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## ATTORNEY-CLIENT CONFIDENTIALITY AND THE ASSESSMENT OF CLAIMANTS WHO ALLEGE POSTTRAUMATIC STRESS DISORDER

Robert H. Aronson,\* Lonnie Rosenwald,\*\* & Gerald M. Rosen\*\*\*

*Abstract:* Posttraumatic Stress Disorder (PTSD) was first recognized by the American Psychiatric Association in 1980. A PTSD diagnosis requires an individual or individual's loved ones to have experienced a traumatic event that was a threat to life or physical integrity and caused the individual to react to the incident with a specific number of avoidance, reexperiencing, and hyper-arousal symptoms. Obtaining a PTSD diagnosis can be of great value to a personal-injury plaintiff who claims damages due to a traumatic event. Further, if the traumatic event is unquestioned and the individual reports the classic symptoms, a PTSD diagnosis is relatively easy to apply and difficult to disprove. These plaintiffs will most often be examined and evaluated by mental-health professionals retained by the defendants. The question of whether the claimant was told or provided materials about common PTSD symptoms is crucial to the defense evaluator's accurate PTSD assessment. One source of such information would be plaintiff's counsel, but questions concerning information provided by counsel implicate the attorney-client privilege. This Article suggests that the policy bases underlying the attorney-client privilege and protecting a defendant's right to test the validity of a plaintiff's claims are best served by the creation of a narrowly drawn waiver or exception to the attorney-client privilege. Consistent with the patient-litigant exception to the physician-patient privilege, the proposed exception would be limited to those matters directly related to the nature, diagnosis, and symptoms of PTSD placed in issue by the plaintiff. The exception would also be limited to statements and materials about PTSD symptoms the attorney provided the client. This Article also notes the difficult ethical boundary between an attorney providing essential advice to a client about the nature of emotional and psychological damages versus improper coaching. The proposed exception would help discourage improper coaching and lead to the discovery of any improper coaching that had already occurred. Even where the information provided by the attorney was appropriate from an ethical standpoint, discovery of that information is essential to an accurate diagnosis and fairness to defendants.

Recent highly publicized trials and events have once again raised questions in the legal community and general public about attorney conduct and ethics. One area of concern is the extent to which attorneys have overstepped acceptable bounds by (over)zealously representing their clients. The legal system has seen abuses by prosecutors and

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lawyers for both plaintiffs and defendants. Because unethical conduct on the part of attorneys most often occurs at the instance or with the consent of the client, it follows that unethical discussions between attorney and client do occur but are at least ostensibly protected by privilege. In such instances, should the opposing party be able to discover, or even introduce at trial, information provided by the attorney to the client? Commentators have suggested a number of situations in which they believe that an exception to attorney-client confidentiality should exist.<sup>1</sup>

This Article addresses a relatively recent phenomenon: plaintiffs claiming damages based on allegations of Posttraumatic Stress Disorder (PTSD). Part I indicates the difficulty of accurately diagnosing PTSD, the potential for abuse by claimants in forensic settings, and the psychiatric evaluator's need to know whether the claimant's attorney provided information about PTSD symptoms prior to the evaluation. Part II reviews the historical rationales for the attorney-client privilege, along with the established exceptions and waivers, and concludes that despite the unquestioned value of attorney-client confidentiality, either existing exceptions or a new exception based on overriding policy concerns should be employed to permit the discovery, and possibly the admission, of certain information. Part III establishes the bases and parameters for a narrowly drawn exception for information provided to a PTSD claimant by the claimant's attorney, when such information is necessary for an accurate psychiatric evaluation. Finally, this Article expresses concern that some lawyers may be playing an unethical role by coaching their clients regarding how to present PTSD symptoms to the forensic evaluator.

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1. See, e.g., Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 273 (1992) (advocating child-abuse reporting as exception to attorney-client privilege); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 400 (1989) (suggesting exception to attorney-client confidentiality for harm to third parties); see also Robert Aronson, *What About the Children? Are Family Lawyers the Same (Ethically) As Criminal Lawyers*, 1 J. INST. STUD. LEGAL ETHICS 141 (1996).

I. POSTTRAUMATIC STRESS DISORDER: THE DIFFICULTY OF ACCURATE DIAGNOSIS AND THE NEED TO CONSIDER INFORMATION PROVIDED TO CLAIMANTS

Posttraumatic Stress Disorder (PTSD) was recognized in 1980 by the American Psychiatric Association in the Third Edition of its Diagnostic and Statistical Manual.<sup>2</sup> The diagnosis has undergone revision since that time<sup>3</sup> but continues to maintain a basic assumption regarding causation whereby a defined class of traumatic events is linked to a defined class of symptoms.<sup>4</sup> Thus, to obtain a PTSD diagnosis, an individual or individual's loved ones must experience a traumatic event that was a threat to life or physical integrity (the Stressor Criterion), and the individual must react to the incident with a specific number of avoidance, reexperiencing, and hyper-arousal symptoms (the Symptom Criteria).<sup>5</sup> This causal link between the traumatic event and a set of symptoms makes the a PTSD diagnosis particularly attractive in the furtherance of a personal-injury claim. Unlike other psychiatric diagnoses such as depression, where causes may be multiple or even biologically determined with no external precipitant, the cause of PTSD is clarified by the very act of making the diagnosis.<sup>6</sup>

Soon after the establishment of the PTSD diagnosis, commentators expressed concerns about the potential for abuse in forensic and

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2. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III].

3. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed. rev. 2000) [hereinafter DSM-IV-TR]; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 424-29 (4th ed. 1994) [hereinafter DSM-IV]; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 247 (3d ed. rev. 1987) [hereinafter DSM-III-R].

4. The DSM-IV-TR provides that "[t]he essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor." DSM-IV-TR, *supra* note 3, at 463.

5. *Id.* at 463-68.

6. *Id.* Ralph Slovenko has observed that:

In tort litigation, PTSD is a favored diagnosis in cases of emotional distress because it is incident specific. It tends to rule out other factors important to the determination of causation. Thus plaintiffs can argue that all of their psychological problems issue from the alleged traumatic event and not from myriad other sources encountered in life. A diagnosis of depression, in contrast, opens the issue of causation to many factors other than the stated cause of action."

Ralph Slovenko, *Legal Aspects of Post-Traumatic Stress Disorder*, 17 PSYCHIATRIC CLINICS N. AM. 439, 441 (David A. Tomb ed., 1994).

disability settings.<sup>7</sup> These concerns can be raised at several levels. First, there is the issue of whether a traumatic event actually occurred and if the claimant was indeed present. In support of these concerns the professional literature provides case reports on war-related PTSD claims by individuals who never saw combat,<sup>8</sup> and sting operations have videotaped citizens scrambling onto a bus after a staged accident so they could present themselves as injured passengers.<sup>9</sup>

Even if an event has occurred and the individual was present, there is the issue of how that individual was affected. This is a difficult issue to determine because the symptom criteria for diagnosing PTSD are generally subjective, easily coached, and easily simulated.<sup>10</sup> Thus, an individual who has experienced a traumatic event needs only to report problems such as bad dreams, trouble sleeping, efforts to avoid thinking about the event, loss of interest in hobbies, and perhaps two or three other subjective complaints to fulfill criteria for the diagnosis.<sup>11</sup>

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7. Eldridge stated: "It is not surprising that there are reported cases of factitious PTSD . . . . Exaggeration or fabrication of PTSD symptoms is possible and information about diagnostic features of PTSD is common in the media." Gloria D. Eldridge, *Contextual Issues in the Assessment of Posttraumatic Stress Disorder*, 4 J. TRAUMATIC STRESS 7, 11 (1991). Sparr and Atkinson similarly noted: "Experience with forensic and disability cases where there is a high possibility of secondary gain reveals that posttraumatic stress disorder is a difficult diagnosis to establish . . . ." Landy F. Sparr & Roland M. Atkinson, *Post-traumatic Stress Disorder As an Insanity Defense: Medicolegal Quicksand*, 143 AM. J. PSYCHIATRY 608, 613 (1986). They also note that "the symptoms of [PTSD] are mostly subjective and non-specific, have been well publicized, and are relatively easy to imitate." *Id.* at 608. Paul Lees-Haley considered the potential for professionals to misuse a PTSD diagnosis and concluded: "If mental illnesses were rated on the New York Stock Exchange, [PTSD] would be a growth stock to watch." Paul R. Lees-Haley, *Pseudo Post-traumatic Stress Disorder*, TRIAL DIPLOMACY J., Winter 1986, at 17-20.

8. Edward J. Lynn & Mark Belza, *Factitious Posttraumatic Stress Disorder: The Veteran Who Never Got to Vietnam*, 35 HOSP. & COMMUNITY PSYCHIATRY 697, 697-701 (1984); see also Landy Sparr & Loren D. Pankratz, *Factitious Posttraumatic Stress Disorder*, 140 AM. J. PSYCHIATRY 1016, 1016-19 (1983).

9. Peter Kerr, *'Ghost Riders' Are Target of an Insurance Sting*, N.Y. TIMES, Aug. 18, 1993, at A1.

10. Eldridge, *supra* note 7, at 7-23; Sparr & Atkinson, *supra* note 7, at 608-13.

11. The DSM-IV-TR requires that an individual who meets the diagnostic criteria for PTSD must report one or more "reexperiencing symptoms," one of which includes "recurrent distressing dreams of the event." DSM-IV-TR, *supra* note 3, at 468. The individual must meet three or more symptoms associated with "persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness," among which are included efforts to avoid thoughts associated with the trauma, diminished interest in activities, and reduced expectations of having a normal future or life span. Last, the individual must experience two or more symptoms that demonstrate "increased arousal," such as difficulty sleeping and difficulty concentrating. DSM-IV-TR, *supra* note 3, at 468.

