

Michigan Journal of Gender & Law

Volume 9 | Issue 2

2003

Lawyers and Domestic Violence: Raising the Standard of Practice

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Recommended Citation

John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207 (2003).

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LAWYERS AND DOMESTIC VIOLENCE: RAISING THE STANDARD OF PRACTICE

*John M. Burman**

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This article is based, in part, on a series of articles which appeared in the WYOMING LAWYER. John M. Burman, *Lawyers and Domestic Violence: Part I*, WYOMING LAWYER, October 2001, at 36; John M. Burman, *Lawyers and Domestic Violence: Part II*, WYOMING LAWYER, December 2001, at 37; and John M. Burman, *Lawyers and Domestic Violence: Part III*, WYOMING LAWYER, February 2002, at 34.

The author thanks James Whiting, University of Wyoming College of Law class of 2003 for his valuable research assistance, without which this article would not have been written, and Chris Jorgenson, University of Wyoming College of Law class of 2004. A special thanks to Bette Garlow for reviewing and commenting on a draft of this article. Her suggestions were valuable.

The title is borrowed from a conference entitled "Raising the Standard of Practice: Justice in Civil Courts for Domestic Violence," held by the American Bar Association Commission on Domestic Violence in Boston, Massachusetts in November of 2001.

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I. INTRODUCTION

One in every four women in America will be raped or physically assaulted by a date or an intimate partner (a spouse, a cohabitant, a former spouse, or a former cohabitant) sometime during her life.¹ Each year, nearly five million American women are raped or physically assaulted by an intimate partner.² Another half-a-million will be stalked by an intimate partner.³ Despite the obviously criminal nature of such violent and threatening behavior, most of it will not be reported to law enforcement; it will remain a private, family matter, hidden from public view or condemnation.⁴

In recent years, domestic violence has begun to emerge from behind the closed doors and drawn shades which have traditionally hidden it from public scrutiny. The severity and pervasiveness of domestic violence has shocked those of us fortunate enough to have had little personal experience with it. The severity and pervasiveness of domestic violence make it one of America's primary social, public health, and legal issues. But while the dimensions of domestic violence are now known to be large, domestic violence is still often largely ignored. Even though the problem of domestic violence is both obvious and enormous, the violence far too frequently

1. PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii (July 2000).

2. *Id.*

3. *Id.*

4. *Id.* at v. (One-fifth of rapes, one-quarter of physical assaults, and one-half of stalkings are reported).

lurks in the shadows of ignorance and apathy, its causes and effects given short shrift.

Ignoring the problem of domestic violence has not made it go away, nor will it. Domestic violence will go away only with a concerted effort on the part of virtually every element of society. This article is about one element of society, the legal system, which is uniquely positioned to play a significant role in addressing domestic violence and its effects. Although uniquely positioned, the legal system has, thus far, failed to have the impact it could and should have, primarily because of ignorance and apathy.⁵ It is time for the ignorance and apathy to end and for the legal profession to become actively involved in attempts to mitigate the causes and effects of domestic violence. However, addressing apathy is not enough. Ignorance, alone, can effectively prevent lawyers and judges from responding promptly and properly to cases involving domestic violence. Without proper training, lawyers may actually harm, rather than help, their clients who are victims of domestic violence, a clear violation of their ethical and legal obligation to help clients. Without proper training, judges may enter orders with similar results. This article attempts to address both the ignorance and apathy of lawyers and judges when dealing with domestic violence issues. Apathy often ends with awareness. Ignorance can end with information.

Lawyers and judges should be the vanguard of those working to end domestic violence and mitigate its effects, yet they are not. This article is an attempt to change that. It strives to shed some light on the profound effect domestic violence has on law and law practice, as well as the profound effect lawyers and the legal system can have on domestic violence. Part II of this article demonstrates the extent and pervasiveness of domestic violence.

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5. The legal protections available to victims have improved substantially in the last twenty years. Congress and state legislatures have enacted important laws which provide at least the possibility of legal protections when properly and promptly utilized by lawyers and courts. In 1994, for example, Congress passed, and President Clinton signed, the Violence Against Women Act (VAWA). 42 U.S.C. §§ 13981–14050 (2002). It provides for “a national domestic violence hotline, a new federal civil rights cause of action for victims . . . many new or increased criminal provisions, confidentiality of victim addresses, immigration relief for battered spouse and children, research . . . and funding for many programs.” Nancy K.D. Lemon, *The Violence Against Women Act*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE* 9–1 (Deborah M. Goelman, et al. eds., American Bar Association Commission on Domestic Violence 1996). VAWA was reauthorized in 2000. Pub.L. No. 106–386. Civil protection orders are available in all fifty states, the District of Columbia, Puerto Rico, and all territories of the United States. Catherine F. Klein & Leslie E. Orloff, *Civil Protection Orders*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE* at 4–1 (Deborah M. Goelman, et al. eds., American Bar Association Commission on Domestic Violence 1996). The efficacy of such orders is uncertain.

Part III describes how domestic violence will affect a lawyer's practice. Part IV provides guidance on what a lawyer should do to determine if a prospective client or a current client is involved in domestic violence, and, if so, how the lawyer should assist the prospective client or client in taking measures to protect against future violence. Finally, Part V addresses a lawyer's duty to warn non-clients of possible domestic violence by a client. This article is, in sum, about what a reasonable lawyer should know about domestic violence and what that reasonable lawyer should do with that knowledge.

II. THE EXTENT AND PERVASIVENESS OF DOMESTIC VIOLENCE

For centuries, society has viewed domestic violence as a private family affair, properly immune from public scrutiny or public intervention. That view has fostered the belief, all too common among victims, as well as others, that domestic violence is the fault of the victims, rather than the fault of those who inflict the violence.⁶ As a result, it has been very difficult to get an accurate picture of the extent and pervasiveness of domestic violence. In recent years, several attempts have been made to this end.⁷ While there are some differences among the results of those efforts, a singular picture emerges from all. Domestic violence is both brutal and common.

A. The Pervasiveness of Domestic Violence

Although domestic violence is no longer considered to be a private matter, it is still difficult to get an accurate picture of its true magnitude. Whatever information one considers, however, the scope of the problem is staggering.⁸

The most comprehensive attempt to define the extent of domestic violence is a nationwide survey conducted by the National Institutes of Justice (NIJ) and the Centers for Disease Control (CDC), acting under the auspices of the United States Department of Justice. Eight-thousand men and eight-thousand women were surveyed. Domestic violence, concludes the

6. See, e.g., R.B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) ("The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or 'chastisement' so long as he did not inflict permanent injury upon her.").

7. For a discussion of different surveys and their differing findings, see TJADEN & THOENNES, *supra* note 1, at 19-24.

8. See generally, TJADEN & THOENNES, *supra* note 1.

report, "is a pervasive and serious social problem in the United States."⁹ The NIJ/CDC Report is shocking.

The NIJ/CDC survey found that one of every four women in America will be raped or physically assaulted by a date or an intimate partner (a cohabitant, a spouse, a former cohabitant, or a former spouse) at some point in her life.¹⁰ Each year, nearly five million women are raped or physically assaulted by an intimate partner. Another half million women will be stalked by a current or former intimate partner. Most of the violence, however, is never reported to law enforcement.¹¹

The CDC has obtained additional information about adolescent victims of domestic violence. The CDC designed a Youth Risk Behavior Survey (YRBS), which measures the prevalence of youth health concerns.¹² In 1997 and 1999, the YRBS administered by the Commonwealth of Massachusetts contained questions about the prevalence of sexual and physical violence. Approximately 2,000 high school girls in Massachusetts answered the survey each year.¹³ The results are horrifying. One in five female students in grades nine through twelve reported that she had experienced physical and/or sexual abuse by a dating partner.¹⁴ As if such violence were not bad enough, the survey disclosed that dating violence often creates an array of additional problems, such as increased risk of substance abuse, unhealthy weight gain, risky sexual behaviors, pregnancy, consideration of suicide, and suicide attempts.¹⁵

Men, of course, are not just batterers; they are also the victims of domestic violence.¹⁶ Batterers, however, are overwhelmingly male, and victims are overwhelmingly female. In fact, eighty-five percent of domestic violence victims are women.¹⁷ Nationwide, women experience significantly more

9. *Id.* at 55.

10. *Id.* at iii-v. A recent study reported that twenty percent of adolescent girls, ages fourteen through eighteen, are victims of physical or sexual assault. Erica Goode, *Study Says 20% of Girls Reported Abused by a Date*, N.Y. TIMES, August 1, 2001, at A10.

11. TJADEN & THOENNES, *supra* note 1, at v. (One-fifth of rapes, one-quarter of physical assaults, and one-half of stalkings are reported).

12. For a description of the YRBS, see J.G. Silverman et al., *Dating Violence Among Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 265 JAMA 572, 573 (2001).

13. *Id.*

14. *Id.* at 574.

15. *Id.* at 577.

16. Roberta Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187 (1995); Jeffery Edeleson et al., *Men Who Batter Women*, 6 J. FAMILY ISSUES 229 (1985).

17. CALLIE MARIE RENNISON, PH.D. & SARAH WELCHANS, *INTIMATE PARTNER VIOLENCE 1* (May 2000).

violence from male intimate partners than men experience from female intimate partners.¹⁸ Accordingly, this article refers to victims as women and batterers as men.

Domestic violence touches virtually all facets of society. The American Medical Association (AMA) describes domestic violence as “a public health problem that has reached epidemic proportions.”¹⁹ Although domestic violence occurs in all socio-economic, educational, cultural, and racial groups, it does not occur at the same rates. Some research shows, for example, that domestic violence is more prevalent among women who are unmarried but co-habiting, are pregnant, have lower-incomes, have less education, and/or are minorities.²⁰ Further, there are some reported differences in rates of domestic violence among various minority groups; more research is needed to determine whether the differences result from racial or other factors.²¹ Whatever its cause, domestic violence is so common that it is the leading cause of homelessness and poverty for women and children.²²

Children, too, are frequently victims of domestic violence. The violence may be direct, in which case the harm is obvious. Children are also victims when they are never touched but are exposed to violence against their mothers. Researchers have amassed “an impressive body of empirical data demonstrating the negative impact of exposure to domestic violence upon children’s psychological development and functioning.”²³ The harm is varied, serious, and long term.

Children exposed to domestic violence “may develop a range of social, emotional, and academic problems, including aggressive conduct, anxiety symptoms, emotional withdrawal, and serious difficulties in school.”²⁴ They are also “more likely than are children from nonviolent homes to develop emotional and adjustment problems as adults, including repetition of the patterns of violence they observed as children.”²⁵ The nature and extent of harm caused to children by exposure to domestic violence is similar to the

18. See, e.g., Silverman et al., *supra* note 12, at 572–73. Women in lesbian relationships also experience significantly less violence than women in straight relationships or men in gay relationships. TJADEN & THOENNES, *supra* note 1, at 56.

19. AM. MED. ASS’N, DIAGNOSTIC AND TREATMENT GUIDELINES ON DOMESTIC VIOLENCE 4 (1994).

20. TJADEN & THOENNES, *supra* note 1, at 33.

21. *Id.* at 56.

22. Sarah Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 731 (1999).

23. See Lois Weithorn, *Protecting Children From Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 4 (2001).

24. *Id.* at 6; see also CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMAN AND THE LAW 240–66 (2001).

25. Weithorn, *supra* note 23, at 6.

harm experienced by children who are direct victims of physical or sexual abuse.²⁶ It is clear, therefore, that children's exposure to either direct violence or violence against their mothers is extremely harmful.

Violence against children is a topic unto itself, deserving of more complete treatment and will not be directly addressed in this article.²⁷

B. Defining and Understanding the Dynamics of Domestic Violence

A lawyer who focuses strictly on a client's legal needs may be ineffective.²⁸ Effective representation often requires more than simply solving a client's legal problem and "[a] good lawyer is not only interested in protecting the client's legal rights, but also in the well-being and mental and physical health of the client."²⁹ When a client is a victim of domestic violence, practical considerations, such as personal safety and the safety of children, are often paramount. Accordingly, effective representation requires identifying domestic violence and understanding the dynamics of a domestic violence situation. Since a batterer's reasons for battering and a victim's reaction to domestic violence often appear counter-intuitive, traditional approaches and assumptions to resolving a client's problem may prove ineffective in meeting a client's objectives.³⁰

Defining domestic violence is both difficult and controversial.³¹ While it may never be possible to reach consensus on a definition, a general picture is becoming clear. Domestic violence is more than one partner hitting another. It is "a pattern of coercive behaviors . . . perpetrated by someone who is or was involved in an intimate relationship with the victim."³² The word "pattern," itself, raises many questions since many patterns exist. Ultimately, therefore, a functional definition may be the most useful: domestic violence is that combination of social, economic, and

26. *Id.*

27. For a comprehensive analysis of the effect of domestic violence on children, see Weithorn, *supra* note 23.

28. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2 (2002) ("Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations . . . are predominant.").

