigmore to a degree and suggests that if the third-party also has an evidentiary privilege, then the three-way communication remains privileged. This 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 privilege.[154]

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conversation between attorney and his clients' physician, in clients' presence, during the course of investigation into facts of case); *People v. Doss*, 514 N.E.2d 502, 505 (Ill. App. 4 Dist. 1987)(holding that third party's presence destroyed the privilege, even "where the third party was present to provide support to the client at a particularly trying period in the client's life.").

[153] *United States v. Ackert*, 169 F.3d 136, 139 (2nd Cir. 1999)(quoting the preceding passage from Wigmore § 2317, *supra* note 152).

[154] RESTATEMENT, *supra* note 123, § 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 (N.Y.App.Div. 1980)(holding that a three-way conversation among an attorney, his client, and the client's spouse was not privileged)). *Compare, 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."

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 client and her collaborating professionals.[155] The Reporter's Note in the Restatement for this comment continues, "The approach of modern evidence codes varies" on this point. "In 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."[156]

The Restatement's approach, although thinly cited, is consistent with the proposals in this paper, although a case-by-case inquiry into a "reasonable person's" expectation does not suffice to promote and protect robust, multidisciplinary professional collaboration for domestic violence victims. The proposals here call 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 case-by-case balancing analysis:

> We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. 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. As we explained in *Upjohn*, if 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.[157]

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. These common law reforms would promote a predictable, sound and good privilege across professions in a multidisciplinary practice serving common clients who are victims of domestic violence or sexual assault.

2. State Rules of Attorney-Client Privilege

State rules generally are more specific than the federal expression and enumerate particular evidentiary privileges. For example, many are informed by the revised Uniform Rules of Evidence, Rule 502:

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[155] *See* section V.D., *infra*, 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.
[156] RESTATEMENT, *supra* note 123, § 71, cmt. b (Reporter's Note).
[157] *Jaffee*, 518 U.S. at 17-18 (citing *Upjohn*, 449 U.S. at 393).

RULE 502. LAWYER-CLIENT PRIVILEGE.

(a) Definitions. In this rule:

(1) "Client" means a person for whom a lawyer renders professional legal services or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A communication is "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.

(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any State or country.

(4) "Representative of the client" means a person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(5) "Representative of the lawyer" means a person employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in rendering professional legal services.

(b) General rule of privilege. 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. [158]

[158] UNIF. R. EVID. 502 (a),(b) (rev. 2005).

State rules, especially those modeled after the Uniform Rules, likely would find that the counselor's presence in the attorney's client interview or the attorney's consultation with the client's counselor destroyed or violated the client's attorney-client privilege.[159] Merely because the client enjoys a privilege with both professions does not secure a privilege for their collaboration.[160]

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, but this is the not the common reality of multidisciplinary practice. In Katrina's scenario and often in multidisciplinary collaborations, the counselor is not subordinate to the lawyer, and she is not hired for purposes of litigation. Instead, they are cooperating professionals with a common client, both serving their respective ends and bound by distinct ethical obligations.

Under Uniform 502(a)(2) and (4), unless the counselor is necessary for the client's life or ability to function at all, then her presence likely destroys the privilege. A "necessary third party" usually is someone like a language interpreter or medical professional.[161] Probably, however, in the scenario imagined here, the counselor is not necessary like an interpreter, and she is not necessary like a nurse in intensive care. Rather, she is necessary 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 embrace this notion of necessity. No clear authority creates an exception to the basic rule regarding helpful, collaborating third parties, privileged or not.

Probably, under contemporary construction of the privilege rules, Katrina's insistence that her counselor remain is a waiver of her attorney-client privilege and her counselor-client

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[159] California is an exception. *See* CALIF. EVID. CODE §952:

> . . . . "[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.

(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* note 112, *supra.*

[160] *See* note 154, *supra,* regarding the presence of privileged spouses in attorney-client meetings. *See also, e.g., Zimmerman v. Nassau Hosp.*, 76 A.D.2d 921, 922 (N.Y.A.D. 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.")

[161] 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, at § 9.9 (2008 Supp.). *See also*, *e.g., 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).

privilege, especially after the conservative advice of the law teacher which would have informed her reasonable understanding of confidentiality.[162]

The proposals that follow would not create drastic changes to current privilege rules but would expand their own valuable policies to promote 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."[163] The counselor is not necessary because of a physical impairment or language barrier, but because of the client's need for emotional and moral support and comfort, because of the necessity of a trusted professional and to overcome her abuser's campaign of subjugation, coercion and violence.

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

States have provided a privilege for counselor-client communications or for communications between clients and victim-counselors, in various statutory forms.[164] For purposes of discussion and analysis in this article, most 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 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*

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[162] *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'g* 244 A.D.2d 450, 451 (N.Y.A.D. 2 Dept. 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 154-156.

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

[164] *See* note 139, *supra*, for specific state citations.