The mental-health professional who serves as forensic expert faces a difficult task when assessing the validity of alleged problems resulting from trauma. The expert cannot assume that an event has occurred as the claimant describes or that the claimant even participated in the event as alleged. The expert also cannot assume a claimant actually has a posttraumatic stress disorder simply because the defining symptoms are reported. These problems are recognized in the American Psychiatric Association's Diagnostic and Statistical Manual, which specifically cautions professionals to rule out malingering when PTSD presents in forensic and disability settings.<sup>12</sup>

Michael Trimble reflected on the attraction of a PTSD diagnosis in forensic settings and the problem of malingering when he noted that attorneys might coach clients in the furtherance of a claim: “[PTSD,] sanctioned so neatly by the DSM-III, clearly has both conceptual and medico-legal implications. . . . [It] will give a great deal of leverage to those seeking compensation and the counting off of symptoms in checklist fashion will become routine practice in many a lawyer's office.”<sup>13</sup>

Recently, Trimble's concerns received support when twenty survivors of a major marine disaster filed personal-injury claims for emotional damages, resulting in a high incidence rate of diagnosed PTSD.<sup>14</sup> As it

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12. The text of the DSM-IV states: “Malingering should be ruled out in those situations in which financial remuneration, benefit eligibility, and forensic determinations play a role.” DSM-IV, *supra* note 3, at 467.

13. Michael R. Trimble, *Post-traumatic Stress Disorder: History of a Concept*, in TRAUMA AND ITS WAKE 5–14 (Charles R. Figley ed., 1985).

14. Gerald M. Rosen, *The Aleutian Enterprise Sinking and Posttraumatic Stress Disorder: Misdiagnosis in Clinical and Forensic Settings*, 26 PROF. PSYCHOL.: RESEARCH & PRACTICE 82, 82–87 (1995). Records, reports, and depositions of treating doctors showed that nineteen of twenty litigating survivors had been seen by one or more mental-health professionals and all had presented with the hallmark features of PTSD. All mental-health professionals provided a diagnosis of PTSD, and these diagnoses were maintained for six months or longer. The survivors' presentation of symptoms yielded a total incidence rate for diagnosed PTSD of eighty-six percent if it was conservatively assumed that non-assessed survivors did not have problems. Rosen pointed out that nowhere in the scientific literature has such a high incidence rate been reported for survivors of accidental trauma. Instead, epidemiological surveys find that fewer than twenty-five percent of accident survivors report reactions of sufficient severity to warrant a PTSD diagnosis. See, e.g., Naomi Breslau et al., *Traumatic Events and Posttraumatic Stress Disorder in an Urban Population of Young Adults*, 48 ARCHIVES GEN. PSYCHIATRY 216, 216–22 (1991); Fran H. Norris, *Epidemiology of Trauma: Frequency and Impact of Different Potentially Traumatic Events on Different Demographic Groups*, 60 J. CONSULTING & CLINICAL PSYCHOL. 409, 409–18 (1992). Recent methodological refinements in surveying techniques suggest rates of PTSD after accidents that are even lower. See, e.g., Naomi Breslau et al., *Trauma and Posttraumatic Stress Disorder in the Community*, 55 ARCHIVES GEN. PSYCHIATRY 620, 626–32 (1998).

turned out, the high incidence of diagnosed PTSD among litigating survivors was explained, at least in part, by reports of attorney coaching and symptom sharing. Thus, several survivors discussed in follow-up interviews how they had received instructions from their counsel.<sup>15</sup> Three reported being told they did not need to work.<sup>16</sup> Another explained that he was told it might be worth his while to see a doctor every week.<sup>17</sup> Another survivor reported that attorneys had explained to several crew members how people with PTSD had sleep problems, nightmares, and fears.<sup>18</sup> Rosen noted in his report on the *Aleutian Enterprise* sinking: "All told, 6 of 20 survivors provided unambiguous reports that some form of attorney advice had occurred with regard to symptoms of PTSD, not going back to work, or the merits of seeing a doctor."<sup>19</sup> The survivors reported that crew members shared this information with others in the group.<sup>20</sup>

Findings from this maritime case do not represent an isolated instance. J. R. Youngjohn has documented a case of attorney coaching prior to the neuropsychological evaluation of a mild head-injury client.<sup>21</sup> Further, in one survey of attorneys, sixty-three percent of those questioned felt it was appropriate to provide clients with information about psychological-test validity measures, when separate studies find that such coaching can reduce the performance of validity checks.<sup>22</sup> Paul Lees-Haley has reviewed these findings and observed that "insofar as examinees' responses to tests and interviews reflect preparation by an attorney for litigation, instead of the psychological status of the

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15. Rosen, *supra* note 14, at 82–87.

16. *Id.* at 84.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. James R. Youngjohn, *Confirmed Attorney Coaching Prior to Neuropsychological Evaluation*, 2 ASSESSMENT 279, 280–83 (1995).

22. See Martha W. Wetter & Susan K. Corrigan, *Providing Information to Clients About Psychological Tests: A Survey of Attorneys' and Law Students' Attitudes*, 26 PROF. PSYCHOL.: RES. & PRACTICE 474, 474–77 (1995). The finding that forty-seven to forty-eight percent of those surveyed "always or usually" provided clients with information about psychological-test validity measures, and sixteen percent "sometimes" provided such information, raises concerns for psychologists who also have found that coaching about validity scales can reduce the effectiveness of these scales. See Ruth A. Baer et al., *Effects of Information About Validity Scales on Underreporting of Symptoms on the MMPI-2: An Analogue Investigation*, 2 PSYCHOL. ASSESSMENT 189, 189–200 (1995); see also Joanne Storm & John R. Graham, *Detection of Coached General Malingering on the MMPI-2*, 12 PSYCHOL. ASSESSMENT 158, 158–65 (2000).

examinee, the validity of psychologists' expert opinions may be compromised."<sup>23</sup>

In addition to professional peer-review articles that speak to the issue of attorney coaching, insurance "sting operations" have demonstrated that attorneys can play an active role in furthering the presentation of false claims.<sup>24</sup> In light of such findings, a responsible forensic evaluator would want to know whether a claimant's attorney has provided information about psychiatric symptoms that might pertain to the claimant's clinical presentation. Unfortunately, efforts to obtain such information inevitably run up against claims of attorney-client confidentiality.

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23. Paul R. Lees-Haley, *Attorneys Influence Expert Evidence in Forensic Psychological and Neuropsychological Cases*, 4 PSYCHOL. ASSESSMENT 321, 321-24 (1997).

24. See, e.g., Kerr, *supra* note 9, at A1. New Jersey transit companies reported that when buses had collisions in urban areas,

they would often be surrounded by 'runners' for doctors and lawyers who would get on the bus, hand out leaflets with phone numbers, and encourage passengers to say they suffered from back or neck injuries that are hard to disprove. The most sophisticated runners spent their days scanning police radio frequencies for word of traffic accidents. . . . One tape made inside a bus crashed in September 1992, shows a man jumping onto the bus three minutes after the accident and declaring to the passengers on board: "All you people who want to get paid you stay right there, stay down. Wait for the ambulance to come. Your neck hurts, your legs hurt. All of that. You'll get some money. Stay there. They pay."

*Id.* at D2.

Sting operations have contributed to public awareness that coaching occurs, to the extent that the phenomenon has now appeared in popular books of fiction, much to the detriment of attorneys' professional image. See G. M. Rosen, *Posttraumatic Stress Disorder, Pulp Fiction, and the Press*, 24 BULL. AM. ACAD. PSYCHIATRY & LAW, 267, 267-69 (1996), who cites Carl Hiassen's *Strip Tease* (1993). In that pulp fiction book one of the leading characters places a cockroach in a container of yogurt and reseals the package, preparing to make a claim for PTSD. The character meets with his attorney and states:

"Tell me about your ace shrink," to which counsel responds, "A good man. I've used him on other cases. You should start seeing him as soon as possible, and as often as possible. . . . It's important to document your pain and suffering. It will help determine the final damages. . . . You might even consider quitting your job. . . . Lost income would greatly enhance a jury award.

Hiassen, *supra*, at 52.



## II. ATTORNEY-CLIENT CONFIDENTIALITY: APPLICABILITY TO A PTSD CLAIM

### A. *Historical Perspective: Confidentiality To Promote Free Flow of Communication*

Professor Wigmore stated the classic conception of the attorney-client privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.<sup>25</sup>

The privilege is rooted in sixteenth-century common law.<sup>26</sup> At that time, although parties were not allowed to testify at trial, their attorneys could be called to testify.<sup>27</sup> Steeped in notions of the attorney as a gentleman, whose “first duty . . . is to keep the secrets of his client,”<sup>28</sup> the privilege originally protected the attorney from the unwonted compromise of his “honor” that compulsory testimony regarding client confidences would entail.<sup>29</sup> At its inception, the privilege belonged to the attorney, who could waive it.<sup>30</sup>

By the eighteenth century, ownership of the privilege shifted to the client, as did the ability to waive it.<sup>31</sup> The privilege came to be seen as a

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25. JOHN H. WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton rev. ed. 1961).

26. See 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 198–203 (1926); JOHN H. WIGMORE, EVIDENCE § 2291 (3d ed. 1940). It has been suggested that the privilege reflects “ideas at least as old as Roman Law.” CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1.2, at 242 (1986) (citing Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487 (1928)).

27. WOLFRAM, *supra* note 26, § 6.1.2, at 243.

28. WIGMORE, *supra* note 25, § 2290, at 543 (quoting *Taylor v. Blacklow*, 132 Eng. Rep. 401, 406 (C.P. 1836)).

29. *Id.* at 530–31; WOLFRAM, *supra* note 26, § 6.1.2, at 243.

30. WIGMORE, *supra* note 25, § 2290, at 544–45; see also ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL 196 (2d ed. 1991); WOLFRAM, *supra* note 26, § 6.1.2, at 243.

31. See *In re Colton*, 201 F. Supp 13, 15 (S.D.N.Y. 1961), *aff'd*, 306 F.2d 633 (2d Cir. 1962); see also Wolfram, *supra* note 26, § 6.1.2, at 243 (citing *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139, 1225 (Ex. 1743) (opinion of Mountenay, B.)).

means of safeguarding the client's freedom in consulting and benefiting from the assistance of counsel.<sup>32</sup> The existence of the privilege was thought to encourage greater candor on the part of the client and to enhance the truth-seeking functions of the adversary system.<sup>33</sup> The privilege protected both the client's statements to the attorney and the attorney's statements to the client.<sup>34</sup> This was deemed by some to be essential because any statements by the attorney could reveal the nature of the client's disclosures and could also be interpreted as admissions by the client.<sup>35</sup>

### *B. Definition of the Privilege and Rationale for Its Continued Use*

#### *1. Privilege: The Evidentiary Obligation To Protect Client Communications from Disclosure*

Today, the common law privilege has been statutorily codified in most states<sup>36</sup> and a number of U.S. Supreme Court decisions have interpreted and upheld the privilege, finding that

its purpose is 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. The privilege recognizes that sound legal advice or advocacy

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32. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976).