29. *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828, 834 (Minn. 1991).

30. A client, not a lawyer, sets the objectives of the representation. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

31. The Wyoming Domestic Violence Protection Act defines "domestic abuse" as "physical abuse, threats of physical abuse or acts which unreasonably restrain the personal liberty of any household member by any other household member." WYO. STAT. ANN. § 35-21-102(a)(iii) (2001).

32. AM. MED. ASS'N, *supra* note 19, at 5.

cultural factors and individual behaviors “by which a batterer forces an intimate partner to ‘live with a constant sense of danger and expectation of violence.’”³³ “Pattern” also implies, of course, that the behaviors are repeated, and they are. While women occasionally escape an abusive relationship after one incident of violence, most are caught in a cycle of recurrent and escalating abuse.³⁴

Just as the combinations of social, economic, and cultural factors are limitless, so, too, are the individual behaviors which a batterer may use to control a victim. In addition to physical violence, such behaviors may include verbal abuse, imprisonment, humiliation, stalking, and denial of access to financial resources, shelter, or services.³⁵

Domestic violence may occur at any point in a relationship. Generally, however, the frequency and severity of the violence escalate over time. It is commonly believed that the risk and amount of violence increase when a relationship ends.³⁶ The NIJ/CDC study, however, indicates that “most rapes and physical assaults occur in the context of an ongoing, rather than terminated relationship.”³⁷ By contrast, stalking “is most likely to occur in the context of a terminated relationship. . . .”³⁸ Whichever survey one accepts, however, it seems clear that at least some abusive behaviors increase when a relationship ends. Since a victim often seeks legal assistance, such as a protection order or a divorce, to help end a relationship, the time that a woman consults a lawyer is often a time of increased risk for the women, which corresponds to a heightened responsibility for the lawyer.³⁹

As discussed earlier, domestic violence touches all strata of society.⁴⁰ As a result, no determinative factors or characteristics accurately indicate an individual’s propensity to become a victim or a batterer in a domestic

33. TADEN & THOENNES, *supra* note 1, at iv.

34. AM. MED. ASS’N, *supra* note 19, at 5.

35. TADEN & THOENNES, *supra* note 1, at 5. The number and variety of controlling behaviors is nearly limitless. Non-physical behaviors may include yelling, swearing, name-calling, incessant criticism, economic coercion (withholding financial information, rationing money, withholding necessary medical treatment for a woman or her children, limiting the use of a vehicle or other assets), physical and/or emotional isolation (preventing contact or communication with her friends or family), and changing the rules without warning (“rules” such as when dinner is to be on the table or what is acceptable housekeeping). *See, e.g.*, DALTON & SCHNEIDER, *supra* note 24, at 66–68.

36. *See, e.g.*, TADEN & THOENNES, *supra* note 1, at 37.

37. *Id.* at 37–38.

38. *Id.* at 38.

39. In *Roberts v. Healey*, for example, the events which led to the death of the client’s children, and the subsequent suit against the lawyer who did not obtain an order of protection, occurred when the woman was attempting to leave her batterer. *Roberts v. Healey*, 991 S.W.2d 873, 876 (Tex. App. 1999).

40. *See supra* notes 19–22 and accompanying text.

violence situation.⁴¹ The absence of useful predictors means that lawyers, as well as other persons who come into contact with victims, need to assume that any individual woman is a victim until that possibility is eliminated through appropriate screening, which will be discussed in Part IV.⁴²

1. Why Doesn't She Leave?

A victim's survival strategies often appear "maladaptive, illogical, and unstable."⁴³ Despite brutal abuse, a victim often remains in an abusive relationship, even though doing so may provide an opportunity for the batterer to abuse further both the woman and their or her children. A victim may use drugs or alcohol to cope with the situation, resulting in neglect of the children, or she may deny or minimize the violence.⁴⁴

Staying with or returning to a batterer seems absurd at first glance. It may, however, be a logical response to survive in a completely illogical situation. Even if a woman wants to leave, at least three difficult hurdles may prevent her from doing so. First, leaving generally increases a woman's risk of being the victim of additional domestic violence.⁴⁵ Second, many women have no practical ability to support themselves or their children.⁴⁶ After all, control of the family's finances is a common form of control exercised by a batterer.⁴⁷ Third, a victim often believes a batterer's threats that he will take the children, and she will never see them again.⁴⁸

41. See, e.g., DALTON & SCHNEIDER, *supra* note 24; and Roberta L. Valente, *Screening Guidelines*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, *supra* note 5, at 2-3.

42. See *infra* notes 146-162 and accompanying text.

43. Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 45 (2000).

44. *Id.*; see also Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187, 191 (1995) (stating that "victims are more likely to adopt their batterers' perception[s] . . . to the point of minimizing or denying the abuse, as a survival strategy.").

45. Deborah M. Goelman, *Safety Planning*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, *supra* note 5, at 2-11.

46. See, e.g., DALTON & SCHNEIDER, *supra* note 24, at 177-82.

47. See, e.g., TJADEN & THOENNES, *supra* note 1, at 5.

48. See, e.g., ABA COMMISSION ON DOMESTIC VIOLENCE, A GUIDE FOR EMPLOYERS: DOMESTIC VIOLENCE IN THE WORKPLACE 11. ("Frequently, perpetrators use threats about the children to manipulate victims.").

2. Why Does He Batter?

Just as more research is needed about victims of domestic violence, much more research is needed about batterers. While there is much we do not know, we do know that domestic violence grows out of a batterer's desire for control.⁴⁹ The key inquiry is why such a desire exists. After all, the desire is clearly one which the batterer can and does selectively control.⁵⁰ Battering appears to be a learned behavior. Men who were reared in homes with domestic violence are more likely to become batterers than those who were not; the correlation, however, is far from exact. Men who were exposed to violence as children may not become batterers, and men who were not may.⁵¹ Whatever the reason for the violence, a batterer often receives support, rather than the condemnation he deserves. The CDC found, for example, that "[p]arents and peers appear to play a role in supporting adolescent males' violence toward dating partners."⁵² It is not surprising, therefore, that "perhaps the most pressing need for research involves the [reasons for the] development of this [battering] behavior among partners"⁵³

C. Summary

The pervasiveness and magnitude of domestic violence are no longer open to questions, though its precise parameters and causes are. The scope of the problem makes it inevitable that a lawyer will encounter domestic violence in some manifestation, regardless of the nature of a lawyer's practice (the nature of a law practice may make encountering domestic violence more or less likely, but will not eliminate the possibility).

As a result of the severity and pervasiveness of domestic violence, every lawyer has both an ethical⁵⁴ and a legal⁵⁵ duty to act as a reasonable lawyer

49. *Id.* See also DALTON & SCHNEIDER, *supra* note 24, at 66–68; TJADEN & THOENNES, *supra* note 1, at 5.

50. See, e.g., ABA COMMISSION ON DOMESTIC VIOLENCE, *supra* note 48, at 13 ("Stress . . . does not cause batterers to abuse their partners . . . if stress caused domestic violence, batterers would assault their bosses or co-worker rather than their intimate partners. Domestic violence flourishes because perpetrators learn that they can achieve what they want through the use of force . . .").

51. AM. MED. ASS'N, *supra* note 19, at 5.

52. Silverman et al., *supra* note 12, at 578.

53. *Id.*

54. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

55. A malpractice action may be based in contract or negligence. The general standard of care in a legal malpractice case is adapted from the "reasonable person" standard of tort

under the circumstances. The questions, therefore, become: (1) what should a reasonable lawyer know about domestic violence; (2) what should a reasonable lawyer do to determine whether the lawyer's current or prospective client is a victim or a batterer; and (3) what should a reasonable lawyer do if the lawyer discovers that the current or prospective client is a batterer or a victim. These questions are addressed in the third and fourth parts of this article.

III. THE EFFECT OF DOMESTIC VIOLENCE ON LAW PRACTICE

Given the prevalence of domestic violence, it is likely that every lawyer will encounter persons dealing with it during his or her career.⁵⁶ Nevertheless, many lawyers erroneously assume that domestic violence will only arise in domestic relations cases, and since they have little or no involvement with that area of law, domestic violence will never touch their practices. That assumption is not simply wrong; it is a mistake which can have significant consequences for both lawyer and client.

The simple and sad truth is that domestic violence is so pervasive that virtually every lawyer will encounter domestic violence in his or her practice.⁵⁷ Consider, for example, the estate planning lawyer who is asked to prepare estate plans for each spouse; the real estate lawyer who represents a couple in a property transaction; the business lawyer who represents a business entity whose constituents include intimate partners; the tax lawyer whose client had no idea that her spouse was not filing their joint tax returns; or the lawyer whose secretary misses work or is unable to work efficiently because of the effects of domestic violence. Given the pervasiveness of domestic violence, it is likely that a lawyer in general practice will represent either a batterer or a victim. This part discusses how lawyers' practices will be affected by domestic violence.

law. A lawyer must "handle the client's affairs with the degree of care and skill that would have been exercised by a reasonable attorney acting in similar circumstances." ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 301:101 (1993).

56. See, e.g., Roberta L. Valente, *Domestic Violence and the Law*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, *supra* note 5, at 1-3.
57. Roberta L. Valente, *Domestic Violence and the Law*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, *supra* note 5, at 1-2. ("Lawyers in most areas of practice have already had or will have a client who is a perpetrator of a victim of domestic violence.")

A. Why Lawyers Should Be Concerned

Rather than acknowledging and confronting disturbing problems, it is easier and more pleasant to turn from them. And so it is tempting for lawyers to turn from domestic violence, comfortable in their ignorance. Yet to do so is morally indefensible and ethically and legally unreasonable. Lawyers should be concerned about domestic violence and how it will touch their lives and practices. Lawyers will encounter domestic violence in their practices, whether they want to or expect to. When they do, they have both an ethical and a legal obligation, not to mention a moral one,⁵⁸ to respond reasonably. The story of Karin Roberts and Daniel Kennedy illustrates how domestic violence can become a part of a lawyer's practice, whether wanted or otherwise, and how a lawyer's failure to act reasonably can have dire consequences.

Karin Roberts and Daniel Kennedy were married in 1991; their marriage produced two daughters.⁵⁹ During the marriage, Daniel became progressively more volatile and more violent. By the fall of 1994, concerned with Daniel's increasingly threatening and violent behavior, Karin contacted a lawyer and asked him to file for a divorce and secure an order to restrain Daniel from contacting or harming Karin. The lawyer filed a petition for divorce, along with an application for a restraining order. The lawyer did not, however, take any further steps to obtain a signed protective order, "despite repeated calls from Karin and her mother."⁶⁰

Daniel's behavior became so disturbing that Karin moved to a new apartment, with the two children, in an attempt to hide from her husband. It didn't work. Daniel tracked her down and left a threatening note on the apartment door. Frightened, Karin took the note to her lawyer's office. A few days later, Daniel accosted Karin in the parking lot of her apartment and forced her to take him to the apartment. He broke in, shot and killed their two young daughters and wounded Karin's mother, before turning the gun on himself.

Karin and her mother, Marjorie Roberts, sued Karin's lawyer for failing to obtain an order of protection, alleging negligence, gross negligence, breach of contract, breach of warranty, violation of the Deceptive Trade Practice Act (DTPA), and "bystander damages" (analogous to negligent

58. Morality has a clear role in the practice of law. "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience . . ." MODEL RULES OF PROF'L CONDUCT Preamble (2002).

59. *Roberts v. Healey*, 991 S.W.2d 873, 876 (Tex. App. 1999).

60. *Id.*

infliction of emotional distress).⁶¹ The trial court granted summary judgment in favor of the lawyer on all counts. On appeal, the Texas Court of Appeals affirmed summary judgment in favor of the lawyer on Karin's claims of negligence, gross negligence, and DTPA, as well as her mother's claims for negligence and gross negligence. The Court reversed summary judgment, however, on Karin's claims for breach of contract and breach of warranty, and on Marjorie's claims for violations of the DTPA, breach of contract, breach of warranty, and the claim for bystander damages.⁶² The case was subsequently settled.