> *members of the patient's family, who are participating in the diagnosis or treatment under the direction of the psychotherapist or mental-health provider.*[165]

As emphasized, the Uniform Rule for this privilege protects the participation of third parties who are present to "further the interests" of the client, even if they are not necessary to the rendition of services, like a lawyer's staff, or necessary for communication, like an interpreter. Such a testimonial privilege for psychotherapists or mental-health professionals enforces the ethical standards of their professions.[166] The APA Ethics Code provides for more liberal collaboration among other professionals and professions, for the sake of the client: "When indicated and professionally appropriate, psychologists cooperate with other professionals in order to serve their clients/patients effectively and appropriately."[167]

Psychotherapists working under the APA Ethics Code must abide by the law, of course, even if collaborative disclosures serve a therapeutic purpose:

> 4.05 Disclosures
>
> (a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.
>
> (b) 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) *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.[168]

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

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

[166] *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, 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."

[167] *Id.* at §3.09 Cooperation with Other Professionals.

[168] *Id.* at § 4.06 (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 81, §§ B.1.a ("Counselors 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."); B.3.b (regarding treatment teams); B.4.a (regarding group work); B.4.b (regarding couples counseling).

Like the attorney-client privilege, courts have not applied the psychotherapist or counselor privileges completely consistently. Regarding the instant question, 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 or medical professionals than for lawyers. For example, a Connecticut case 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 "publically 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 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.[169]

If the third person is helpful to the medical or mental health professional, and if the client-patient does not intend to waive privilege, 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.[170] Consistently, psychotherapist-patient and counselor-client privileges accommodate group therapy sessions without sacrificing confidentiality.[171]

In a note for the Illinois Law Review, Jennifer Bruno identifies the outer edge of the privilege for victim-counselors, where collaboration would threaten a common client's confidence:

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[169] *Cabrera v. Cabrera*, 580 A.2d 1227, 1234 (Conn. App. 1990); *see also, e.g.*, *Ellis v. Ellis*, 472 S.W.2d 741, 745-746 (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.*

Id. (emphasis added).

[170] *See, e.g.*, *Cox v. State*, 849 So.2d 1257, 1271 (Miss. 2003)(construing Mississippi's Rule 503, holding 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).

[171] *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 (3rd ed. 2007)(citing Cross, *Privileged Communications Between Participants in Group Psychotherapy*, 1970 L. & SOC. ORDER 191; and Note, *Group Therapy and Privileged Communication*, 43 IND. L. REV. 93 (1967)); WEINSTEIN'S FEDERAL EVIDENCE, §504.08[4] (Joseph M. McLaughlin, ed., 2nd ed. 2009).

> The privilege laws are not clear about how interactions with third parties such as police officers, significant others, and prosecutors affect the confidential relationship between victim and counselor. As a result, counselors must be conservative about providing certain valuable services when third parties are involved. . . . If this advice applies to sexual assault victim privilege and is heeded by sexual assault counselors, 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.[172]

Even considering rather lenient application of psychotherapist-patient and counselor-client privileges and the participation of third parties, Bruno likely is correct in her concern. In the cases she describes, these relationships and conversations are not therapeutic *per se* and are not 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 her abuse. This is near to the situation in Katrina's case and identifies the great problem of multidisciplinary collaboration for domestic violence victims.

Presently, despite the public good undergirding the counselor-client privilege, judicial application probably would not extend protection to the collaborating 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. The counselor then became a third-party to the attorney's privilege, because she is neither a non-lawyer assistant, subordinate employee, retained expert nor a common client. The attorney and law students became third parties to the counselor's privilege, because they are neither family, common clients, group therapy participants nor helpful sources of information about her plight. The proposals that follow address this problem.

VI. Policy and Call for Reform

The authoritative, oft-cited Dean 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 that the benefit* thereby gained for the correct disposal of litigation.

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[172] Bruno, *supra* note 28, at 1375.

> 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.[173]

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

> The common law principles underlying the recognition of testimonial privileges case be stated simply. "For more than three centuries it has now been recognized as a fundamental maxim that the public. . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemption which may exist are 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."[174]

Here, the problem is not a need for a new privilege, because 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 notion of "necessary third parties" and, second, to establish firmly that their respective privileges can accommodate the other when both are present with the client or collaborating for her. These reforms satisfy 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.[175] These people are usually law partners, non-lawyer staff, investigators or retained experts, or they are language interpreters or intimate family members necessary to bridge physical communication barriers.[176] 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.[177]

Although the collaborating counselor is not subordinate 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