33. *Upjohn*, 449 U.S. at 389; *Fisher*, 425 U.S. at 403; see *Trammel v. United States*, 445 U.S. 40, 51 (1980) (noting that privilege assures that "advocate and counselor [can] know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out").

34. See, e.g., *In re LTV Sec. Litig.*, 89 F.R.D. 595, 602-03 (N.D. Tex. 1981). But see *Wells v. Rushing*, 755 F.2d 376, 379 n.2 (5th Cir. 1985) (noting that content of communication may not be privileged to the extent that it contained communications from attorney to client). Some courts have noted that advice given by a lawyer to his client is privileged only if the advice is based on, or would reveal, confidential information furnished by the client. *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977); *SMC Corp. v. Xerox Corp.*, 70 F.R.D. 508 (D. Conn. 1976); *J.P. Foley & Co., Inc. v. Vanderbilt*, 65 F.R.D. 523, 526 (S.D.N.Y. 1974).

35. *Zacharias*, *supra* note 1, at 358; see also *ARONSON & WECKSTEIN*, *supra* note 30, at 196. But see, e.g., *SCM Corp.*, 70 F.R.D. at 522.

36. For example, in Washington, the privilege is codified at REVISED CODE OF WASHINGTON 5.60.060(2) (2000): "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." See also, e.g., CAL. EVID. CODE § 954 (2000); N.Y. C.P.L.R. 4503 (McKinney 2000).

serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.<sup>37</sup>

In spite of the privilege's general acceptance, it has not been without its critics. Early commentators noted that if lawyers warned clients from the start not to discuss criminal or other improper conduct, the end result would be positive—that is, the truly guilty would receive less legal assistance.<sup>38</sup> Others believed the argument that clients would not confide in lawyers absent a broad privilege was not compelling because surveys have shown much of the public does not believe an absolute privilege exists.<sup>39</sup> Lawyers themselves are not completely comfortable with a rule that arguably has evolved as a tool to protect information unnecessarily when disclosure would be desirable.<sup>40</sup> Professor Wigmore cautioned against an overly broad application of the privilege and urged that it be employed as “an exception to the general duty to disclose” that should be “strictly confined within the narrowest possible limits.”<sup>41</sup>

## 2. *Privilege: The Ethical Obligation To Protect Client Communications from Disclosure*

In addition to the evidentiary attorney-client privilege, there is also a general ethical duty of attorney-client confidentiality springing from the law of agency.<sup>42</sup> While there is considerable overlap between the

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37. *Trammel*, 445 U.S. at 51; see also *Upjohn*, 449 U.S. at 392; *Fisher*, 425 U.S. at 403–04. Some authorities have suggested that the privilege helps to prevent crime and other misconduct by encouraging clients to disclose contemplated wrongdoing, giving attorneys a chance to discourage such acts. See, e.g., *Upjohn*, 449 U.S. at 392. But cf. *Zacharias*, *supra* note 1, at 369–70 (indicating that there is no empirical evidence to support this argument).

38. WIGMORE, *supra* note 25, at 549 (quoting JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 302–04 (1827)).

39. For example, a 1962 Yale Law School study found that 40 of 108 laypeople questioned believed that attorneys could be compelled to disclose all confidences in court. *Zacharias*, *supra* note 1, at 394.

40. In a survey of lawyers in upstate New York, more than one-third said they had asserted the privilege when they believed they should have been required to disclose information. *Zacharias*, *supra* note 1, at 382.

41. WIGMORE, *supra* note 25, § 2292, at 554.

42. The ethical rule is codified in the ABA's MODEL RULES OF PROFESSIONAL CONDUCT (MRPC), Rule 1.6 (2000), which provides in part: “(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, [with limited exceptions].”

privilege and the ethical duty, there are notable differences between the two. As an evidentiary rule, the attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise compelled to produce evidence about a client. It also is limited to those matters communicated in confidence to an attorney by his or her client or by the attorney or client to an intermediary necessary for effective communication between the attorney and client.<sup>43</sup>

The lawyer's ethical duty to maintain client confidentiality is much broader, encompassing the full range of obligations owed by an agent to a principal. Not limited to situations in which evidence is sought from the lawyer under the compulsion of law, the ethics rule forbids unauthorized disclosure of client confidences in *any* forum and regardless of the source of the information.<sup>44</sup> Within its scope, therefore, is all "information relating to the representation," not just confidences shared by the client.<sup>45</sup> Under the more capacious ethical obligation, the lawyer as a trusted "agent" truly is the keeper of the client's secrets.

### C. *Exceptions to the Privilege: Crime or Fraud*

Although quite expansive, attorney-client confidentiality as embodied in both the evidentiary privilege and the ethical rules of professional conduct is subject to certain limited exceptions. Most notably, the attorney-client privilege does not attach to advice sought by the client in furtherance of a crime or fraud.<sup>46</sup> The rationale for this exception is that

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A majority of jurisdictions has adopted this rule, with some modifications. ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT § 55:104-107 (1993); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101; ARONSON & WECKSTEIN, *supra* note 30, at 197; Zacharias, *supra* note 1, at 361-62.

43. *See, e.g.*, United States v. Kovel, 296 F.2d 918, 920-21 (2d Cir. 1961); *In re* Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel, 666 F. Supp. 1148, 1157 (N.D. Ill. 1987) (collecting cases).

44. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (2000); *see also* ARONSON & WECKSTEIN, *supra* note 30, at 198-200; ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 55:902.

45. MODEL RULES OF PROF'L CONDUCT R. 1.6.

46. United States v. Zolin, 491 U.S. 554, 563 (1989); Clark v. United States, 289 U.S. 1, 15 (1933) (stating that attorney and client communications are no longer privileged where client seeks to commit fraud); *see also* Burton v. R.J. Reynolds Tobacco Co., 167 F.R.D. 134, 142-43 (D. Kan. 1996) (noting that evidence sufficient to establish prima facie showing that tobacco company attorneys were used to facilitate perpetration of continuing fraud to deceive American public about hazards of smoking was sufficient for crime or fraud exception to attorney-client privilege); Haines v. Liggett Group, Inc., 140 F.R.D. 681, 697 (D.N.J. 1992), *order vacated on other grounds*, 975

a lawyer advising a client in the commission of a crime or fraud is not acting within his or her rightful capacity as a legal advisor, and the client is not entitled to invoke the privilege in such an instance.<sup>47</sup> Similarly, if the communications regarding the commission of a crime or fraud are initiated by the lawyer but the client acts in accordance with the fraudulent advice, the privilege would be vitiated because the privileged relationship would not exist.<sup>48</sup> The proponent of the crime or fraud exception must make a foundational showing of crime or fraud to obtain the otherwise privileged communications.<sup>49</sup> The U.S. Supreme Court has held that before a trial court can even engage in an *in camera* review of the privileged materials, the proponent of the exception must make a showing adequate to support “a good faith belief by a reasonable person” that review of the materials will produce evidence sufficient to warrant application of the exception.<sup>50</sup>

Under the American Bar Association (ABA) Model Rules, a lawyer may not knowingly counsel or assist a client in conduct that is criminal or fraudulent,<sup>51</sup> nor may the lawyer use false evidence or commit a fraud upon the court.<sup>52</sup> Also, a lawyer who learns a client intends to commit a criminal act that is likely to result in “imminent death” or “substantial bodily harm” has the discretion to reveal the information in order to

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F.2d 81 (3d Cir. 1992) (stating that intentional shielding of evidence that scientific research might tend to prove smoking caused disease was viable theory of fraud entitling plaintiffs to discovery of withheld documents under crime or fraud exception to attorney-client privilege); *Buell v. Superior Court*, 391 P.2d 919, 924 (Ariz. 1964) (noting that attorney-client communications are not protected where client consults attorney for purposes of committing fraud); *People v. Superior Court (Bauman)*, 44 Cal. Rptr. 2d 734, 740 (Cal. Ct. App. 1995) (noting that attorney-client privilege was not applicable where services of lawyer were sought to enable or aid in plan or commission of crime or fraud); *Whetstone v. Olson*, 46 Wash. App. 308, 310, 732 P.2d 159, 161 (1986) (stating that exception applies if client knows, or reasonably should know, that advice is sought for wrongful purpose).

47. See GEOFFREY HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* §1.6.109 (Supp. 1996); *Zolin*, 491 U.S. at 571; *Whetstone*, 46 Wash. App. at 309, 732 P.2d at 160–61; see also WOLFRAM, *supra* note 26, § 6.4.10, at 279–82; David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 458 (1986).

48. *Clark*, 289 U.S. at 15.

49. See *Zolin*, 491 U.S. at 572.

50. *Id.* at 571.

51. MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

52. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4). *But see id.* at R. 1.2(d): “[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

prevent commission of the crime.<sup>53</sup> A lawyer may also reveal client confidences to the extent necessary to protect the lawyer from any liability that may emerge from the representation of the client.<sup>54</sup> Some states have added exceptions for fraud,<sup>55</sup> information involving possible bodily harm,<sup>56</sup> and past client improprieties involving the lawyer's services.<sup>57</sup>

### D. *Waiver of the Privilege*

The attorney-client privilege may also be waived by the client. This waiver may occur either expressly or implicitly. An express waiver may be effected either in discovery or at trial when a client clearly and voluntarily agrees to waive the privilege.<sup>58</sup> Also, in some instances, an "implied" waiver of the privilege is found to occur.<sup>59</sup> When, for

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53. *Id.* at R. 1.6(b)(1). In some states, this portion of the rule has been modified and expanded to allow a lawyer (in his or her discretion) to reveal client confidences to prevent the client from committing any crime. There is no requirement that the crime be one that is likely to result in "imminent death" or "bodily harm." ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 55:104-107 (1993). Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Texas, and Wisconsin all have versions of RPC 1.6 that make mandatory disclosure of information reasonably necessary to prevent a client from committing a crime likely to result in death or substantial bodily harm. *Id.*; *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 117A (Proposed Final Draft No. 2 1998); ABA Ethics 2000 Commission's Proposed Revision of RPC 1.6(b)(1).

54. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2).

55. *See, e.g.*, Sup. Ct. Va. R. 1.6(b)(3) (2000).

56. *See, e.g.*, RULES REGULATING THE FLA. BAR R. 4-1.6(b)(2) (2000).

57. *See, e.g.*, CONN. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2000); MD. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2000); NEV. SUPREME COURT RULES R. 156(3)(a) (2000).

58. *See, e.g.*, G.S. Enters., Inc. v. Falmouth Marine, Inc., 571 N.E. 2d 1363, 1368-69 (Mass. 1991) (finding defendant's express waiver of attorney-client privilege after formal discovery period had elapsed was not too late to preclude reliance on defense).

59. *See, e.g.*, Chi. Title Ins. Co. v. Superior Court, 220 Cal. Rptr. 507, 512 (Cal. Ct. App. 1985) (finding that implied waiver where communication "goes to the heart of the claim"); Mountain States Tel. & Tel. v. DiFede, 780 P.2d 533, 543 (Colo. 1989) (finding that implied waiver results when party places in issue confidential communication going to heart of claim); League v. Vanice, 374 N.W.2d 849, 856 (Neb. 1985) (stating party impliedly waives privilege by raising issue central to his ability to maintain action); Jakobleff v. Cerrato, Sweeney & Cohn, 97 A.D.2d 834, 835 (N.Y. App. Div. 1983) (noting that privilege is impliedly waived when necessary to determine validity of claim and when application would deprive adversary of vital information); Kammerer v. W. Gear Corp., 96 Wash. 2d 416, 420, 635 P.2d 708, 711 (1981) (noting that when client intends to waive privilege, waiver cannot be delayed until trial because it would unduly limit discovery); *see also* United States v. Sanders, 979 F.2d 87, 92 (7th Cir. 1992) (noting that attorney-client-privilege objection is waived where defendant fails to make timely and specific objection to admission of privileged statement at trial); Hollins v. Powell, 773 F.2d 191, 196-97 (8th Cir. 1985) (noting that

example, the client discloses the communications to a third person,<sup>60</sup> chooses to testify regarding privileged communications,<sup>61</sup> or fails to object when others reveal the privileged communications.<sup>62</sup>

The privilege is also waived when, as part of a claim or defense, the client places the subject matter of the confidence in issue.<sup>63</sup> Reasoning that privileged materials ought not to be used as both a shield and a sword, courts have employed a "fairness doctrine"<sup>64</sup> in finding a waiver of the privilege for matters in issue.<sup>65</sup>

This waiver of the attorney-client privilege has been found where a client brings a claim of legal malpractice<sup>66</sup> or asserts reliance on the

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attorney-client privilege waived for failure to object to questioning that led client to testify concerning portions of attorney-client communication); *Love v. United States*, 386 F.2d 260, 265 (8th Cir. 1967) (noting that failure of defendant to object to testimony of attorney who represented him in another case waived assertion of attorney-client privilege on appeal).

60. See, e.g., *In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987) (holding that client's acquiescence in attorney's publication of widely read book containing privileged materials from client's criminal case was sufficient to waive privilege for those matters in subsequent civil case); *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 881 (Colo. Ct. App. 1987) (holding that attorney-client privilege was waived where university disclosed to state auditor information gathered from internal investigation regarding contracts with Saudi Arabia); *Dutton v. State*, 452 A.2d 127, 145 (Del. 1982) (holding that revelation to close friend waived privilege); *State v. Shire*, 850 S.W.2d 923, 931 (Mo. Ct. App. 1993) (finding attorney-client privilege waived where defendant's daughter was present during conversations between attorney and client and daughter's presence was not necessary or essential to communication).

61. See *State v. Ingels*, 4 Wash. 2d 676, 104 P.2d 944 (1940); *State v. Vandenberg*, 19 Wash. App. 182, 187, 575 P.2d 254, 257 (1978) (holding client's testimony as to fact of communication to attorney waives privilege for whole of that communication and all other communications to attorney on same subject matter).

62. E.g., *Love*, 386 F.2d at 265.

63. E.g., *Harding v. Dana Transp., Inc.* 914 F. Supp. 1084, 1096 (D.N.J. 1996) (holding that employer waived attorney-client privilege with respect to communications between manager and attorney by using information gathered from that conversation as part of its defense); *N.Y. TRW Title Ins., Inc. v. Wade's Canadian Inn & Cocktail Lounge, Inc.*, 638 N.Y.S.2d 800, 801 (N.Y. App. Div. 1996) (holding that attorney-client privilege was waived where defendants placed question of parties' intent at issue); *Seattle NW Sec. Corp. v. SDG Holding Co.*, 61 Wash. App. 725, 742-43, 812 P.2d 488, 498-99 (1991) (raising issue of existence of confidential communication).

64. *In re von Bulow*, 828 F.2d at 101.

65. See *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (holding that privilege was waived when client asserted affirmative defense of reliance on advice of counsel); *Indep. Prods. Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958); *Wade's Canadian Inn*, 638 N.Y.S.2d at 801; *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 161-63 (Tex. 1993) (regarding "offensive use" exception).

66. E.g., *Pappas v. Holloway*, 114 Wash. 2d 198, 208, 787 P.2d 30, 36 (1990); WIGMORE, *supra* note 25, § 2327, at 638; see also *Elia v. Pifer*, 977 P.2d 796, 804 (Ariz. 1999) (holding that by filing legal malpractice action against domestic-relations attorney, client impliedly waived

advice of counsel as an affirmative defense.<sup>67</sup> In *Hearn v. Rhay*,<sup>68</sup> for example, the court required disclosure of legal advice given to defendants who asserted the defense of qualified immunity from a claim for damages under the Civil Rights Act based on their status as “public officials.”<sup>69</sup> Because the defendants contended that they acted in good faith and on the advice of legal counsel, the court found the content of their communications with counsel was “inextricably merged” with the affirmative defense and “inhere[d] in the controversy itself.”<sup>70</sup> The court stated the benefit to be gained from disclosure outweighed any potential damage to the attorney-client relationship because access to the materials was required for a “fair and just determination” of the issues.<sup>71</sup>

The *Hearn* court applied a three-part test to determine whether the privilege had been implicitly waived:

- (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.<sup>72</sup>

A number of courts have followed *Hearn*.<sup>73</sup>

Other courts, however, have criticized *Hearn* for creating an overly broad “placing-at-issue” exception and thereby undermining the legislative intent of the privilege by requiring a balancing of the interests

attorney-client privilege as to communications with client’s subsequent domestic-relations and bankruptcy attorneys); *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057, 1060 (R.I. 1999) (holding that assignment of legal malpractice claim as part of commercial transaction serves as waiver of client’s attorney-client privilege).

67. *Pennzoil*, 974 F.2d at 1161.

68. 68 F.R.D. 574 (E.D. Wash. 1975).

69. *See id.* at 578, 581.

70. *Id.* at 582.

71. *Id.*

72. *Id.* at 581.

73. *See, e.g., Zenith Radio Corp. v. United States*, 7 Ct. Int’l Trade 398, 399–401 (1984) (noting that some courts have “adopted the automatic waiver rule . . . on the theory that when a party seeks judicial relief, he waives whatever privilege he has”); *Hoechst Celanese Corp. v. Nat’l Union Fire Ins. Co.*, 623 A.2d 1118, 1125 (Del. Super. Ct. 1992); *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.*, 612 N.E.2d 442, 447–48 (Ohio Ct. App. 1992); *see also Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1579 (Fed. Cir. 1985).



of the privilege holder against those of the opponent.<sup>74</sup> For example, the Third Circuit criticized *Hearn* in *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*<sup>75</sup> The court noted it is essential that clients know from the start what confidences will never be revealed.<sup>76</sup> By making later disclosure dependent on the particular facts of future litigation, the Third Circuit asserted that the *Hearn* court had destroyed that predictability.<sup>77</sup> The court instead adopted a narrower waiver rule: “The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.”<sup>78</sup>

However, *Hearn* is not, or need not be, as open-ended as the Third Circuit implied. First, the decision places a heavy burden on the party seeking disclosure by requiring it to demonstrate the necessity of disclosure.<sup>79</sup> Courts can add further safeguards by requiring that a party also show that it has exhausted every reasonable alternative source of the information sought and that it describe the information with reasonable specificity.<sup>80</sup>

The “at issue” exception to attorney-client privilege corresponds to the exceptions to the physician-patient and psychotherapist-client privileges that apply in personal-injury and wrongful-death actions. Several states have enacted exceptions to those privileges in situations where the patient puts his or her physical, mental, or emotional state at issue in litigation. For example, under Rule 510 of the Texas Rules of Evidence, a plaintiff who seeks damages for alleged injuries, such as mental anguish, may not suppress communication or records relevant to his or her mental and emotional condition.<sup>81</sup> Codified by statute in some

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74. *E.g.*, *Succession of Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1145–46 (La. 1987).

75. 32 F.3d 851 (3d Cir. 1994).

76. *See id.* at 863–84.

77. *Id.* at 864.

78. *Id.* at 863.

79. *Hearn v. Rhay*, 68 F.R.D. 574, 581–82 (E.D. Wash. 1975).

80. *See, e.g.*, *Greater Newburyport Clamshell Alliance v. Pub. Serv. Co. of N.H.*, 838 F.2d 13, 18 (1st Cir. 1988) (holding, in case involving prosecution for criminal trespass, that only privileged communications that were made while undercover informant was present were subject to discovery).

81. TEXAS RULES ANN. R. 510(d)(5) (Vernon 2001); *see also* HAW. R. EVID. 504.1(d)(3) (1995) (establishing psychologist-client privilege but stating: “There is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the client in any proceeding in which the client relies upon the condition as an element of the client’s claim or

states, there is an automatic waiver of the litigant's physician-patient privilege after the commencement of the action.<sup>82</sup> Likewise, the privilege is waived in the criminal context when a psychiatrist, formerly a member of the defense team, is called as a witness by the State, after the defendant has raised the insanity defense.<sup>83</sup> By placing his or her mental state in issue, a defendant waives any privilege with respect to that issue.

Even when the attorney-client privilege is applicable, the privilege may be waived. Such a waiver may be express or implied. A widely recognized implied waiver of the physician-patient privilege occurs when the patient places his or her physical or mental state in issue. A similar waiver of the attorney-client privilege would be appropriate in civil cases.