Summary judgment was affirmed on the negligence claims because the appellate court found that the lawyer's "failure to obtain a protective order is too attenuated from [the husband's] criminal conduct to constitute a legal cause of injury to Karin, her mother, and her children."⁶³ Although the lawyer "won" much of the battle, the losses his former client suffered were extraordinary, and any lawyer outside of Texas who relies on the court's rationale to absolve him or her of legal responsibility under such circumstances is taking a significant gamble. The court's analysis of causation is problematic, at best. Another court could easily have gone the other way on similar facts and using a similar analysis. And the absence of legal liability does not eliminate the possibility of a grievance and, ultimately, a sanction for breach of the lawyer's ethical responsibility to provide competent representation.⁶⁴

As domestic violence assumes a higher profile in society at large and in the legal community, in particular, it will become increasingly difficult for a lawyer to argue successfully that he or she has neither a legal nor an ethical responsibility to understand domestic violence and no obligation to take reasonable precautions to minimize the potential harm to a client or others involved in such violence. Lawyers who represent alleged batterers also need to be aware of their potential responsibility to warn or take other steps to minimize harm to non-clients.⁶⁵

Lawyers are not the only ones being sued. Their clients are, too. Wal-Mart, for example, was recently sued by an employee who was shot by her husband shortly after he bought bullets at the store. The suit alleges that the employee had recently obtained a restraining order against her husband,

61. *Id.* at 877.

62. *Id.* at 881–82.

63. *Id.* at 879.

64. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("A lawyer shall provide competent representation to a client.").

65. For a discussion of a lawyer's duty to warn, see Part V of this article, A Lawyer's Duty to Warn, footnotes 163–246 and accompanying text.

that Wal-Mart management knew about the order, and that it negligently failed to take any steps to protect her.⁶⁶ Wal-Mart's lawyers doubtlessly do not consider themselves domestic relations lawyers; they likely are corporate litigators. Yet they, too, need to understand domestic violence law in order to represent properly a client who has become unintentionally involved in domestic violence litigation.⁶⁷

B. *Lawyers for Victims*

Not surprisingly, domestic violence will be a significant issue for victims in both civil and criminal matters. Therefore, it is necessarily a significant issue for the lawyers who represent them.

1. Civil Matters

Knowing about domestic violence is no longer optional for lawyers who practice domestic relations law. The failure to know about and inquire into the possibility of domestic violence simply does not meet the ethical or legal standard of care required for domestic relations lawyers. The reasons are several.

First, a relatively new area of domestic relations law is representing a person seeking a domestic violence protection order⁶⁸ or a person seeking judicial relief from a stalker.⁶⁹ It should be self-evident that a lawyer who is contacted by a woman seeking an order of protection or civil relief against a stalker will need to be familiar with the dynamics of, and laws regarding, domestic violence.

66. Shannon P. Duffy, *Employee Sues Wal-Mart Because Store Didn't Protect Her From Husband's Attack*, THE LEGAL INTELLIGENCER (August 24, 2001), at <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZZE42V7RQC>.

67. See generally Roberta L. Valente, *Domestic Violence and the Law*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, *supra* note 5.

68. Until the mid-1970s, restraining orders were generally only available as part of divorce proceedings. Every state now has a statutory procedure which authorizes the issuance of an order of protection to restrain a batterer from committing additional violence against an intimate partner. DALTON & SCHNEIDER, *supra* note 24, at 498. The federal Violence Against Women Act requires states to give full faith and credit to orders issued in other jurisdictions. *Id.*

69. Stalking laws often provide an additional or alternative remedy in many states. See, e.g., CAL. CIV. CODE § 1708.7 (West 2002); R.I. GEN LAWS § 9-1-2.1 (2001); TEX. CIV. PRAC. & REM. CODE ANN. § 85.002 (Vernon 2003); WYO. STAT. ANN. § 1-1-126 (Michie 2001).

One of the more important issues to discuss with a client seeking protection from a batterer or a stalker is whether obtaining a protective order or other civil relief will actually protect the client, or whether doing so may create more danger by inflaming the batterer.⁷⁰ In either event, a lawyer's failure to act promptly and properly may well lead to a malpractice suit, as it did in the *Healey* case discussed above.⁷¹ A lawyer who learns that a client is in danger of domestic violence may also need to take steps beyond obtaining an order of protection or initiating some other legal proceedings. The lawyer may need to assist the client in safety planning.⁷² "[T]he danger of violence, including the risk of death, escalates when a domestic violence survivor attempts to leave a batterer."⁷³ (It is also the most dangerous time for the lawyer.)⁷⁴ Obtaining an order of protection may not actually protect a victim since some batterers will not be deterred by a piece of paper and may even be provoked to additional violence.⁷⁵ In addition, or instead, a lawyer should either advise the client about safety planning or refer her to outside resources (safety planning is discussed in Part IV of this article).⁷⁶

Fortunately, lawyers and their clients need not face the dangers and difficulties of domestic violence alone; they can call on expert assistance from an increasing number of resources. Many communities now have domestic violence prevention programs, which can provide shelter and assistance in safety planning. They may also have a coalition against domestic violence and sexual assault, which can provide advice about representing victims of domestic violence. Finally, the National Domestic Violence Hotline can be contacted at (800) 799-7233.

Second, the touchstone of child custody or visitation in virtually every state is "the best interests of the child."⁷⁷ Since it is now well established that domestic violence against a child or witnessed by a child is extremely detrimental to the child, domestic violence is critically important to child

70. See EVE S. BUZAWA & CARL G. BUZAWA, DO ARRESTS AND RESTRAINING ORDERS WORK? 222 (1996).

71. See *supra* notes 39, 59–63 and accompanying text.

72. Safety is often the primary concern of a current client or prospective client who is a victim of domestic abuse. Safety planning is discussed in Part IV of this article.

73. Roberta L. Valente, *Screening Guidelines*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, *supra* note 5, at 2–11.

74. The Family Violence Project of the National Council of Juvenile And Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 198 (1995) [hereinafter Family Violence Project].

75. The efficacy of orders of protection has been hotly debated. See BUZAWA & BUZAWA, *supra* note 70, at 229.

76. See *infra* notes 160–62 and accompanying text.

77. DALTON & SCHNEIDER, *supra* note 24, at 350–51.

custody proceedings.⁷⁸ Similarly, joint custody, a relatively recent legal phenomenon designed to encourage the active participation of both parents in their children's lives, may be inappropriate or even harmful where domestic violence is involved. In these cases, joint custody is contrary to a child's best interests.⁷⁹

In the majority of states, statutes require courts to consider domestic violence when determining the best interests of a child.⁸⁰ Often by statute a court considering custody or visitation must consider evidence of domestic violence as being contrary to the best interests of the child.⁸¹ Since custody determinations are a matter of state law, a finding of domestic violence will have different consequences in different states.

Custody provisions in several states create rebuttable presumptions, either against awarding custody to a batterer or against awarding joint custody when domestic violence is involved.⁸² Whether those schemes have cured the problem of custody decrees paying too little heed to domestic violence is not clear. It is clear, however, that lawyers need to be familiar with the statutory and case law standards in their states which relate to domestic violence. The same or similar standards generally apply in paternity cases involving custody or visitation.⁸³ Statutes in other states may simply require the court to consider domestic violence as a factor in determining custody and visitation.⁸⁴

Whatever the custody standard, domestic relations practitioners need to be conversant with the dynamics of domestic violence and its effects on children so that the lawyers can help courts craft custody and visitation arrangements which will promote the safety of all concerned and thereby further the best interests of the children.⁸⁵ That may include presenting expert testimony to help the court understand the need to treat cases involving domestic violence differently than other custody cases.⁸⁶

78. Family Violence Project, *supra* note 74, at 198; *see also* Linda Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WILLIAM MITCHELL L. REV. 495 (2001).

79. Family Violence Project, *supra* note 74, at 200.

80. *Id.* at 199–200.

81. *Id.* at 200; *see* ALA. CODE § 30-3-131 (2001); CAL. FAM. CODE § 303.1 (West 2002); N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2002); ARK. CODE ANN. § 9-13-101(c)(1) (Michie 2002).

82. Family Violence Project, *supra* note 74, at 208.

83. *In re Adoption of R.S.C.*, 837 P.2d 1089, 1092 (Wyo. 1992).

84. *See, e.g.*, WYO. STAT. ANN. § 20-2-201(c) (Michie 2001). (The court “shall consider evidence of spousal abuse or child abuse as being contrary to the best interest of the children.”).

85. Family Violence Project, *supra* note 74, at 209.

86. *Id.* at 213.

Third, while mediation is now common in domestic relations cases involving children, and required in some jurisdictions,⁸⁷ mediation may not be appropriate when the relationship is an abusive one. Victims' advocates fear that mediation may: (1) remove cases involving domestic violence from the public scrutiny of open judicial proceedings; (2) cause victims to compromise their legal rights to gain some measure of safety for themselves or children; and (3) allow batterers to reassert control over victims.⁸⁸

Fourth, although many states are now so-called "no-fault" divorce states, others are not. And even in those states where divorce is "no-fault," evidence of fault may still be relevant to other issues, such as the equitable distribution of property and debts.⁸⁹ Domestic violence is directly relevant to the issue of fault.⁹⁰ Accordingly, evidence of domestic violence may be both admissible and persuasive on issues other than custody and visitation.

Finally, domestic violence can easily give rise to a tort. The old common law view was that when a woman married, her legal identity merged with her husband's; she could not sue him for a tort (or vice versa).⁹¹ The old common law is changing rapidly. In those states where the issue of spousal immunity has arisen, "state courts have usually abolished the immunity for intentional torts."⁹² In those states which allow claims for interspousal torts, potential claims for assault, battery, and now, intentional infliction of emotional distress,⁹³ need to be investigated and evaluated as part

87. Some states require mandatory mediation for custody cases. See NEV. REV. STAT. §§ 3.475–3.500 (2002); OR. REV. STAT. § 107.179 (2001) (requiring mediation when one party formally objects to joint custody). Other jurisdictions provide for a court to order mediation without requiring it. See KAN. STAT. ANN. § 23-602(a) (2001); FLA. STAT. ANN. § 61.183(1) (West 2002). Still other jurisdictions provide for court ordered mediation except when domestic violence is at issue: TEX. FAM. CODE ANN. § 153.0071 (Vernon 2002); COLO. REV. STAT. ANN. § 13-22-311 (West 2002); ALA. CODE § 6-6-20 (2002); IOWA CODE ANN. § 598.7A (West 2002); N.D. CENT. CODE § 14-09.1-02 (2001).

88. Family Violence Project, *supra* note 74, at 219. No data is yet available on whether those fears are justified. *Id.*

89. See, e.g., *Grosskopf v. Grosskopf*, 677 P.2d 814, 819 (Wyo. 1984) (Although the Wyoming statutes on marriage dissolution have been amended since *Grosskopf* was decided, the reference in WYO. STAT. ANN. § 20-2-114 to the "merits" of the parties has not been changed).

90. See, e.g., *Monson v. Monson*, 583 N.W.2d 825, 826 n.2 (N.D. Ct. App. 1998) ("[T]his divorce is the fault of [Ronald] on the grounds of abuse, neglect, financial irresponsibility, dissipation of assets and adultery.").

91. DAN B. DOBBS, *THE LAW OF TORTS* § 279, at 751 (2000).

92. *Id.* at 753.

93. See also Bradley A. Case, *Turning Marital Misery Into Financial Fortune: Assertion of Intentional Infliction of Emotional Distress Claims by Divorcing Spouses*, 33 U. LOUISVILLE J. FAM. L. 101, 115 (1995).

of every divorce. While those claims may need to be asserted in another action,⁹⁴ a divorce lawyer needs to inquire into these issues and take appropriate action or refer the person to a lawyer who will.

In the area of domestic relations law, a lawyer's obligations are becoming clear. A reasonable lawyer should know about the pervasiveness and dynamics of domestic violence; inquire into the possibility and extent of domestic violence in every divorce, paternity, or custody proceeding; use information about domestic violence accordingly. "Only an informed attorney can argue the various innovative provisions in child custody laws concerning family violence. Likewise, only an informed attorney can see the relevance of family violence to the issue of child custody and can articulate it well to the court."⁹⁵ A lawyer who fails to take reasonable steps to learn if domestic violence is occurring, and use the information for the client's benefit, will have failed to act as a reasonable lawyer under the circumstances, a violation of a lawyer's legal⁹⁶ and ethical⁹⁷ duties.