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[173] WIGMORE, *supra* note 113, §2285 (emphasis in original).
[174] *Jaffee*, 518 U.S. at 9, 116 S.Ct. at 1928 (quoting *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950)(quoting WIGMORE, § 2192, p. 64 (3d ed. 1940); *Trammel*, 445 U.S. at 50, 100 S.Ct. at 912 (quoting *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1688 (1960)(Frankfurter, J., dissenting) and citing *U.S. v. Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974)).
[175] *See, e.g.,* UNIF. R. EVID. 502(a)(2);
[176] *See* UNIF. R. EVID. 502 (a)(5), (b); *see also* note 161, *supra.*
[177] *See* note 152, *supra.*

resolves to flee her abuser. Physically, the client may have endured recent trauma, rape and threats on her life.[178] She probably has been hospitalized within the previous year, suffers from chronic ailments and is more susceptible to illness.[179] Psychologically, she probably is depressed, distrustful, anxious, and her self-confidence, esteem and even cognition are suppressed and wounded. She doubts herself and has adapted to survive with skepticism and appeasement.[180] Financially, she may be effectively destitute after leaving her sole source of income, food, shelter and economic provision, her abuser, who has kept her isolated and unproductive.[181] She probably, suddenly, is a single parent without a job. She may be laboring under his threats of violence upon her leaving, and she is at a much greater risk for domestic violence homicide in the time immediately following her leave taking. [182]

As she engages the domestic violence shelter and her counselor, she faces a daunting array of services and professionals all dedicated to her well being but all presenting a new set of faces, all insisting that she recount again the most horrible and embarrassing details of her life.[183] She will engage the police, prosecutors and 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.[184]

When she sits down with her lawyer, her counselor indeed is 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.[185] 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 desires well enough to assist her legal counsel. Her counselor can empower and encourage her and collaborate with her attorney to promote her interest and a good outcome.

B. Inter-professional Common Client Privilege

As noted, the Restatement optimistically suggests, without citation or authority, "The 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."[186] To promote multidisciplinary collaboration, this should be the law, at least.

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

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[178] *See* section III.A.1, *supra.*
[179] *See id.*
[180] *See id.*
[181] *See id.*
[182] *See id.*
[183] *See* note 48, *supra.*
[184] *See* notes 20, 48, *supra.*
[185] *See* sections III.A., B., *supra.*
[186] RESTATEMENT, *supra* note 123, § 71, cmt. b.

way as the attorney-client privilege. The attorney-client privilege is to be narrowly construed and permits the presence only of third parties who are retained agents or subordinates of the attorney or client or who are necessary for rendition of legal services or for the transmission of communication.[187] 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.[188]

Not only do the privileges offer distinct protection, they both probably 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. First, the client's communication with the counselor and the lawyer originates in a confidence that they will not be disclosed.[189] As thoroughly cited, every state and the federal courts have recognized that confidentiality is a bedrock for both legal and mental-health counsel. Without assurances and expectations of confidentiality, clients, 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 among the parties.[190] Without confidentiality, the client's communications with either the attorney or the counselor would chill, stumping both in their service. Professional confidentiality is essential to useful counseling and effective lawyering for victims of domestic violence. For these clients, confidentiality transcends a desire for fruitful therapy; they may see a threat of disclosure as a threat to life, safety and 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 shade her story, all for her sense of survival.

Third, these relationships, in the opinion of the community, ought to be sedulously fostered.[191] The attorney-client privilege is the oldest of the professional privileges, dating to Roman law, and the imperative of confidentiality in the attorney-client relationship is secure. Today, every state and the federal courts have some form of privilege covering counselors and victim advocates. Society has sealed these relationships with the imprimatur of confidentiality and privilege. Since both professional relationships already are "sedulously fostered," then their collaboration for a common, vulnerable client should be fostered as well.

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[187] *See* sections V.A., C., *supra.*
[188] *See* sections V.B., D., *supra.*
[189] See WIGMORE, *supra* note 113, §2285(1).
[190] *See* WIGMORE, *supra* note 113, §2285(2).
[191] *See* WIGMORE, *supra* note 113 , §2285(3).

Fourth, permitting a defendant perpetrator, experienced in the tactics of shame, exploitation and abusive coercion, to invade these professional confidences would work a much greater injury on society than the limitation on "every man's evidence" and disposal of the litigation.[192] In *Jaffee*, the United States Supreme Court confirmed the wisdom of 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."[193] The unsettled question is whether protecting multidisciplinary collaboration with privilege is worth the cost to fact-finding and confrontation.

The law extends the testimonial privilege to both counselors and lawyers serving victims of domestic violence, acknowledging that confidence in these relationships is more valuable than adversarial discovery. Privilege rules should permit the collaboration of these 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.

VII. Conclusion

Victims of domestic violence should not be made to choose between collaborative professionals and her confidentiality. Collaboration among diverse professionals affords their common clients more thorough and efficient services and better access to justice and community resources. Competing professional privileges can undermine their own policies and hinder client communication and candor. While protecting the great necessity of professional privileges and confidentiality, current rules should conform to the evolving benefit of multidisciplinary practice. Reforming the rules of privilege and confidentiality will promote collaboration, ensure client trust and generate more favorable outcomes for clients and society.

[192] *See* WIGMORE, *supra* note 113, §2285(4).
[193] *Jaffee*, 518 U.S. at 15.