### *E. Distinction Between Civil and Criminal Cases*

While the fundamentals of attorney-client confidentiality are the same in criminal and civil suits, it is important to distinguish the underlying rationales for confidentiality in these two very different realms. In the criminal context, the defendant may bolster the underlying rationales of the attorney-client privilege with constitutional protections against self-

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defense."); LA. REV. STAT. ANN. § 37.2363 (West 2000) (establishing psychologist-client privilege except "[w]here the patient or client puts his mental state in issue by alleging mental or emotional damages or condition in any judicial or administrative proceedings"); MD. CODE ANN. § 9-109(d)(i) (2001) (establishing psychiatrist-client and psychologist-client privilege except when "the patient introduces his mental condition as an element of his claim or defense"); NEB. REV. STAT. ANN. § 71-1, 206.29 (Michie Supp. 2000) (noting that psychologist-client privilege exists except "[w]hen the client or patient, by alleging mental or emotional damages in litigation, puts his or her mental state in issue"); TENN. CODE ANN. § 24-1-207 (Supp. 2000) (stating that communication between psychiatrist and patient is privileged except in proceedings "in which the patient raises the issue of the patient's mental or emotional condition;" if patient raises issue, communication shall be disclosed only after finding by court that "the evidence cannot be obtained from another source" or that "the evidence sought is necessary to avoid substantial injustice to the party seeking it, and either that the disclosure will result in no significant harm to the patient or that it would be substantially unfair as between the requesting party and the patient not to require the disclosure").

82. *See, e.g.*, WASH. REV. CODE § 5.60.060(4)(b) (2000) (stating that privilege is waived ninety days after commencement of action); *see also* CAL. EVID. CODE ANN. § 996 (West 2001) (codifying exception to physician-patient privilege for personal-injury actions); MICH. COMP. LAWS ANN. § 600.2157 (West 2000) (stating that patient waives physician-patient privilege by bringing personal-injury action or malpractice suit), § 600.2912f (stating that person who has given notice or commenced action alleging medical malpractice waives physician-patient privilege).

83. *In re Rice*, 118 Wash. 2d 876, 889-90, 828 P.2d 1086, 1094-95 (1992); *see also* *State v. Pawlyk*, 115 Wash. 2d 457, 465, 800 P.2d 338, 342 (1990); *State v. Bonds*, 98 Wash. 2d 1, 21-22, 653 P.2d 1024, 1035-36 (1982).

the attorney-client privilege with constitutional protections against self-incrimination under the Fifth Amendment,<sup>84</sup> the right to the assistance of counsel under the Sixth Amendment,<sup>85</sup> and the presumption of innocence. Further, zealous advocacy by defense counsel is necessary to offset the resources the police and prosecutors can marshal to prove the defendant's guilt. Therefore, even when a criminal defendant admits guilt to his or her attorney, the adversary system assumes that greater justice for more people will be achieved if the attorney is not permitted to reveal the information.<sup>86</sup> This rationale supports the justice system's fundamental assumption that it is preferable to let ten guilty people go free than to have one innocent person convicted.<sup>87</sup>

In the civil realm, by contrast, these constitutional considerations do not come into play. There is, for example, no presumption of innocence and no privilege against self-incrimination. Consequently, the civil litigant may be required to produce evidence about the facts underlying an attorney-client communication, even if incriminating, where the criminal defendant would be protected from doing so under the Fifth Amendment. Likewise, different considerations apply when the privilege is used to shield from scrutiny a plaintiff's claim for damages due to emotional stress, particularly when the accurate PTSD diagnosis is so dependent on whether the symptoms occurred after "prompting" by one or more third persons.

In spite of these inherent distinctions, many of the Rules of Professional Conduct, including the strict rule of confidentiality, are premised on a criminal-law vision of lawyers' roles and obligations. Noting that the Rules of Professional Conduct state rules applicable to lawyers in all fields of practice, resulting in rules that in some cases are irrelevant and in others are contrary to certain highly specialized practice areas, some legal ethicists have proposed the adoption of more

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84. See *Fisher v. United States*, 425 U.S. 391, 402-05 (1976).

85. *United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) ("[T]he Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney.").

86. See *People v. Belge*, 372 N.Y.S.2d 798, 802 (1975); MODEL CODE OF EVID. R. 210 cmt. a (1942).

87. *Furman v. Georgia*, 408 U.S. 238, 368 n.158 (1972) (Marshall, J., concurring) (quoting Justice William O. Douglas in Foreword, J. FRANK & B. FRANK, NOT GUILTY, 11-12 (1957)). *But see* 7 THE WORKS OF JEREMY BENTHAM 474-75 (J. Bowring ed. 1843) (suggesting that lawyer whose representation enabled client whom he knew to be guilty to escape punishment was virtually accessory after fact to crime).

flexible rules of attorney-client confidentiality to account for these differences.<sup>88</sup>

In harmony with this approach, the American Academy of Matrimonial Lawyers' (AAML) *Bounds of Advocacy* elaborates on, and occasionally modifies, the Rules of Professional Conduct in the family-law area.<sup>89</sup> Its standards specifically provide for an exception to the rule of confidentiality, and hence, permit disclosure that an attorney reasonably believes necessary to prevent substantial physical or sexual abuse of a child.<sup>90</sup> Similarly, many states have carved out exceptions to various evidentiary privileges and duties of confidentiality in their child abuse reporting laws. Some states have compelled attorney reporting,<sup>91</sup> while others have left it in the attorney's discretion.<sup>92</sup> Most states' statutes expressly state that reporting of child abuse will not constitute a violation of the confidential communications privileges of most professions but make no mention of the attorney-client privilege.<sup>93</sup> As the AAML's *Bounds of Advocacy* suggests, however, allowing a family

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88. See, e.g., William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); Zacharias, *supra* note 1, at 400; see also Aronson, *supra* note 1, at 150-51.

89. AMERICAN ACADEMY OF MATRIMONIAL LAWYERS' (AAML) BOUNDS OF ADVOCACY: STANDARDS OF CONDUCT (1991); AAML BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS (2000), available at <http://www.aaml.org>.

90. AAML BOUNDS OF ADVOCACY (2000) Goal 6.5 ("An attorney should disclose information relating to a client or former client to the extent the lawyer reasonably believes necessary to prevent substantial physical or sexual abuse of a child."); AAML BOUNDS OF ADVOCACY (1991) Standard 2.26 ("An attorney should disclose evidence of a substantial risk of physical or sexual abuse of a child by the attorney's client."). A footnote recognizes, however, that such disclosure would be prohibited in some jurisdictions as "conduct adverse to the client and based on confidential information." BOUNDS OF ADVOCACY (2000) n.79; BOUNDS OF ADVOCACY (1991) n.42.

91. See, e.g., N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 280 Supp. (1974) (finding that attorney-client privilege does not apply and information must be reported to Children's Bureau); Wis. Bar Assn. Comm. on Prof'l Ethics, Op. E-88-11 (deciding that lawyer *must* report).

92. See, e.g., Indianapolis Bar Assn. Legal Ethics Comm., Op. 1-1986 (April 29, 1986) (attorney permitted to report); see also generally Mosteller, *supra* note 1, at 216-17.

93. See, e.g., WASH. REV. CODE § 26.44.060(3) (2000) ("[C]onduct conforming with the reporting requirements of this chapter shall not be deemed a violation of the confidential communication privilege of RCW 5.60.060 (3) [priest/clergyman] and (4) [physician], 18.53.200 [optometrist] and 18.83.100 [psychologist]"); see also Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 734 n.53 (1987) ("[T]he express retention of the attorney-client privilege [in most statutes] is noteworthy in light of the frequently conceded weakness of its rationale.").

lawyer the discretion to reveal confidences in order to protect the best interests of a child would truly serve the interests both of the family law system and the public in keeping children from harm.<sup>94</sup> Even if it were necessary to safeguard the abuser's criminal system protections by prohibiting use of such confidential information in any criminal proceeding, at least the child would be better protected and any custody determination would be made on the basis of all relevant facts.

Constitutional support for the attorney-client privilege of criminal defendants is not applicable to civil penalties. In the criminal context, a broad privilege with narrow exception preserves the defendant's presumption of innocence and Fifth and Sixth Amendment rights. The principles do not support preventing discovery of information about PTSD provided to a civil litigant claiming damages based on PTSD.

#### *F. Bases for Finding PTSD Claims*

A waiver or exception to the attorney-client privilege for information about PTSD symptomology provided to a plaintiff claiming damages due to PTSD could be justified on a number of bases. First, since the attorney-client privilege shields relevant information from the trier of fact, it should be narrowly construed consistent with its purpose: encouraging clients to confide fully in their attorneys. As such, it would not include materials and information about PTSD diagnosis and

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94. AAML BOUNDS OF ADVOCACY, Goal 6.5 cmt. As stated in the Comment to the ABA Ethics 2000 Commission's Proposed Revision of RPC 1.6(b)(1):

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life-threatening or debilitating injuries and illnesses and the consequences of child sexual abuse. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A (Proposed Final Draft No. 2 1998).

symptoms provided by the attorney. As the court stated in *SCM Corp. v. Xerox Corp.*:<sup>95</sup>

I see no reason to broaden the privilege beyond the narrow standard as set forth in *United Shoe*. The purpose of the privilege is to insure that the client may confide in his attorney to obtain legal advice. Unless the legal advice reveals what the client has said, no legitimate interest of the client is impaired by disclosing the advice. Wigmore's discussion of the broader standard concedes that it is not based on "any design of securing the attorney's freedom of expression." 8 Wigmore, *supra*, § 2320, at 629. His rationale is twofold: to prevent use of the attorney's statements as admissions of the client or as revelations of the client's communication. The latter reason, of course, is safeguarded by the explicit requirement of the narrow standard. That same requirement seems adequate to protect against admissions entitled to protection. If the attorney's statement is based upon a fact communicated by the client, its use as an admission is barred by the availability of the privilege, even under the narrow standard. If the attorney makes an admission as agent for his client, without revealing a fact confidentially communicated from the client, no reason appears why such admission should be protected. Thus, Wigmore's reasons for adopting the broad standard are adequately satisfied by the narrow standard.<sup>96</sup>

Second, where a *prima facie* case of fraudulent conduct can be established, the information could be obtained under the crime or fraud exception to the attorney-client privilege. Third, the claim for damages based on PTSD could be deemed a waiver of the attorney-client privilege, as is the case with medical records. By placing the plaintiff's symptoms of PTSD in issue, fairness to the defendant would require access to information the client received about PTSD prior to reporting those symptoms.<sup>97</sup> Such information is necessary to the defendant's mental-health expert in evaluating the plaintiff's condition and as a basis for evaluating the plaintiff's credibility at trial.