Although domestic violence will be an important issue in many domestic relations cases, domestic violence can, and will, affect all areas of civil practice. It is common, for example, for an estate planning lawyer to be asked to represent a husband and a wife in performing joint estate planning. Potential conflicts of interest are inherent in every such situation, regardless of the possibility of domestic violence. A lawyer asked to represent multiple clients with potentially differing interests must always consider the appropriateness of obtaining waivers from each of the clients and obtain them properly.⁹⁸

Whenever a lawyer is asked to represent multiple parties, the lawyer is well advised to meet with each prospective client separately. Such a meeting with an individual often yields very different results from a joint meeting. Such a meeting is the ideal time to screen for domestic violence. If it turns out that one party has assumed control of the other through violence or by other means, an attorney asked to represent both spouses needs to be aware of that control and consider whether it is permissible to continue with joint representation. It likely will not be.

94. *Id.* at 114–15.

95. Family Violence Project, *supra* note 74, at 222.

96. See CATHERINE PALO, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE § 8.17B (Supp.2002) ("[A]ttorney malpractice regarding the negligent handling of a domestic tort cause of action is a natural extension of the proliferation of tort claims arising out of divorce cases and family disputes.").

97. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

98. For a discussion of the general standards for such conflicts of interest, see ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT §§ 51.301–16 (1993).

If individual meetings disclose domestic violence, the lawyer likely has a duty to decline the representation because of the actual or potential conflict of interest.⁹⁹ The lawyer should not, however, simply inform the prospective clients that he or she must decline the representation because of a conflict of interest. The reason is that doing so likely will alert the batterer that the victim disclosed something to the lawyer. Simply declining representation is not appropriate because a lawyer owes duties to a prospective client, even though the lawyer and the prospective client never form an attorney-client relationship.¹⁰⁰ Foremost among them is the duty of confidentiality. A lawyer “shall not use or reveal information learned in the consultation” with the prospective client.¹⁰¹ A lawyer may not, therefore, disclose to one spouse what the other spouse said, i.e., that she said she is the victim of domestic violence. Further, the lawyer should assist the victim in assessing lethality,¹⁰² consult with the victim about safety planning,¹⁰³ or refer her to someone who will. It is not reasonable to do otherwise.

Joint estate planning is just one example of how domestic violence can profoundly affect a lawyer’s representation in an area of the law other than domestic relations. The possible scenarios where one intimate partner effectively controls the other are endless and should be a concern in any case where a lawyer is asked to represent clients jointly. As part of the lawyer’s conflict screening with each prospective client, the issue of control through domestic violence can and should be determined and evaluated. If domestic violence has occurred or is occurring, a lawyer cannot ethically represent both parties.

Domestic violence may be an issue in cases which do not involve joint representation. In a tax case, for example, in which a wife was relying on her husband to file a joint tax return, and the return was not correct, the wife may seek to avoid tax liability on the basis that “she did not know of,

99. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2002).

100. “Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But *there are some duties*, such as that of confidentiality under Rule 1.6, *that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established*. See Rule 1.18.” MODEL RULES OF PROF'L CONDUCT pmbl. (2002) (emphasis added); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990) (Protection of Information Imparted by Prospective Client) (“Information imparted to a lawyer by a would-be client seeking legal representation is protected from revelation or use by Model Rule 1.6 even though the lawyer does not undertake representation . . .”).

101. MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2002); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358, *supra* note 100.

102. See *infra* note 159 and accompanying text for a discussion of assessing lethality.

103. See *infra* notes 160–62 and accompanying text.

and had no reason to know of . . .” the representations in the return.¹⁰⁴ A woman who has been the victim of domestic violence may be the quintessential innocent spouse. The lawyer needs to know, therefore, whether domestic violence has occurred and, if so, be able to use that information to the client’s benefit.

2. Criminal Matters

A victim of domestic violence may resort to violence against a batterer to protect herself and/or her children from further violence. Such actions may lead to criminal charges against the victim. The obvious defense in such cases is self-defense. As a general matter, self-defense is predicated on the individual having an imminent fear of death or substantial bodily harm.¹⁰⁵ In the past, traditional concepts of imminence were often not present in cases of domestic violence since the victim’s actions against the batterer may have come at a time when the batterer was not actively engaged in physical violence. The victim’s conduct, however, may have been reasonable given her circumstances. Fortunately, courts in most jurisdictions have now held that victims of domestic violence can establish imminent fear.¹⁰⁶

Evidence about battering and its effects¹⁰⁷ on a woman is now often a critical element of a legal defense of self-defense.¹⁰⁸ The lawyer who raises the affirmative defense of self-defense arising out of domestic violence must generally introduce expert testimony that the woman suffered from battering and its effects in order to establish the necessary belief of a

104. See 26 U.S.C. § 66(c)(1) (2002).

105. See *Hernandez v. State*, 976 P.2d 672 (Wyo. 1999).

106. See John F. Wagner, Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant’s Belief, for Purposes of Self-Defense Claim, that Physical Force is Necessary—Modern Cases*, 73 A.L.R. 4th 993 (1989); OHIO REV. CODE ANN. § 2901.06 (Anderson 2002); *State v. Hendrickson*, 914 P.2d 1194 (1996).

107. The phrase “battered woman’s syndrome” was, and is still, often used to describe battering and its effects. A consensus has emerged, however, that the phrase “does not adequately reflect the breadth or nature of the empirical knowledge about battering and its effects.” U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT’L INST. OF JUSTICE, *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT* vii (May 1996)[hereinafter *REPORT RESPONDING TO SECTION 40506*]. As an alternative, the phrase “battering and its effects” more accurately describes the body of scientific and clinical knowledge on which appropriate expert testimony is based. *Id.* at xii.

108. *Id.* at iii–xiv. See also Michelle Michelsen, *The Admissibility of Expert Testimony On Battering And Its Effects After Kumho Tire*, 79 WASH. U. L. Q. 367 (2001).

reasonable fear of imminent death or great bodily harm.¹⁰⁹ Expert testimony can “provide relevant information important to the fact finders for purposes of their deliberations in a criminal case involving battered women.”¹¹⁰ Such evidence cannot only help educate the judge and the jury about domestic violence, it may well be critical to representing adequately a criminal defendant. Expert testimony about battering and its effects has been admitted in all fifty states and in the District of Columbia.¹¹¹ Accordingly, a criminal defense lawyer must understand the dynamics of domestic violence and consult appropriate experts to defend properly a client who has struck out at a batterer.

Knowing about and understanding domestic violence is not just a matter of fulfilling a criminal defense lawyer’s ethical and legal duties to act as a reasonable lawyer; it has constitutional overtones. The failure to present evidence to support a claim of self-defense based on battering and its effects in an appropriate case may be a deprivation of a criminal defendant’s Sixth Amendment right to effective assistance of counsel.

Under the Sixth Amendment, representation in a criminal matter is ineffective if “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”¹¹² This standard requires the defendant to show two things: (1) that “counsel’s performance was deficient;” and (2) that the deficient performance “prejudiced the defense.”¹¹³ State constitutions generally contain a similar requirement.¹¹⁴ The failure to properly raise and pursue a defense involving domestic violence may be constitutionally deficient.

Debra and Terrance Romero were charged with and convicted of second degree robbery and four counts of attempted robbery.¹¹⁵ Debra admitted her involvement in the crimes but claimed that her participation had been under duress; she was afraid that Terrance would kill her if she

109. See Anna Farber Conrad, *The Use of Victim Advocates and Expert Witnesses in Battered Women Cases*, COLO. LAW., December 2001, at 43.

110. See REPORT RESPONDING TO SECTION 40506, *supra* note 107, at ix.

111. *Id.*

112. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

113. *Id.* at 687.

114. See THE REPORT RESPONDING TO SECTION 40506, *supra* note 107, at vii.

115. See *People v. Romero*, 13 Cal. Rptr. 2d 332, 333 (Cal. Ct. App. 1992), *rev'd on other grounds*, 883 P.2d 388 (Cal. 1994) (Court of Appeal lacked authority for its grant of relief on contested habeas corpus petition without issuing writ of habeas corpus or order to show cause . . .); see also *United States v. Nelson*, 966 F. Supp. 1029, 1032 (D. Kan. 1997) (Not ineffective assistance where defense attorney knew about battered woman’s syndrome and elected not to raise the issue).

did not help him.¹¹⁶ After her conviction, she sought post-conviction relief, claiming ineffective assistance of counsel because her lawyer had not presented expert testimony about battered woman's syndrome (BWS)¹¹⁷ to corroborate the duress defense.¹¹⁸ After an extensive review of the literature and law on battered woman's syndrome, the California Court of Appeals agreed with Ms. Romero that "there is a reasonable probability that presentation of expert testimony about BWS would have bolstered her credibility and persuaded the jury to accept the defense of duress."¹¹⁹ Such expert testimony, concluded the court, "would have explained a behavior pattern that might otherwise (and obviously did) appear unreasonable to the jurors."¹²⁰

In short, the reasonable criminal defense lawyer knows about and understands battering and its effects so that if appropriate, it can be investigated and raised at trial. A lawyer who fails to do so will have failed ethically, legally, and constitutionally.

Prosecutors, too, need to be able to address domestic violence issues. It may be important, for example, for a prosecutor to help a jury understand why a woman who has been repeatedly assaulted remains in an abusive relationship and why her doing so is not a defense to additional criminal assault(s).

In *Trujillo v. State*,¹²¹ a male defendant was convicted of aggravated assault and battery on his female partner. The trial court permitted the state to present evidence about the defendant's prior assaultive behavior and allowed an expert to testify that the victim's behavior was similar to persons with "Hostage Syndrome and Battered Woman Syndrome."¹²² On appeal, the Wyoming Supreme Court upheld the trial court's rulings.¹²³

C. Lawyers for Batterers

Lawyers for batterers have similar responsibilities to lawyers for victims. Both need to be conversant with domestic violence and its effects.

116. See *Romero*, 13 Cal. Rptr. 2d at 333.

117. As noted above, a consensus has emerged that the phrase battered woman's syndrome "does not adequately reflect the breadth or nature of the empirical knowledge about battering and its effects." See *supra* note 107.

118. See *Romero*, 13 Cal. Rptr. 2d at 335.

119. *Id.* at 340.

120. *Id.* at 341. The failure to raise a defense of the effects of battering has arisen in very few cases. It is, therefore, impossible to predict whether that failure will lead to successful arguments that a lawyer has failed to provide effective assistance.

121. *Trujillo v. State*, 953 P.2d 1182 (Wyo. 1998).

122. *Id.* at 1185.

123. *Id.* at 1187.

Many of the same issues will arise. Just as a lawyer for a victim must represent his or her client reasonably, so, too, must a lawyer for a batterer. Both lawyers will need to know about and understand domestic violence to discharge properly that ethical and legal responsibility.

Just as a lawyer for a woman seeking a protection order or civil relief from a stalker must be familiar with domestic violence, so, too, must the lawyer for the alleged batterer or stalker. The consequences of having a protective order entered against a client have become potentially significant—federal law restricts the transfer, transportation, and ownership of firearms by a person who has been found guilty of domestic violence¹²⁴ or a person who is the subject of an order of protection, even if there is no finding that domestic violence has occurred).¹²⁵ A lawyer for an alleged batterer must be familiar with the potential consequences and advise the client accordingly.

As discussed above, domestic violence is often a mandatory consideration in a child custody case.¹²⁶ The lawyer for the batterer must, therefore, be prepared to rebut or at least minimize such allegations and evidence. The lawyer should also advise a batterer about the consequences of domestic violence on the children.

124. Under federal law:

It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9) (1996). The United States District Court for the District of Nebraska and the United States Court of Appeals for the District of Columbia have found the statute unconstitutional in part. *United States v. Ficke*, 58 F. Supp. 2d 1071, 1075 (D.Neb. 1999); *FOP v. United States*, 332 U.S. App. D.C. 49, 152 F.3d 998, 1004 (D.C. Cir. 1998).

125. The federal law restrictions on the transportation and possession of firearms also apply to any person:

who is subject to a court order that—(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

18 U.S.C. § 922(g)(8) (1994).

126. See *supra* notes 77–86 and accompanying text.

Before a lawyer “zealously assert[s]” the client’s position, a lawyer must be an advisor, and “provide[] a client with an informed understanding of the client’s legal rights and obligations”¹²⁷ The reason for acting first as an advisor is that the client, not the lawyer, shall determine “the objectives of representation”¹²⁸ Accordingly, a lawyer’s advice must be “candid . . . [and] a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”¹²⁹ The rule clearly emphasizes a client’s need for practical advice: “Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as . . . effects on other people, are predominant.”¹³⁰ It is hard to imagine a situation where the potential effect on other people, the children, will be greater than when a batterer wishes to have custody of or visitation with children who have been exposed to domestic violence. Similarly, the American Academy of Matrimonial Lawyers recommends that a lawyer who represents a parent in a divorce case “advise the client of the potential effect of the client’s conduct on a child custody dispute.”¹³¹

With the abrogation of inter-spousal immunity in many states, and the concomitant possibility of claims for assault, battery, and/or intentional infliction of emotional distress arising out of a dysfunctional marriage, all divorce lawyers need to be aware of and advise their clients of potential claims and defenses.¹³² It may be appropriate to seek a global resolution of such claims as part of the divorce settlement. A lawyer for a batterer who fails to inform the client of potential tort claims, and who fails to address them properly when requested, may well have fallen short of acting as a reasonable lawyer.

A lawyer who is asked to prepare a pre-nuptial agreement needs to be sensitive to the possibility of domestic violence and its potential effect on

127. MODEL RULES OF PROF’L CONDUCT pmb. ¶ 2 (2002).

128. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (noting that although the lawyer then has ultimate control over the means to be used to obtain those objectives, the lawyer is required to “consult with the client as to the means by which they are to be pursued.”); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.4 (a)(2).

129. MODEL RULES OF PROF’L CONDUCT R. 2.1.

130. MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 2. The permissive discussion of “non-legal considerations” may become mandatory under the requirement that a lawyer “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.4(b). Providing an adequate explanation may well require discussing the effects of domestic violence on the child(ren) of a batterer.

131. American Academy of Matrimonial Lawyers, *Bounds of Advocacy: Goals for Family Lawyers*, at <http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm> (November 2000).

132. *See supra* notes 124 through 131 and accompanying text.

the enforceability of such an agreement. The failure to do so can lead to adverse consequences for all concerned. Drafting a pre-nuptial agreement, which benefits one party, generally the lawyer's long-time client, at the expense of the other is asking for trouble. If the agreement is ultimately voided, the lawyer has benefited no one. The lawyer has, in fact, harmed his or her client by failing to draft a reasonable agreement and failing to advise the client of the potential that an agreement may not survive. The lawyer who drafts such an agreement and does not know of the nature of the relationship between the parties is not acting reasonably. The following case illustrates the potential impact of domestic violence on pre-nuptial agreements.

A lawyer in Washington State had represented James Foran and his business for years.¹³³ James asked the lawyer to prepare a prenuptial agreement that he and his soon-to-be wife Peggy could sign. The lawyer did so, drafting an agreement that ensured that James would remain a wealthy man and that Peggy would get virtually nothing if they divorced. James and Peggy went to the lawyer's office the day before their planned trip to Las Vegas to be married. The lawyer notified Peggy, in writing, that he represented James, and that she should consult independent counsel. Peggy elected not to do so and signed the agreement.

During the Foran marriage, "episodes of domestic violence escalated, both in frequency and severity."¹³⁴ Peggy ultimately sought a divorce and asked the court to set aside the prenuptial agreement. The Washington Court of Appeals voided the agreement, holding that Peggy had neither been given enough time to seek independent counsel nor an adequate explanation of why she should do so.¹³⁵ The court explained: "That which is obvious to attorneys and judges may not be obvious to the unrepresented and economically subservient party."¹³⁶ This contravenes the purpose of independent counsel, which is to help "the subservient party to negotiate an economically fair contract."¹³⁷ Since domestic violence is ultimately all about control,¹³⁸ a lawyer asked to draft a prenuptial agreement needs to avoid taking advantage of a subservient party. Not doing so runs the risk of having the agreement thrown out, a result which benefits neither the client

133. *In re Marriage of Foran*, 834 P.2d 1081,1084 (Wash. Ct. App. 1992).

134. *Id.*

135. *Id.* at 1090.

136. *Id.* at 1088.

137. *Id.* at 1089.

138. See, e.g., Christopher L. Griffin, *Real Men Take Responsibility for Domestic Violence*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, *supra* note 5, at 1-8; TJADEN & THOENNES, *supra* note 1, at 5.

nor the lawyer, and which opens the lawyer to a grievance and/or a malpractice claim by a dissatisfied client.

A lawyer for a batterer may learn that his or her client intends to continue to batter his victim. The question which then arises is whether the lawyer has a duty to warn the potential victim. A lawyer's duty to warn is a complex and uncertain issue which is discussed in detail in Part IV of this article.¹³⁹ If such a duty exists, it exists when a lawyer reasonably believes that the client intends to commit a serious crime which will result in serious bodily harm to a specific, identifiable victim. In a battering relationship, the identity of the potential victim is usually well-known. The question is whether the lawyer has a reasonable belief that the client intends to harm the victim. If so, the lawyer probably has a duty to warn. The reason for saying probably is that no court has ever held that a lawyer has a duty to warn, other than in very narrow contexts.¹⁴⁰ Courts have, however, considered the issue in a variety of professional relationships, notably mental health therapist-patient,¹⁴¹ and have found a duty to warn when the professional has a reasonable belief that the patient intends to commit a crime that will cause serious harm to a specific, identifiable victim. It is not uncommon for a married couple jointly to approach a lawyer and ask that he or she draft the agreement, which they have already reached. Sadly, some lawyers undertake to do just that, despite the obvious conflict of interest which arises from representing two parties with directly adverse interests.¹⁴² Although the ABA Model Rules of Professional Conduct formerly contained a narrow exception, and the rules in many states still do, which arguably allows such representation, the conditions described in the rule will almost never exist, and lawyers are better off simply to not undertake such conflict-ridden tasks.¹⁴³ The potential conflict of interest is so enormous and so obvious that the reasonable lawyer never agrees to draft a

139. See *infra* notes 163–246 and accompanying text.

140. See *infra* Part V.

141. See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

142. The ABA Model Rules of Professional Conduct generally prohibit the representation of parties with adverse interests. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2002).

143. The ethical window was Rule 2.2, lawyer as intermediary. This rule permitted a lawyer to act as an intermediary between clients provided certain conditions were met. However, these conditions will almost never exist. In its recent amendments to the model rules, the ABA's House of Delegates repealed Rule 2.2. The vote was based on the recommendation of the ABA's Commission on Evaluation of the Rules of Professional Conduct. Repeal was recommended because "the Committee is convinced that neither the concept of 'intermediation' . . . nor the relationship between Rules 2.2 and 1.7 [relating to conflicts of interest] are well understood." ABA COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, R. 2.2, Reporter's Explanation of Changes (1999). It will be some time before states modify their rules to conform to the amendments of the Model Rules.

settlement agreement for a soon-to-be-divorced couple.¹⁴⁴ All the problems that arise with respect to pre-nuptial agreements arise in this context as well. The only way to avoid them is just to say no to joint representation in domestic relations cases. Just saying no to joint representation is also in accord with the recommendations of the American Academy of Matrimonial Lawyers.¹⁴⁵

D. Summary

Domestic violence has always been a pervasive problem. Not surprisingly, persons involved in a violent relationship have legal problems among their myriad problems. The pervasive nature of domestic violence and its unique dynamics impose obligations on lawyers.

Fifteen or twenty years ago, a lawyer could reasonably assert that “I don’t know or care about domestic violence, I don’t want to know or care about it, and I don’t need to.” Today, such an assertion would be both ethically and legally unreasonable. Today, the reasonable lawyer may no longer remain ignorant of domestic violence and its effects on the lawyer’s practice. The reasonable lawyer knows or is willing to learn about domestic violence and its potential effect on a client’s legal issues, and then the lawyer has a choice. The lawyer either knows how to use that knowledge to further his or her client’s interests, or the lawyer will refer the individual to a lawyer who does.

In order to fulfill the responsibility to act reasonably, a lawyer should screen prospective clients to determine if they are involved in domestic violence. Only with that information can the lawyer represent clients effectively or refer them to lawyers who can. Part IV of this article discusses

144. New ABA Model Rule 1.7(b)(3) says that “[n]otwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if . . . the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation” Since a divorce always involves the assertion of claims by one spouse against the other in the same litigation, lawyers should not undertake joint representation of divorcing spouses. Comment 7 to the previous rules, versions of which are in effect in 46 jurisdictions, says “[p]aragraph (a) [of Rule 1.7] prohibits representation of opposing parties in litigation.” MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(3) cmt. 7 (2002).

145. The Academy’s Bounds of Advocacy states that: “An attorney should not represent both husband and wife even if they do not wish to obtain independent representation.” American Academy of Matrimonial Lawyers, *Bounds of Advocacy: Goals for Family Lawyers*, § 3.1 at <http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm> (November 2000).

how to screen clients for domestic violence and what steps to take if that screening discloses the threat of future violence.

IV. SCREENING FOR DOMESTIC VIOLENCE AND SAFETY PLANNING

Not only is it important for lawyers to know about domestic violence and how it will affect their practices, it is important for lawyers to know if their clients are or have been the victims of such violence. Knowing the client's experiences with domestic violence will, or at least should, significantly alter the lawyer's representation. This Part provides recommendations about how to screen prospective clients for domestic violence, how to assess the risk of additional violence, and how to develop safety plans for those clients who are determined to be at risk of additional violence.

A. Screening for Domestic Violence

The best, and easiest, way for lawyers to determine if prospective clients are involved in domestic violence is to screen their clients. In this regard, the legal profession can borrow heavily from the medical profession. For, just as a physician may be a victim's first contact outside a violent relationship, so, too, may a lawyer. To determine if prospective clients are involved in domestic violence, lawyers can follow the recommendations of the American Medical Association to doctors regarding their new patients—ask them.¹⁴⁶

While many victims who should seek medical attention do not, so many do that the AMA has issued a pamphlet for physicians entitled "Diagnostic and Treatment Guidelines."¹⁴⁷ Among the guidelines is a recommendation that physicians routinely screen all female patients for domestic violence.¹⁴⁸ In addition to the health reasons for doing so, the AMA suggests that physicians have a legal obligation to screen patients. A physician, says the AMA, may have a duty to warn a potential victim of domestic violence.¹⁴⁹ The failure to do so, concludes the AMA, may lead to medical malpractice lawsuits.¹⁵⁰ The authors of a study about the prevalence

146. See AM. MED. ASS'N, *supra* note 19, at 8.

147. See AM. MED. ASS'N, *supra* note 19.

148. *Id.* at 8.

149. *Id.* at 18.

150. *Id.* at 19.

of dating violence amongst adolescent girls make a similar recommendation: “[m]edical and mental health professionals should routinely screen adolescent girls for dating violence”¹⁵¹ Likewise, lawyers should have a similar responsibility.

Screening all potential clients does not place a significant burden on lawyers. After all, lawyers generally screen prospective clients for a variety of purposes. A lawyer needs to determine if the prospective client: (1) has a case the lawyer wants (or will take); (2) can pay; (3) is already represented by counsel, or (4) has interests which will create an actual or potential conflict of interests which will preclude representation. Questions to screen for domestic violence can easily be integrated into the existing screening process.

A victim of domestic violence, or a batterer, is unlikely to identify herself or himself as such unless asked directly, even if the violence is a primary factor in seeking legal assistance.¹⁵² Since knowledge of the existence of a violent relationship is critical to competent representation, and since the prospective client is unlikely to disclose voluntarily the necessary information, it becomes incumbent upon the lawyer to take the initiative to discover pertinent client experiences with domestic violence.

A common reaction to suggesting that lawyers screen for domestic violence is that to do so will involve asking embarrassing and intrusive questions. While there may be some initial embarrassment, victims are generally relieved when the issue is on the table, particularly if they have been properly notified of the confidential relationship which exists between a lawyer and a client. Some discomfort in asking questions about domestic violence, however, is insignificant when compared with learning later that the failure to screen has led to improper representation, which, in turn, may have contributed to the injury or death of a client. That, of course, could lead to a grievance or a malpractice suit.¹⁵³

151. Silverman et al., *supra* note 12, at 578.

152. Roberta L. Valente, *Screening Guidelines*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE*, 2-1 (Deborah M. Goelman, et al. eds., American Bar Association Commission on Domestic Violence 1996).