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95. 70 F.R.D. 508 (D. Conn. 1976).

96. *Id.* at 522.

97. *Cf., e.g.,* Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 635-42 (1980), *quoted with approval in* State v. Pawlyk, 115 Wash. 2d 457, 462-63, 800 P.2d 338, 341 (1990).

Further, to the extent that plaintiffs will testify about their symptoms, they arguably waive the confidentiality of information provided to them prior to trial. Under Federal Rule of Evidence 612, the opposing party may examine a document used “before testifying, if the court in its discretion determines it is necessary in the interests of justice.” The authorities are split as to whether review by the witness of attorney-prepared documents waives the attorney-client privilege and work-product protection.<sup>98</sup>

In jurisdictions that grant the trial judge discretion to authorize discovery of otherwise privileged materials provided to a witness, materials concerning PTSD symptoms would present the strongest case for permitting discovery. As noted above, it would be virtually impossible for the defendant’s mental-health evaluator to make an accurate PTSD determination without access to materials provided to the claimant.<sup>99</sup> Similarly, the claimant’s testimony at trial concerning the symptoms would be inextricably intertwined with materials read concerning PTSD symptoms prior to claiming to suffer such symptoms.<sup>100</sup> In jurisdictions where the above bases for finding a waiver of or exception to the attorney-client privilege would not be applicable, however, a new exception for information about PTSD diagnosis and symptoms should be established.

### III. A NEW EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE

#### A. *The Need for an Exception when Assessing PTSD Claims*

When psychiatrists and psychologists evaluate a patient in a clinical setting for PTSD symptoms, they generally rely on the patient’s statement of symptoms and their causes as the primary, if not sole, source of data.<sup>101</sup> This is understandable and meets the standard of care because it is assumed that the patient is motivated to report accurately in

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98. See Alfred F. Belcour, *Use It and Lose It—Privileged Documents, Preparing Witnesses, and Rule 612 of the Federal Rules of Evidence*, 31 FED. B. NEWS & J. 171 (1984); see also James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 145–46 (D. Del. 1982) (finding that use of materials to prepare witness waived privilege and work-product protections).

99. See *supra* notes 7–24 and accompanying text.

100. See *infra* notes 104–05 and accompanying text.

101. See Stewart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PROF. PSYCHOL.: RES. & PRAC. 50, 50–57 (1997); Larry H. Strasburger, et al., *On Wearing Two Hats: Role Conflict in Serving as Both Psychotherapist and Expert Witness*, 154 AM. J. PSYCHIATRY 448–56 (1997).

order to obtain an appropriate diagnosis and treatment.<sup>102</sup> In forensic and disability settings, additional motivational factors may influence what an individual reports, and reliance on an individual's self-reporting of symptoms is ill advised.<sup>103</sup>

It is in the context of these additional motivational factors that concerns about a malingered PTSD diagnosis apply. Individuals can malingering PTSD symptoms on their own, with the assistance of relevant reading materials, or with the benefit of coaching by relatives, friends, or counsel. In every case, it is necessary to evaluate these sources of influence. After all, the goal of an independent exam is for the expert to assess for the court the plaintiff's emotional status. To accomplish this goal, the examiner must assess all factors that have contributed to the client's presentation of symptoms, including the possibility of extraneous factors that serve to educate the individual on symptoms not truly present. In the forensic setting, all of these sources of influence can be assessed by the expert except information provided by the attorney. Thus, for example, in *Nelsen v. Research Corp. of the University of Hawaii*,<sup>104</sup> a treating doctor provided information on psychiatric symptoms of PTSD to the plaintiff Nelsen. The court stated: "I am not persuaded that Nelsen in fact suffered the full range of PTSD symptoms, based on the evidence indicating a lack of candor on the part of Nelsen, and in light of the testimony at trial that Dr. Poletti provided Nelsen with the DSM-III-R list of PTSD symptoms."<sup>105</sup> In this context, an exception

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102. See Greenberg & Shuman, *supra* note 101, at 53; Strasburger et al., *supra* note 101, at 450-51.

103. See Greenburg & Shuman, *supra* note 101; Strasburger et al., *supra* note 101. The role of a therapist is considered incompatible with the role of a forensic examiner because of the differing approach to data demanded by each function. A similar concern underlies common law restrictions on the statements-of-physical-condition exception to the hearsay rule. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.42, at 938-39 (2d ed. 1999):

The main reason to admit statements made for purposes of getting treatment is that they are trustworthy. Usually they are made by the patient to his physician, and they describe past and present physical sensations relating to his condition, so risks of misperception and faulty memory are minimal. He knows his description helps determine treatment, so he has reason to speak candidly and carefully, and risks of insincerity and ambiguity are minimal.

Statements for purposes of diagnosis offer no similar assurance of candor. The speaker is likely to be trying either to prepare a doctor to testify or aid in litigation, or to get some other personal benefit (job or insurance coverage). He is tempted to maximize or minimize, overstate or understate injuries, pains, symptoms, and disabilities.

*Id.*; see also 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 277, at 233 (5th ed. 1999).

104. 805 F. Supp. 837 (D. Haw. 1992).

105. *Id.* at 844-45.



to the attorney-client privilege is needed when mental-health professionals are asked to determine the validity of PTSD claims.

An unusual turn of events in one personal-injury case illustrates the problem faced by experts attempting to assess claims of PTSD. In *Mallory v. Supreme Alaska Seafoods, Inc.*,<sup>106</sup> the plaintiff was asked at deposition if he had read anything about PTSD, a condition that had been diagnosed after plaintiff's attorney had referred his client to a psychologist.<sup>107</sup> Plaintiff's counsel objected to the question on the basis of attorney-client privilege. The issue was taken before the judge, who ruled that the nature of materials provided were privileged but the materials were not.<sup>108</sup> The plaintiff then disclosed that his attorney had provided deposition transcripts of other clients who, on referral by this same attorney to the same psychologist, had all presented the classic PTSD symptoms.

### *B. Policy Bases and Parameters for a New Exception*

#### *1. The Exception Should Be Narrowly Drawn To Avoid Detrimental Effect on Attorney-Client Relationship*

As discussed above, one of the primary rationales underlying attorney-client confidentiality is the facilitation of frank and open client-attorney communications.<sup>109</sup> The attorney-client privilege's aim is both to facilitate the full development of facts necessary for effective representation and to help a lawyer advise clients in the proper exercise of their legal rights and the avoidance of any violation of the law. In the long run, lawyers will be better able to assist clients to act properly if they have all of the relevant information.<sup>110</sup>

None of the policy rationales in support of the privilege would be frustrated by the adoption of a limited waiver of attorney-client confidentiality in the situation of a plaintiff claiming PTSD as a source of damages. The scope of the waiver would be extremely limited,

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106. No. C95-322WD (W.D. Wash. July 7, 1995).

107. *See id.* at 2.

108. *Id.* Because written and oral information provided by any party other than counsel would not be privileged, only coaching provided by attorneys is subject to privilege.

109. *See supra* notes 32-33 and accompanying text.

110. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 87-88, 98 (1990); MONROE H. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 4-5 (1975).

including only those matters directly related to the nature, diagnosis, and symptoms of PTSD. Because the waiver would take effect only when a litigant placed those matters in issue, it would be consistent with the patient-litigant exception to the physician-patient privilege. In the context of a claim for damages resulting from PTSD, it makes little sense to require disclosure of the plaintiff's communications with psychological professionals while shielding communications from the plaintiff's attorney that preceded the consultations with the mental-health professionals and very likely influenced them.

In addition, the waiver could be limited to those statements and materials about PTSD symptoms provided by the attorney to the client. Some jurisdictions already limit the privilege to information communicated by the client to the attorney, rather than the reverse.<sup>111</sup> There is no evidence that such a limitation has negatively affected the attorney-client relationship.

## *2. Information Is Essential to Accurate Diagnosis and Assessment of Credibility*

Once a plaintiff claims damages based on PTSD, the defendant has the right to have the plaintiff evaluated by a mental-health professional. Finding out whether a plaintiff's symptoms appeared spontaneously or after he or she was provided with information about PTSD symptoms is essential to an accurate evaluation. The importance of evaluating the effect of information about PTSD symptoms is not diminished if the information was provided by the attorney.

Consider how a mental-health professional would go about assessing the possibility of attorney influence on a plaintiff's presentation of symptoms. The issue could be approached by first asking a general question such as: "Have there been any sources of information that have influenced your knowledge of post-trauma reactions or your presentation of symptoms today?" This type of question covers the possibility that the plaintiff has acquired information from news articles, books, friends, or other sources, including counsel. Only an affirmative response to the general question would be followed by more focused ones such as, "Have any of your friends who are war veterans spoken to you about their post-trauma experiences?" In a similar vein the evaluator might ask, "With specific reference to your attorney, has he or she advised you

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111. See, e.g., *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 520-23 (D. Conn. 1976).

how you might present your problems today?,” or “Has counsel ever advised you or provided information concerning how people react to traumatic events?” Both the general question and more specific questions open the door for a plaintiff to discuss what may be considered privileged communications, though only in a very limited area of concern—and only if the attorney has in fact provided information about PTSD symptoms.

The arguments noted above for applying the “at issue” exception to attorney-client confidentiality would also justify a new exception.<sup>112</sup> Because the proposed waiver or exception would only take effect when a litigant places those matters in issue, it would be in line with the matter-in-issue exception. By asserting PTSD as a source of damages, the plaintiff would be deemed to have placed any oral or written statements by the attorney regarding the nature, diagnosis, and symptoms of PTSD in issue and thus should be considered to have waived the privilege regarding those particular communications.

Just as a personal-injury plaintiff who waives his or her physician-plaintiff privilege on bringing the action is not thereby precluded from seeking medical assistance, so too the proposed waiver should not prevent a client from seeking a lawyer’s advice. Lawyers may ethically provide information concerning the symptoms of PTSD to clients prior to their psychological evaluation.<sup>113</sup> But if they do provide such information, the evaluator must have access to the information to make an accurate evaluation. At the very least, the evaluator should be permitted to ask about prompting or bases for the symptoms other than spontaneous occurrence, and then be permitted to indicate, as part of the basis for the evaluation, if the plaintiff had refused to answer. This background information would also be vital for the jury to make an accurate assessment of the credibility of the plaintiff’s condition and the expert’s evaluation thereof.

### 3. *A Limited Exception Is Necessary in Fairness to Defendants*

While attorney-client confidentiality serves many laudable goals, there are strong countervailing policies favoring disclosure when litigants assert PTSD as a source of damages and there is a possibility of attorney coaching concerning the symptoms. For one, assertion of the

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112. See *supra* notes 81–83 and accompanying text.

113. See *infra* Part III.B.4.

privilege in this instance blocks the defendant's access to materials that are crucial to the claim asserted against the defendant. Courts in similar situations have weighed the equities and come out on the side of a waiver.<sup>114</sup> Starting its analysis with a "presumption in favor of preserving the privilege," one court found that

In a civil damages action, however, fairness requires that the privilege holder surrender the privilege to the extent that it will weaken, in a meaningful way, the defendant's ability to defend. That is, the privilege ends at the point where the defendant can show that the plaintiff's civil claim, and the probable defenses thereto, are enmeshed in important evidence that will be unavailable to the defendant if the privilege prevails. The burden on the defendant is proportional to the importance of the privilege. The court should develop the parameters of its discovery order by carefully weighing the interests involved, balancing the importance of the privilege asserted against the defending party's need for the information to construct its most effective defense.<sup>115</sup>

Following this reasoning, a PTSD plaintiff's claim may be "enmeshed" in the content of the attorney-client communications. Accurate diagnosis of PTSD is dependent on the client's truthful reporting of certain key symptoms and the psychotherapist's knowledge of whether the client was provided prior information about those symptoms. Therefore, it is impossible for defendants to construct a defense against coached manifestations of PTSD if they are prevented from gaining access to the very communications that contain the relevant evidence. Where the evidence is crucial to the defendant's ability to defend against a claim and the disclosure is narrowly limited to information about PTSD symptoms provided to a plaintiff asserting PTSD as a basis for a damages award, the balance of equities in such a personal-injury action should tip toward disclosure.

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114. *See, e.g.,* Greater Newburyport Clamshell Alliance v. Pub. Serv. Co. of N.H., 838 F.2d 13, 20 (1st Cir. 1988) (holding, in case involving prosecution for criminal trespass, that only privileged communications which were made while undercover informant was present were subject to discovery); *State v. Pawlyk*, 115 Wash. 2d 457, 463-65, 800 P.2d 338, 341-42 (1990).

115. *Newburyport*, 838 F.2d at 20.

#### 4. *An Exception Will Assist in Discouragement and Discovery of Fraud*

In addition to fairness to defendants, an exception to the privilege would serve to discourage fraudulent claims of PTSD. If plaintiffs (and their lawyers) are aware that placing their condition in issue by asserting the claim will make information they have seen or heard regarding the symptoms of PTSD nonprivileged, they may be less likely to fabricate the elements of the claim and attorneys may be less likely to prompt clients with information they know can be revealed to the evaluator.

As the exceptions suggest, the privilege does not have a firm constitutional basis as it is applied in civil litigation. The Sixth Amendment provides some protection from disclosure in criminal cases.<sup>116</sup> But in civil cases, the policy favoring liberal discovery<sup>117</sup>—a relatively recent development compared to the attorney-client privilege—weighs heavily in favor of limiting the privilege.

In an adversary system, the attorney is often placed in an extremely difficult position. On the one hand, the attorney has an obligation to give clients the benefit of the attorney's knowledge and expertise. In the context of a client involved in a traumatic event, the client is likely to inquire about the likelihood and nature of potential damages. The attorney would be remiss in failing to advise that, in addition to damages for physical injury, lost wages, and harm to personal property damages may be awarded for emotional and psychological trauma.

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116. *United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) (“[T]he Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney.”); *Mosteller*, *supra* note 1, at 270 & n.202.

117. *See, e.g.*, *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 342, 858 P.2d 1054, 1077 (1993). The *Fisons* court stated:

The concept that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials is reflected in decisions of our Court of Appeals. In *Gammon v. Clark Equip. Co.*, 38 Wash. App. 274, 686 P.2d 1102 (1984), *aff'd*, 104 Wash. 2d 613, 707 P.2d 685 (1985), the Court of Appeals held that a new trial should have been ordered because of discovery abuse by the defendant. Then Court of Appeals Judge Barbara Durham wrote for the court:

The Supreme Court has noted that the aim of the liberal federal discovery rules is to “make a trial less a game of blindman’s b[li]ff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” The availability of liberal discovery means that civil trials no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

*Id.*

Suppose, for example, that the client was injured in a plane crash. In the ensuing lawsuit against the airline, the client would seek damages, including damages for psychological and emotional trauma. Lawyers may properly provide information about the diagnosis and symptoms of PTSD so that clients might determine whether they have experienced such symptoms. A plane-crash victim who has had nightmares or is afraid to take airplane trips may not realize such effects can form the basis for a PTSD diagnosis or resulting damages. Discussion with the client's attorney about potential symptoms may be necessary to protect the client's rights. For example, the attorney might ask specific questions about unusual fears, dreams, relationship problems, inability to engage in certain activities, and other difficulties that can occur post-trauma.

While such questions may be permissible, an attorney actually telling a client to study a list of symptoms, a book on PTSD, or sample depositions of clients who successfully obtained a PTSD diagnosis would appear to constitute impermissible coaching. There is a fine line between necessary and desirable preparation and unethical coaching; between helping the client understand and express existing trauma reactions and assisting the client to create symptoms that did not previously exist.<sup>118</sup> To the extent that lawyers assist in the *creation* of symptoms that did not otherwise exist, they violate the Rules of Professional Conduct.<sup>119</sup>

In addition to providing the forensic evaluator information essential to an accurate diagnosis, disclosure of information provided by the attorney would serve as a disincentive to "create" symptoms that did not otherwise exist. At the least, a client who described symptoms in the precise language of a list, book, or deposition transcript provided by the

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118. As Professor Wolfram stated:

The line between legitimate and disreputable preparation is largely one of the lawyer's intentions. A lawyer may legitimately attempt to refresh a witness' memory, to assist the witness to testify in a straightforward and effective way, and to help the witness be prepared to meet improper or suggestive lines of hostile examination. On the other hand, a lawyer may not assist or school a witness in twisting or distorting the witness' subjective memory and, thus, the truth as far as the witness knows it.

WOLFRAM, *supra* note 26, § 12.43, at 648 (footnotes omitted) (commenting that witness must also "testify in his or her own words" and not "simply to parrot words and phrases supplied by a lawyer").

119. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (assisting client in conduct that is fraudulent); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (fraud upon court); MODEL RULES OF PROF'L CONDUCT R. 3.4 (fairness to opposing party and counsel).

attorney would lose credibility and the likelihood of a diagnosis of PTSD. And, in extreme cases, fraudulent conduct would be exposed.<sup>120</sup>

Permitting a limited exception for information about PTSD symptoms provided to the client is one way of discouraging unethical coaching and determining those instances in which the lawyer has gone beyond proper counseling to assist a client in committing fraud. Allowing the fact-finder access to the communications should make clear the nature of the attorney's conduct. That is, it should be apparent from the content of the communications whether the claim of PTSD was manufactured or was in fact mainly elicited from the client who was already experiencing the symptoms without knowing what they were.

Even if evidence of the information is not permitted at trial, it is still desirable to require disclosure during discovery. Under Federal Rule of Evidence 703, it is well established that an expert (here, a diagnosing psychiatrist or psychologist) can base his or her testimony on evidence that would not be admissible at trial. In the court's discretion, such bases of expert testimony are discoverable.<sup>121</sup> In such a case the court ought to

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120. An example of how the attorney-client privilege in the civil context obscured the truth for too long can be found in the tobacco litigation. For nearly forty years, the tobacco companies succeeded in hiding a massive fraud on the American public by invoking the attorney-client privilege. When the veil of deception was finally pierced, it was revealed that counsel for the tobacco companies participated in the creation of an elaborate public-relations scheme to encourage the public to continue smoking cigarettes by pretending to investigate the health hazards of smoking. In reality, the tobacco companies were already in possession of information that smoking was hazardous to the health, which they deviously suppressed by even going so far as to prohibit scientists on their payroll from publishing study results. See, e.g., *Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134, 142-43 (D. Kan. 1996) (finding evidence sufficient to establish prima facie showing that tobacco-company attorneys were used to facilitate perpetration of continuing fraud to deceive American public about hazards of smoking); *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 697 (D.N.J.), *order vacated on other grounds*, 975 F.2d 81 (3d Cir. 1992) (finding that intentional shielding of evidence that scientific research might tend to prove smoking caused disease was viable theory of fraud entitling plaintiffs to discovery of withheld documents under crime or fraud exception to attorney-client privilege).

121. Fed. R. Civ. P. 26(b)(1) provides:

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

*Id.*

“develop the parameters of its discovery order by carefully weighing the interests involved, balancing the importance of the privilege asserted against the defending party’s need for the information to construct its most effective defense.”<sup>122</sup>

As noted above, it is essential in some cases for the defendant’s forensic mental-health expert to know whether the claimant received information about PTSD symptoms in order to make an accurate diagnosis. Because the exception would be limited to information provided by the attorney—and not communications the client made in confidence—there would be a very limited impact on the attorney-client relationship.