153. *See, e.g.*, Roberts v. Healey, 991 S.W.2d 873, 876 (Tex. App. 1999), *reh. denied*. *See* discussion of Roberts v. Healey, *supra* Part III.

B. Screening Questions

As discussed above, awareness of the extent and pervasiveness of domestic violence has risen significantly in recent years.¹⁵⁴ Awareness of the impact of domestic violence on law and law practice has risen too.¹⁵⁵ In response to the growing awareness of the impact of domestic violence on law and law practice, the ABA has established a commission on domestic violence. The Commission has drafted guidelines to help lawyers address domestic violence issues arising in their legal practice. The American Bar Association's Commission on Domestic Violence recommends that lawyers screen all clients. The commission's recommended screening guidelines, with minor modifications, follow:¹⁵⁶

To represent clients effectively, I¹⁵⁷ need to know about all of the issues which impact their cases. For this reason, I routinely ask the following questions:

- Everyone argues or fights with his or her partner or spouse now and then. When you argue or fight at home, what happens? Do you ever change your behavior because you are afraid of the consequences of a fight?
- Do you feel that your partner or spouse treats you well? Is there anything that goes on at home that makes you feel afraid?
- Has your partner or spouse ever hurt or threatened you or your children? Has your partner or spouse ever put his or her hands on you against your will? Has your partner or spouse ever forced you to do something you did not want to do? Does your partner or spouse criticize you or your children often?
- Has your partner or spouse ever tried to keep you from taking medication you needed or from seeking medical help? Does your partner refuse to let you sleep at night?
- Has your partner or spouse ever hurt your pets or destroyed your clothing, objects in your home, or something which you especially cared about? Does your partner or spouse

154. See *supra* Part I.

155. See *supra* Part II.

156. Valente, *supra* note 152, at 2-1.

157. The guidelines are written in the first person, as if a lawyer were actually screening a client with them.

throw or break objects in the home or damage the home itself during arguments?

- Does your partner or spouse act jealously, for example, always calling you at work or home to check up on you? Is it hard for you to maintain relationships with your friends, relatives, neighbors, or co-workers because your partner or spouse disapproves of, argues with, or criticizes them? Does your partner or spouse accuse you of flirting with others or having affairs?
- Has your partner or spouse ever tried to keep you from leaving the house?
- Does your spouse or partner make it hard for you to find or keep a job or go to school?
- Every family has its own way of handling finances. Does your partner or spouse withhold money from you when you need it? Do you know what your family's assets are? Do you know where important documents like bankbooks, checkbooks, financial statements, birth certificates, and passports for you and members of your family are kept? If you wanted to see or use any of them, would your partner or spouse make it difficult for you to do so? Does your spouse or partner sometimes spend large sums of money and refuse to tell you why or what the money was spent on?
- Has your spouse or partner ever forced you to have sex or made you do things during sex that make you feel uncomfortable? Does your partner demand sex when you are sick, tired, or sleeping?
- Has your spouse or partner ever used or threatened to use a weapon against you? Are there guns in your home?
- Does your spouse or partner abuse drugs or alcohol? What happens?

A client who answers "yes" to any one or even more than one question may not be a victim of domestic violence. Rather, the lawyer needs to consider the answers collectively and follow-up when appropriate. A lawyer who is uncertain whether the answers suggest domestic violence should consult someone with appropriate expertise.¹⁵⁸ If the answers to the

158. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 4 (2002) ("Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical

screening questions indicate domestic violence has occurred or is occurring, the lawyer and the client need to assess the degree of risk of future violence.

C. Assessing Lethality

The American Judges Foundation has developed “lethality factors” to assist lawyers and clients in attempting to assess the risk of future violence. With minor modifications, those factors appear below.¹⁵⁹ Going through the factors with a client is not only a good method of evaluating the client’s risk, but it often serves as a useful device to help her understand the risk.

While it is impossible to predict with certainty what a batterer will do, the presence of even some of the following lethality factors can signal the need for extra safety precautions. The more of these factors that are present, the greater the danger.

- The victim (who is familiar with the batterer’s behavior) believes the batterer’s threats may be lethal.
- The batterer threatens to kill the victim or someone else.
- The batterer threatens or attempts suicide.
- The batterer has or has access to weapons and/or the batterer has a history of using weapons.
- The domestic violence has involved strangling, choking, or biting the victim.
- The batterer has easy access to the victim or the victim’s family.
- The couple has a history of prior calls to the police for help.
- The batterer is stalking the victim
- The batterer is jealous and possessive, or imagines the victim is having affairs with others.
- The batterer is preoccupied or obsessed with the victim.
- The batterer is isolated from others (This is especially important in rural areas, when the victim is central to the batterer’s life).

psychology or social work Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.”)

159. NANCY L. RYGWELSKI, *BEYOND HE SAID/ SHE SAID* 49–52 (1995). *See also* WALKER ET AL., *DOMESTIC VIOLENCE AND THE COURTROOM: UNDERSTANDING THE PROBLEM, KNOWING THE VICTIM* 4 (1995); *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE*, *supra* note 5.

- The batterer is assaultive during sex.
- The batterer makes threats to the victim's children.
- The batterer threatens to take the victim hostage, or has a history of hostage-taking.
- The severity or frequency of violence has escalated.
- The batterer is depressed or paranoid.
- The batterer or victim has a psychiatric impairment.
- The batterer has experienced recent deaths or losses.
- The batterer was beaten as a child, or witnessed domestic violence as a child.
- The batterer has killed or mutilated a pet, or threatened to do so.
- The batterer has started taking more risks, or is "breaking the rules" for using violence in the relationship (e.g., after years of abuse committed only in the privacy of the home, the batterer suddenly begins to behave abusively in public settings).
- The batterer has a history of assaultive behavior against others.
- The batterer has a history of defying court orders and the judicial system.
- The victim has begun a new relationship.
- The batterer has problems with drug or alcohol use, or assaults the victim while intoxicated or "high."

The presence of even several of the above factors suggests the need to take steps to develop a practical plan to protect a victim beyond simply obtaining an order of protection which a batterer may ignore, and which may even provoke him.

*D. Safety Planning Guidelines*¹⁶⁰

If screening and evaluating lethality disclose the threat of continued violence, a reasonable lawyer will advise the client of the need to take steps to ensure the client's safety and either refer the client to someone who will assist with safety planning (such as a domestic violence programs) or actively assist the client in such planning. Some of the suggested steps involve primarily the lawyer's conduct; some are directed more at the client's conduct.

A lawyer may need to take precautions when contacting a client. The mere fact that a victim has contacted a lawyer will likely increase the possibility of violence.¹⁶¹ A typical, innocent action by a lawyer, such as sending a client a letter in an envelope with the lawyer's return address, or making a telephone call to someone with caller ID, or leaving a message on an answering machine, may disclose a lawyer's involvement and precipitate violence. It is important, therefore, for a lawyer to ask a client if it is safe to send mail or make calls before doing so. If it is not, a lawyer should discuss a safe place to send mail or make calls. A lawyer should always keep client information confidential. It is doubly important when the client may be harmed by its disclosure.

A lawyer needs to give a victim advance notice of expected developments. If, for example, a batterer is going to be served with legal documents, an event which often provokes a batterer, the client needs to be aware of when and where that is likely to happen so the client can take steps to be in a safe place.

As a lawyer, you should either meet and accompany the client to court or be sure to arrive there early so she does not have to confront her batterer alone. At the conclusion of the hearing, ask the court to let her leave first so he cannot follow her. If that doesn't work, leave with her. If the lethality checklist indicates a high risk, notify the court and arrange to have an armed peace officer present. When in court, do not let a batterer speak to

160. This section is based, in significant part, on the Safety Planning Checklist developed by the American Bar Association's Commission on Domestic Violence. *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE*, *supra* note 5, at 2-16. *See also* NAT'L COUNCIL OF DOMESTIC AND FAMILY COURT JUDGES, *MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE* § 405 (1994).

161. An attempt to end a batterer's control by leaving or taking steps to leave a relationship may result in an escalation of abuse. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 146 *SMU L. REV.* 2117 (1993), *excerpted in* DALTON & SCHNEIDER, *supra* note 24, at 64 ("[t]he victim's attempt to end the relationship does not mean that the control and domination will end; indeed, it may escalate.").

your client—unless he is appearing pro se in which case he will be entitled to cross-examine her. In that event, there will be plenty of opportunities to object. Do so, and do so frequently.

It is also important that you discuss with your client increasing the safety of your client's home. If she and the batterer have lived together and he has keys, have the locks changed (financial assistance for doing so may be available from local domestic violence programs). Plan escape routes. Make sure she has a locked room to which she can retreat and where a cell phone has been hidden so she can call for help (cell phones programmed to call 911 are often available at no charge from domestic violence programs). Don't rely on regular telephones as ripping a phone out of the wall is a common occurrence.

Have your client show a picture of the batterer and describe his car to neighbors or co-workers and ask them to call law enforcement if he appears. Since the home can never be really safe, discuss seeking shelter from a domestic violence program or staying with friends or relatives.

The client should keep a bag packed and stored at another location, so a quick exit can be made. The bag should include important documents, as well as some clothing and other necessities for the client and her children.

Your client should also have extra, certified copies of protection or stalking orders available at the client's home and at work. Law enforcement personnel generally will not act unless presented with a certified copy of an order. Make sure your client understands the difference and the importance.

Most of us follow predictable routines. Have your client vary hers and take a different route to work, or leave at a different time. If possible, have her travel with a different person in a different car.

Have the client screen incoming telephone calls and document them, as well as any other suspicious activities. It will be critical to show a "course of conduct," for example, to obtain a stalking order.¹⁶²

Screening prospective clients will always be a function of the lawyer or the lawyer's staff. If screening discloses concerns about domestic violence, assessing the potential lethality, safety planning, or both, is not necessarily a lawyer's responsibility, though the lawyer may choose to undertake that responsibility. A lawyer may, instead, discharge his or her responsibility by referring the potential victim to one or more of the many resources which are now available to assist victims of domestic violence. Most communities

162. *See, e.g.*, WYO. STAT. ANN. § 6-2-506(a)(i)(Michie 2001) (A "course of conduct" is "a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose").

have a shelter program, and many have a coalition against domestic violence and sexual assault. State Attorneys General often have programs for victims, and national resources, such as the National Domestic Violence Hotline ((800)799-7233) exist as well. What the lawyer may not reasonably do is nothing.

V. A LAWYER'S DUTY TO WARN¹⁶³

Traditionally, a lawyer owes a duty of confidentiality to each client, a duty which prevents the lawyer from disclosing information, even when such disclosure might significantly benefit others.¹⁶⁴ That prohibition is not absolute, however, and it is loosening. The American Bar Association's Model Rules of Professional Conduct and the ethical rules in all states, except California permit a lawyer to disclose confidential information to prevent certain types of criminal acts (at least those which will likely result in imminent death or substantial bodily harm).¹⁶⁵ Ethical rules in

163. This section is based, in part, on John M. Burman, *Disclosing Privileged Communications: A Lawyer's Duty to Warn*, WYOMING LAWYER, August 1996, at 17.

164. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 60 (2000).

165. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm"); see also CAL. EVID. CODE § 956.5 (West 2002) (The California rules of conduct do not directly regulate the duty of confidentiality) ("There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."); IND. RULES OF PROF'L CONDUCT R. 1.6(b)(1) ("[L]awyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing any criminal act. . . ."); N.Y. CODE OF PROF'L RESPONSIBILITY R. DR 4-101(c)(3) (2002) ("A lawyer may reveal . . . [t]he intention of a client to commit a crime and the information necessary to prevent the crime.").

The ABA House of Delegates adopted amendments to Rule 1.6 in February of 2002. As amended, Rule 1.6(b) provides (deletions are shown by a ~~strikeout~~, additions are shown by *underlining*):

(b) A lawyer may reveal ~~such~~ *such* information *relating to the representation of a client* to the extent the lawyer reasonably believes necessary:

(1) to prevent ~~the client from committing a criminal act that the lawyer believes is likely to result in imminent~~ *reasonably certain* death or substantial bodily harm; ~~or~~

(2) *to secure legal advice about the lawyer's compliance with these Rules;*

~~(2)~~ (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the cli-

eleven¹⁶⁶ states require a lawyer to disclose such information. A developing body of tort law regarding other professionals imposes liability on professionals who fail to disclose confidential information to warn a non-patient. Taken together, these developments suggest that a profound change is occurring. A lawyer may well have, and should have, a duty to warn an intended victim of domestic violence, even when doing so results in the disclosure of otherwise confidential information.

A. *The Duty of Confidentiality*

1. Legal and Ethical Obligation to Retain Client Confidences

A lawyer has both a legal and an ethical obligation to maintain client confidences. The legal obligation arises out of the law of agency,¹⁶⁷ the law of evidence (through the attorney-client privilege)¹⁶⁸ and the rules of civil

ent was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) *to comply with other law or a court order.*

Report 401, as passed by the ABA House of Delegates. ABA Center for Professionalism, http://www.abanet.org/cpr/e2k-202report_summ.html. Although changes were made, disclosure remains permissive. While disclosure remains discretionary, allowing disclosure, according to new comment [6] "recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to Report 401." Model Rules of Prof'l Conduct R. 1.6 cmt. 6.

166. Ariz. S. Ct. Rule 42 R.P.C. 1.6(b); Conn. R.P.C. 1.6(b); Fla. St. Bar Rule 4-1.6(b); Ill. St. S. Ct. R.P.C. 1.6; Nev. St. S. Ct. R.P.C. 156(2); N.J. R. R.P.C. 1.6(b)(1); N.M. R. R.P.C. 16-106(B); N.D. R. R.P.C. 1.6(a); Tex. St. R.P.C. 1.05; Va. R. S. Ct. Pt. 6 § 2, C.P.R. DR. 4-101; Wis. St. R.P.C. S.C.R. 20:1.6. With the exception of New Mexico, the language used in these rules is "must reveal." In New Mexico, the language is "should reveal." N.M. R. R.P.C. 16-106(B). Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When A Lawyer Fails to Warn A Third Party of A Client's Threat to Cause Serious Physical Harm Or Death*, 36 IDAHO L. REV. 479, 480-81, note 4 (2000).
167. See, e.g., RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 395 (1957) ("[A]n agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal.").
168. The attorney-client privilege is part of the law in every American jurisdiction, either by statute, court rule, or common-law. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.3.1 (1986). Generally, it prevents an attorney from testifying about communications to, or from, a client and the lawyer regarding the representation. *Id.* Furthermore, an attorney has both a legal duty to assert the privilege in at least some circumstances and an ethical obligation to assert the attorney-client privilege to prevent the disclosure of client confidences. See FED. R. CIV. P. 26(b)(5); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 11 (2002).

procedure (which embody the work-product privilege).¹⁶⁹ Each requires a lawyer to preserve client confidences, and each survives the termination of the attorney-client relationship.¹⁷⁰ A lawyer's ethical obligation of confidentiality is based on applicable rules of professional conduct. Such rules generally provide that a lawyer shall not reveal any information which relates to the representation, regardless of the source.¹⁷¹ Similar to the legal duty of confidentiality, the ethical duty never ends.¹⁷²

The attorney-client privilege applies when communications between a lawyer and a client are sought from an attorney or a client through judicial or other legal processes, including discovery.¹⁷³ The ethical duty applies in all other situations; it will generally be the duty that applies to permit or require the disclosure of a client's intent to commit domestic violence.¹⁷⁴ The attorney work-product privilege applies to information other than communications to or from an attorney and a client. It proscribes the disclosure of an attorney's "mental impressions, conclusions, opinions or legal theories" if they were developed in anticipation of, or preparation for, litigation.¹⁷⁵ Regardless of the nature of the confidentiality obligation, the power to waive it rests with the client, not with the attorney.¹⁷⁶

169. FED. R. CIV. P. 26(b)(3).

170. After the end of an agency relationship, the agent may not use or disclose "trade secrets, written lists of names, or other similar confidential information concerning matters The agent is entitled to use general information concerning the method of business of the principal." RESTATEMENT (SECOND) OF AGENCY § 396(b) (1958). And while many statutes or rules which establish the attorney-client privilege are silent on the question of whether the privilege continues after the end of the attorney-client relationship, courts generally hold that the privilege continues, along with the attorney's obligation to assert it. WOLFRAM, *supra* note 168, § 6.3.4. The privilege generally extends after the death of a client. *See, e.g., Swidler & Berlin v. United States*, 524 U.S. 399, 406 (1998).

171. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a)(2002) ("A lawyer shall not reveal information relating to representation of a client . . .").

172. MODEL RULES OF PROF'L CONDUCT R. 1.9(c), 1.6 cmt. 17.

173. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3. The attorney-client privilege is not a part of the rules of ethics. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. 3, 11. It is part of the law of evidence and definitions vary in different jurisdictions. The privilege generally exists when four features are present: (1) There is a communication; (2) between privileged persons (an attorney or the attorney's staff and a client); (3) made in confidence; and (4) for the purpose of obtaining or providing legal advice. *See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 68 (2000).

174. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5.

175. *See, e.g., FED. R. CIV. P. 26(b)(3)*. A lawyer must assert the privilege or it disappears. FED. R. CIV. P. 26(b)(5).

176. A principal (a client) may agree to allow the agent (the lawyer) to disclose or use otherwise confidential information. RESTATEMENT (SECOND) OF AGENCY § 395 (1958). A client may waive the attorney-client privilege and permit an attorney to testify. *See, e.g., Wolfram, supra* note 168, § 6.4.1. A client may consent to the disclosure of information protected by the rules of ethics. *See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(a)*.

The duty of confidentiality, whether legal or ethical, exists to encourage clients to communicate “fully and frankly with counsel.”¹⁷⁷ This encouragement does not come without a price which is sometimes a steep one. For example, lawyers are not permitted to disclose, and juries are not permitted to hear, information, such as a client’s confession or admission to a lawyer, information that could clarify an individual’s guilt or innocence in a criminal trial, or a client’s liability or non-liability in a civil case. Similarly, a lawyer who knows of a batterer’s intent to commit further domestic violence has traditionally been free from any obligation to warn the intended victim, even when she is readily identifiable and the batterer’s intent and the severity of the injury seem clear. The price of confidentiality is worth paying, according to the United States Supreme Court, because maintaining confidentiality “promote[s] broader public interests in the observance of law and the administration of justice.”¹⁷⁸ While that may be generally true, significant inroads already have been made into the confidential relationship between a lawyer and the lawyer’s client.¹⁷⁹ It is time to re-evaluate the premise of confidentiality as a superior value to public safety when it comes to domestic violence.

2. The Scope and Exceptions to the Duty of Confidentiality

A lawyer’s duty of confidentiality, whatever its source and nature, has never been absolute; other considerations, ethical or legal may over-ride it. Sometimes disclosure of client confidences is required by law, while at other times, is simply permitted.

By statute in many jurisdictions, for example, attorneys are required to report suspected child and/or elder abuse, notwithstanding the otherwise

Similarly, the work-product privilege belongs to the client and may be waived by the client. Wolfram, *supra* note 168, § 6.6.3.

177. *See, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998) (holding that the federal law attorney-client privilege survives the death of the client); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (The ethical duty of confidentiality encourages clients “to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”).

178. *Swidler & Berlin*, 524 U.S. at 403 (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981)).

179. The most significant inroad is the recent promulgation of rules by Attorney General John Ashcroft, which permits the United States Department of Justice to “monitor[] or review . . . communications between [an] inmate and attorneys . . . who are traditionally covered by the attorney-client privilege for the purposes of deterring future act that could result in death or serious bodily injury . . .” 28 C.F.R. § 501.3(d) (2001).

confidential nature of the information learned from a client.¹⁸⁰ Similarly, the ethical rules in eleven states now require the disclosure of information to prevent death or serious bodily harm.¹⁸¹

The exceptions to a lawyer's ethical duty of confidentiality vary, depending on the jurisdiction where the lawyer practices. Generally, there are four views. First, the American Bar Association's recently amended Model Rules say: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm."¹⁸² Similarly, the rules in eighteen jurisdictions are patterned after the previous Model Rule 1.6(b) and permit, but do not require, an attorney to disclose confidential information when the attorney "reasonably believes [disclosure is] necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result" in substantial bodily harm or death. Several jurisdictions further impose an "imminent" death requirement, before a lawyer discloses otherwise confidential information.¹⁸³ The largest group of jurisdictions, twenty-one, subscribe to the second, more liberal approach. Under that approach, a lawyer may reveal confidential information when the lawyer reasonably believes that disclosure is necessary to prevent the client from committing a crime.

180. *See, e.g.*, IND. CODE ANN. § 31-33-5-1 (West 2002) ("[A]n individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report as required by this article."); MONT. CODE ANN. § 52-3-811 ("When the professionals and other persons listed . . . have reasonable cause to suspect that an older person . . . they shall report the matter."); OHIO REV. CODE ANN. § 2151.421 (West 2002) ("No person described in division (A)(1)(b) of this section . . . shall fail to immediately report that knowledge [of child abuse]."); WYO. STAT. ANN. § 14-3-205 (Michie 2001) ("Any person who knows or has a reasonable cause to believe or suspect that a child has been abused . . . shall immediately report . . ."); WYO. STAT. ANN. § 35-20-103(a) ("Any person who knows or has reasonable cause to believe that a disabled adult is abused . . . shall report . . .").

181. Cooper, *supra* note 166, at 481 n.4.

182. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)(2002).

183. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1). The eighteen jurisdictions are: Alabama (AL R RPC Rule 1.6 (b)(1)); Alaska (AK R RPC Rule 1.6 (b)(1)); Delaware (DE RRPC Rule 1.6 (b)(1)); District of Columbia (DC R RPC Rule 1.6 (c)(1)); Georgia (GA R BAR Rule 4-102 Rule 1.6 (b)(1)); Hawaii (HI R S CT EX A RPC Rule 1.6 (c)(1)); Kentucky (KY ST S CT RULE 3.130 RPC Rule 1.6 (b)(1)); Louisiana (LA ST BAR ART 16 RPC Rule 1.6 (b)(1)); Maryland (MD R CTS J AND ATTYS RPC Rule 1.6 (b)(1)); Massachusetts (MA R S CT RULE 3:07 Rule 1.6 (b)(1)); Missouri (MO R RULE 4 Rule 4-1.6 (b)(1)); Montana (MT R RPC Rule 1.6 (b)(1)); New Hampshire (NH R RPC Rule 1.6 (b)(1)); New Mexico (NM R RPC Rule 16-106 B) ("a lawyer should reveal"); Pennsylvania (PA ST RPC Rule 1.6 (c)(1)); Rhode Island (RI R S CT ART V RPC Rule 1.6 (b)(1)); South Dakota (SD ST T. 16, Ch 16-18, APP, Rule 1.6 (b)(1)); and Utah (UT R RPC Rule 1.6 (b)(1)).

However, there is no requirement that the crime be one which is likely to result in physical injury, let alone serious physical injury.¹⁸⁴ Eleven states take a third approach. Those states impose an affirmative ethical obligation on attorneys to disclose confidential information when the lawyer reasonably believes it is necessary to prevent the client from committing a crime which is likely to result in death or substantial injury.¹⁸⁵ Those jurisdictions also permit an attorney to disclose confidential information to prevent other, lesser crimes. Finally, one state, California, has a unique approach to a lawyer's confidentiality duty. California is the only American jurisdiction whose ethical rules do not create an obligation of confidentiality; the California Rules of Professional Conduct are silent.¹⁸⁶ The California Business and Professional Code, however, does impose such an obligation: "It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."¹⁸⁷ The California statute does not permit or require the disclosure of confidential information, under any circumstances, even to prevent substantial bodily harm or death.