C. *An Exception May Be Found or Established by the Courts or Enacted by the Legislature: Washington, a Case Study*

Evidentiary privileges in Washington are established by the legislature and the courts do not have discretion to establish new privileges.<sup>123</sup> Exceptions to existing privileges, on the other hand, may be created either by the legislature<sup>124</sup> or by the courts.<sup>125</sup> In fact, the

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122. *Greater Newburyport Clamshell Alliance v. Pub. Serv. Co. of N.H.*, 838 F.2d 13, 20 (1st Cir. 1988). See also *United Jersey Bank v. Wolosoff*, 483 A.2d 821 (N.J. 1984), where the court held that within the framework of the pretrial discovery process, the attorney-client shield may be pierced when confidential communications are made a material issue by virtue of the allegations in the pleadings and where such information cannot be secured from any less intrusive source. The court stated:

Assuming that all or some of the documents fall within the purview of the attorney-client privilege, it must then be determined whether overriding public policy concerns nevertheless compel disclosure. The “necessary foundations to the valid piercing of [the] privilege” were described by our Supreme Court in *In re Kozlov*, 79 N.J. 232, 398 A.2d 882 (1979). There, the Court adopted a tripartite test in determining whether the privilege must yield to other important societal concerns. First, “[t]here must be a legitimate need . . . to reach the evidence sought to be shielded.” *Id.* at 243, 398 A.2d 882. Second, “[t]here must be a showing of relevance and materiality of that evidence to the issue before the court.” *Id.* at 243–244, 398 A.2d 882. Lastly, the party seeking to bar assertion of the privilege must show “by a fair preponderance of the evidence including all reasonable inferences that the information [cannot] be secured from any less intrusive source.” *Id.* at 244, 398 A.2d 882.

*Wolosoff*, 483 A.2d at 826 (alterations in original).

123. See, e.g., *Drewett v. Rainer Sch.*, 60 Wash. App. 728, 731, 806 P.2d 1260, 1262 (1991).

124. See, e.g., WASH. REV. CODE § 5.60.060(4) (2000) (establishing physician-patient privilege, “except as follows: (a) In any judicial proceedings regarding a child’s injury, neglect, or sexual abuse or the cause thereof; and (b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege”)

125. See, e.g., *State v. Modest*, 88 Wash. App. 239, 247–48, 944 P.2d 417, 421 (1997) (recognizing guardianship exception to marital privilege).



Washington Supreme Court recently stated that “[l]egislative grants of testimonial privilege conflict with the inherent power of the courts to compel the production of relevant evidence and are, therefore, strictly construed.”<sup>126</sup> The Washington appellate courts have established a number of exceptions to the attorney-client privilege when they found the public interest outweighed the benefits the privilege was intended to promote.<sup>127</sup>

The Washington Supreme Court, in determining whether to create an exception to the attorney-client privilege, stated:

The court is faced with the task of balancing society’s interest in the free and open flow of communication between attorney and client, which the privilege promotes, against society’s interest in the administration of justice by our courts on the basis of a full disclosure of the facts and with the affirmative assistance of attorneys, which the privilege discourages.<sup>128</sup>

Similarly, in *Pappas v. Holloway*,<sup>129</sup> the court held that the attorney-client privilege does not prevent disclosure of confidential communications between the client and the third-party-defendant attorney in a malpractice action where the information sought was relevant to the malpractice issue raised by the client and where the application of the

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126. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash. 2d 699, 717, 985 P.2d 262, 271 (1999) (refusing, with respect to reports from priest’s mental-health counselors sent to Diocese, to “fashion a rule similar to the ‘joint defense’ or ‘common interest’ rule under which communications exchanged between multiple parties engaged in a common defense remain privileged under the attorney-client privilege”).

127. *See, e.g., Dike v. Dike*, 75 Wash. 2d 1, 11, 448 P.2d 490, 496 (1968). *Dike* established the exception that an attorney may be compelled, under certain circumstances, to disclose the whereabouts of his client: “The exceptions which have arisen are the result of a balancing process in which the courts have had to weigh the benefits of the privilege against the public interest in the criminal investigation process . . . .” *Id.* (quoting Formal Opinion 91 (1933), ABA, Opinions on Prof. Ethics 339 (1967)); *see also State v. Pawlyk*, 115 Wash. 2d 457, 800 P.2d 338 (1990) (finding that attorney-client privilege does not prevent disclosure of confidential communications between client and psychiatrist retained by defense counsel to evaluate defendant for purposes of insanity defense, even if defendant never calls psychiatrist as witness at trial); *State v. Chervenell*, 99 Wash. 2d 309, 316, 662 P.2d 836, 840 (1983) (finding that attorney-client privilege does not prevent criminal defendant’s former attorney from testifying to advice given regarding defendant’s waiver of his constitutional rights); *State v. Sheppard*, 52 Wash. App. 707, 763 P.2d 1232 (1998) (noting that fee arrangements between attorney and client not protected from disclosure by attorney-client privilege, unless disclosure would convey substance of confidential attorney-client communication); *Whetstone v. Olson*, 46 Wash. App. 308, 732 P.2d 159 (1986) (furtherance of crime or fraud); *State v. Metcalf*, 14 Wash. App. 232, 540 P.2d 459 (1975) (same).

128. *See Dike*, 75 Wash. 2d at 14, 448 P.2d at 498.

129. 114 Wash. 2d 198, 787 P.2d 30 (1990).

privilege would deny the attorney an adequate defense.<sup>130</sup> The court applied the *Hearn v. Rhay*<sup>131</sup> three-part test to determine whether an applied waiver of the attorney-client privilege should be found.<sup>132</sup> The court noted a Louisiana court's criticism of the *Hearn* test on the basis that it "improperly undermines the legislatively established attorney-client privilege by causing courts to reassess the privilege by weighing the individual privilege-holder's interests against his opponent's need for evidence whenever the privilege is attacked."<sup>133</sup> The Washington Supreme Court responded to the criticism of *Hearn* by noting that:

While it is true that the attorney-client privilege is statutory in nature, it is also true that this court has held that the privilege itself should be strictly limited for the purpose for which it exists. [citing *Dike*]. In this instance, the Holloways cannot counterclaim against Pappas for malpractice and at the same time conceal from him communications which have a direct bearing on this issue simply because the attorney-client privilege protects them. To do so would in effect enable them to use as a sword the protection which the Legislature awarded them as a shield.<sup>134</sup>

In *State v. Bonds*,<sup>135</sup> the court appointed a psychiatrist to assist defense counsel and to evaluate the defendant for purposes of an insanity plea.<sup>136</sup> When the defense decided not to call the psychiatrist as a witness at the trial, the prosecution sought the psychiatrist's testimony.<sup>137</sup> The defendant claimed that the psychiatrist's testimony was protected under the attorney-client privilege because the doctor had been part of the defense team at the juvenile proceedings.<sup>138</sup> The court rejected this contention on the basis that the public interest in full disclosure outweighed the privilege. As noted in *State v. Pawlyk*,<sup>139</sup> the *Bonds* court

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130. See *id.* at 203-04, 787 P.2d at 34.

131. 68 F.R.D. 574 (E.D. Wash. 1975). For a discussion of the *Hearn* test, see *supra* notes 68-80 and accompanying text.

132. *Pappas*, 114 Wash. 2d at 207, 787 P.2d at 36.

133. *Id.* at 208, 787 P.2d at 36 (quoting *Succession of Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1145 (La. 1987)).

134. *Id.*

135. 98 Wash. 2d 1, 653 P.2d 1024 (1982).

136. *Id.* at 18, 653 P.2d at 1034.

137. *Id.*

138. *Id.*

139. 115 Wash. 2d 457, 800 P.2d 338 (1990).

found persuasive the reasoning in Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 635-42 (1980), where the author “argues that the defense psychiatrist’s examination of the defendant is likely to be more accurate on the issue of insanity than that of the prosecution’s. . . . Moreover, a defendant might benefit by undergoing several psychiatric examinations, examining reports of psychiatrists unfavorable to his insanity defense, and tailoring his responses in subsequent examinations more favorably to his defense. . . .” Saltzburg argues, and we agree, that for these reasons all available evidence of defendant’s mental condition should be put before the jury.<sup>140</sup>

These bases are also applicable to materials about PTSD symptoms provided to a claimant prior to evaluation by a defense mental-health professional. That evaluation is likely to be more accurate if the evaluator has access to potential bases for the claimant’s responses, and the claimant might well use the information about symptoms to tailor his responses to the evaluator’s questions more favorably to support the PTSD claim.

#### IV. CONCLUSION

Increasingly, plaintiffs have claimed emotional and psychological damages on the basis of their having developed PTSD. Essential to an accurate assessment of PTSD claims is the evaluator’s ability to determine all sources of information about related symptoms that may have been available to the plaintiff and that may impact that individual’s clinical presentation. At present, however, the plaintiff’s assertion of attorney-client privilege and work-product protection is likely to prevent discovery of information provided by the plaintiff’s attorney.

Lawyers and courts determine the “rules of the game,” and they can modify them when supported by convincing policy rationales. Thus, for example, the civil discovery rules have been amended on a number of occasions in an attempt to establish the proper balance between competing considerations, including attorney work product and client privilege, encouraging the parties to zealously pursue all possible factual and legal bases for their positions, avoiding fraudulent claims while encouraging efforts to seek changes in the law, and, most important, deciding cases accurately based on all relevant facts.

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140. *Id.* at 462–63, 800 P.2d at 341 (quoting *Bonds*, 98 Wash. 2d at 21, 653 P.2d at 1035).

Consideration of similar policy rationales warrants discovery and admission of information about PTSD symptoms provided by attorneys whose clients claim damages on the basis of PTSD. Existing authority, on the basis of waiver or an exception to the privilege, supports allowing access to such information. However, to the extent that existing authority within a particular jurisdiction is deemed not to support such a waiver or exception, a new exception is justified: the very minor (if any) impact on the attorney-client relationship of a limited exception for materials provided by the attorney regarding PTSD diagnosis and symptoms is substantially outweighed by the need of the mental-health evaluator to have access to that information. As the Washington Supreme Court stated with respect to a criminal defendant's asserted right to prevent access to communications with a psychiatrist retained by defense counsel to evaluate the defendant for purposes of an insanity defense:

defendant's asserted right . . . reflects the "bygone philosophy that for an attorney's investigations to be effective they must be shrouded in secrecy." If defendant asserts an insanity defense, evidence pertaining to that defense must be available to both sides at trial. There is thus no need for the confidentiality defendant maintains is required.<sup>141</sup>

Limited access to information provided to a PTSD claimant by his or her attorney is essential to a fair and accurate mental-health evaluation. In addition, knowledge that such information will be discoverable will discourage improper coaching by overzealous counsel.

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141. *Pawlyk*, 115 Wash. 2d at 470, 800 P.2d at 345 (quoting *State v. Craney*, 347 N.W.2d 668, 677 (Iowa 1984)).