In sum, lawyers in eleven jurisdictions have an ethical duty to disclose confidential information to protect third parties in some circumstances.¹⁸⁸ That ethical duty, at least arguably, creates a legal duty to disclose, a duty which may form the basis for a tort claim. The unexcused violation of a

184. Arkansas (AR R RPC Rule 1.6 (b)(1)); Colorado (CO ST RPC Rule 1.6 (b)); Idaho (ID R RPC Rule 1.6 (b)(1)); Indiana (IN ST RPC Rule 1.6 (b)(1)); Iowa (IA ST CPR DR 4-101 (C)(3)); Kansas (KS R RULE 226 RPC KRPC 1.6 (b)(1)); Maine (ME R CPR Rule 3.6 (h)(4)); Michigan (MI R MRPC 1.6 (c)(4)); Minnesota (MN ST RPC Rule 1.6 (b)(3)); Mississippi (MS R RPC Rule 1.6 (b)(1)); Nebraska (NE R CPR DR 4-101 (C)(3)); New York (NY ST CPR DR 4-101 C.3); North Carolina (NC R BAR Ch 2, Rule 1.6 (d)(4)); Ohio (OH ST CPR DR 4-101 (C)(3)); Oklahoma (OK ST RPC Rule 1.6 (b)(1)); Oregon (OR R CPR DR 4-101 (C)(3)); South Carolina (SC RA CT RULE 407 RPC Rule 1.6 (b)(1)); Tennessee (TN R S CT RULE 8 CPR DR 4-101 (C)(3)); Washington (WA R RPC 1.6 (b)(1)); West Virginia (WV R RPC Rule 1.6 (b)(1)); and Wyoming (WY ST RPC Rule 1.6 (b)(1)).

185. Arizona (AZ ST S CT RULE 42 RPC ER 1.6 (b)); Connecticut (CT R RPC Rule 1.6 (b)); Florida (FL ST BAR Rule 4-1.6 (b)(1)); Illinois (IL ST S CT RPC Rule 1.6 (b)); Nevada (NV ST S CT Rule 156 2)); New Jersey (NJ R RPC 1.6 (b)(1)); North Dakota (ND R RPC Rule 1.6 (a)); Texas (TX ST RPC Rule 1.05 (e)); Vermont (VT R PROF COND Rule 1.6 (b)(1)); Virginia (VA R S CT PT 6 S 2 RPC Rule 1.6 (c)(1)); and Wisconsin (WI ST RPC SCR 20:1.6 (b)).

186. In 1998, the California Supreme Court rejected, without comment, a proposal from the California State Bar to include a confidentiality provision, similar to that in ABA Model Rule 1.6, in the California Rules of Professional Conduct. CALIFORNIA RULES OF PROFESSIONAL CONDUCT, Chapter 3, ed's note.

187. CAL. BUS. PROF. CODE § 6068(e) (West 2002).

188. See *supra* note 185.

statute or administrative regulation may be used as the basis for imposing a tort duty.¹⁸⁹ It is easy to argue that the violation of a rule of ethics should have the same effect.¹⁹⁰

By contrast, thirty-nine American jurisdictions permit, but do not require, certain disclosures.¹⁹¹ Additionally, since each of the rules is discretionary, the rules also provide that a lawyer's decision not to disclose information in such circumstances does not violate the rules.¹⁹² Therefore, a lawyer in those jurisdictions never has an *ethical* duty to warn an intended victim of a crime. In the absence of an ethical duty, the argument that a violation of such a duty gives rise to a legal duty obviously does not apply.

While a lawyer in most jurisdictions has the discretion to warn of a client's intended crime, the lawyer does not have the discretion to do nothing. Instead, the lawyer must at least discuss the matter with the client and advise him or her of the potential consequences of the intended action.¹⁹³ This duty arises out of a lawyer's general obligation to communicate sufficient information to a client to allow the client to make "informed decisions regarding the representation,"¹⁹⁴ a lawyer's obligation not to assist or counsel a client to commit a criminal or fraudulent act,¹⁹⁵ and a lawyer's ability to refer to non-legal factors in advising a client.¹⁹⁶ Taken together, those standards suggest that a lawyer who learns of a client's intent to commit a crime, which is likely to cause serious injury, has a duty to consult with the client and advise him or her against doing so.¹⁹⁷

189. See, e.g., RESTATEMENT (SECOND) OF TORTS, § 286 (1965).

190. Cooper, *supra* note 166, at 513 ("This article contends that in those jurisdictions requiring disclosure, a lawyer who fails to give such a warning should be subject to tort liability for failure to do so . . ."). It is true that the rules say "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." MODEL RULES OF PROF'L CONDUCT Scope 18. Nevertheless, the rules are generally admissible in court so long as an expert testifies that the rules reflect, rather than create, the standard of conduct. See Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102, 1105 (1996).

191. See *supra* notes 182–84.

192. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 13; see also MODEL RULES OF PROF'L CONDUCT Scope 14.

193. MODEL RULES OF PROF'L CONDUCT R. 1.2(d), 1.4(b), 2.1; See also *infra* note 197 and accompanying text.

194. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.4(b); MODEL CODE OF PROF'L CONDUCT EC 7–8.

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

196. MODEL RULES OF PROF'L CONDUCT R. 2.1.

197. A lawyer counseling a client against committing a crime appears to be very effective. In 1993, Professor Levin conducted an empirical study of New Jersey lawyers which showed both that lawyers confront the issue of clients intending criminal action fairly often, and that the lawyers are generally successful in persuading the client not to commit

Even in those jurisdictions where there is no ethical duty to warn, a lawyer may have a *legal* duty to warn which arises outside the rules of ethics.¹⁹⁸ The question which is largely unanswered is whether a common law legal duty exists which requires a lawyer who learns of potential domestic violence to warn the intended victim, notwithstanding the absence of an ethical obligation to do so. This issue is especially important for a lawyer who represents a batterer, since he or she may well learn information about future domestic violence in the course of representing the batterer.

Whether a lawyer has a legal duty to warn a non-client, other than statutory reporting obligations for suspected child or elder abuse, is unclear. If a legal duty does exist, the duty is an outgrowth of the California Supreme Court's decision in *Tarasoff v. The Regents of the University of California*.¹⁹⁹ In *Tarasoff*, the California Supreme Court held that a psychotherapist may have a duty to warn a non-patient of a patient's intent to harm the non-patient, in some circumstances.²⁰⁰ An accurate understanding of the Court's holding is crucial to an accurate understanding of the scope and nature of a lawyer's duty to warn.

B. *The Tarasoff Case*

Prosenjit Poddar was a voluntary outpatient receiving mental health services at a University of California at Berkeley hospital.²⁰¹ He met with a

the acts. Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 111-12 (1994). First, Professor Levin found that sixty-seven out of 776 responding lawyers reported that they had, at least once in their careers, reasonably believed that a client intended to commit future crime which would cause serious injury to another. Second, the study found that lawyers who reasonably believed that their clients were going to seriously harm a third party tried to convince the clients not to do so. *Id.* at 117. The lawyers believed they had been successful in persuading their clients not to commit the crimes 92.4% of the time. *Id.* Finally, Professor Levin's study found that lawyers with an ethical duty to disclose the threat only did so about half of the time. *Id.* at 128. This, she concludes, is likely explained by "the strong bar ethic concerning protection of client confidences." *Id.* at 130.

198. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 10 ("Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.").

199. 551 P.2d 334 (Cal. 1976).

200. *Id.* at 340.

201. *Id.* at 341.

therapist, Dr. Moore, seven times, before discontinuing treatment. During the therapy, Poddar disclosed that he was obsessed with a young woman, not named but readily identifiable as Tatiana Tarasoff. While she may have had some feeling for him at one time, that had come to an end, at least in her mind. Poddar, however, remained obsessed. He told his therapist that he intended to kill the young woman when she returned from spending the summer in Brazil.

Poddar's therapist discussed the statement with his supervisor, and they decided to notify the campus police and request that the police detain Poddar for possible commitment. The police took Poddar into custody, but released him after he promised to stay away from Tatiana. Several weeks later, Tatiana returned home. No one told her or her parents of Poddar's threat. Shortly thereafter, Poddar killed her. Tatiana's parents sued the therapist and his supervisor (and others), alleging, *inter alia*, that they had had a duty to warn Tatiana of Poddar's threat, and they had failed to do so.

The trial court sustained the therapists' demurrer to the complaint, ruling that the therapists were not liable for Tatiana's death because it was caused by Poddar, a third party, with whom the therapists had a confidential relationship.²⁰² The case made its way to the California Supreme Court, which ultimately ruled (the court issued two opinions, an initial decision and a decision on rehearing)²⁰³ in favor of the plaintiffs. In its opinion on rehearing, the court said that a legally cognizable tort claim could be stated if the complaint alleged that:

[T]he therapists in fact determined that Poddar presented a serious danger of violence to Tatiana, or pursuant to the standards of their profession should have so determined, but nevertheless failed to exercise reasonable care to protect her from that danger.²⁰⁴

The issue thus became whether the standards of the profession of psychology required the therapists to determine that Poddar presented a threat to Tatiana, and whether those standards required that the therapists take some action to protect Tatiana from that threat.²⁰⁵ Under some circumstances, the obligation to take reasonable steps to protect the intended victim might include a duty to warn that person.²⁰⁶ Given the procedural posture of *Tarasoff* (an appeal from the granting of a demurrer),

202. *Id.* at 340.

203. *Tarasoff v. Regents of Univ. of Cal.*, 529 P.2d 553 (Cal. 1974), *vacated*, by 551 P.2d 334 (Cal. 1976).

204. 551 P.2d at 353.

205. *Id.* at 345.

206. *Id.* at 346.

the California Supreme Court naturally did not decide those issues. Rather, the Court held that a complaint that contained such allegations would state a cause of action against the therapists.²⁰⁷

The key to the *Tarasoff* opinion, and the key to whether a therapist has a duty to warn, is how to determine when a therapist owes a duty to a third party. The court looked at two issues to answer the question. First, the court considered whether there was a “special relationship” which imposed liability on one person, the therapist, for the actions of another, the patient.²⁰⁸ Second, the court had to balance several policy factors.²⁰⁹

The court had no difficulty finding a special relationship which could form the basis for tort liability for a therapist failing to warn the intended victim of one of the therapist’s patients. Such a relationship may arise, said the court, because of the defendant’s relationship to “either the person whose conduct needs to be controlled or . . . the foreseeable victim of that conduct.”²¹⁰ Applying that exception to the allegations, the *Tarasoff* court found “that a relationship of defendant therapists to either Tatiana or Poddar will suffice to establish a duty of care”²¹¹

Turning to policy considerations, the court said that “[t]he most important of these considerations in establishing duty is foreseeability” of harm.²¹² As a general matter, therefore, a defendant owes a duty of care to all persons “who are foreseeably endangered by his conduct.”²¹³ When the foreseeable harm involves a third party, however, a defendant is legally responsible only if a “special relationship” exists between the defendant and the dangerous person or the defendant and the endangered person.²¹⁴ Since the court had found such a relationship between Poddar’s therapist and either Poddar or Tatiana, and since it was foreseeable that Poddar would

207. *Id.* at 353.

208. *Id.* at 343.

209. *Id.* at 342. The “major” factors to be considered are:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Id.

210. *Id.* at 343.

211. *Id.*

212. *Id.* at 342

213. *Id.*

214. *Id.* at 343.

harm Tatiana, a duty of care arose, requiring the therapists to exercise reasonable care to protect her.

The court acknowledged that whether Poddar's actions in harming Tatiana were foreseeable depended, in large part, on the therapists predicting dangerousness, a notoriously difficult task.²¹⁵ That difficulty was insufficient, however, to eliminate any duty:

[W]e do not require that the therapist . . . render a perfect performance; the therapist need only exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.²¹⁶

The court also weighed the risk of unnecessary disclosures and the costs of requiring psychologists to violate the confidentiality of the psychologist-patient relationship, against the possibility of a warning saving an intended victim's life. "The protective privilege ends," said the court, "where the public peril begins."²¹⁷

C. *The Aftermath of Tarasoff*

Tarasoff has been cited hundreds of times by courts throughout the country.²¹⁸ Many of the cases involve the issue of whether professionals have a duty to disclose confidential information to protect third parties.²¹⁹ Many others cite to *Tarasoff's* discussion of foreseeability as the key to determining if and when a tort duty arises in other contexts.²²⁰

Tarasoff and the duty to warn have also been the topic of considerable academic debate, some authors arguing in favor of lawyer's disclosing otherwise confidential information when necessary to warn and others taking the opposite view.²²¹ *Tarasoff* and the duty to warn have also been the topic

215. *Id.* at 345.

216. *Id.* (quoting *Bardessono v. Michels*, 478 P.2d 480, 484 (Cal. 1970)).

217. *Id.* at 347.

218. A WestLaw search on September 29, 2002, indicated 1565 citations.

219. *See, e.g.*, *Brady v. Hoper*, 751 F.2d 329, 330 (10th Cir. 1984); *Jablonski by Pahls v. United States*, 712 F.2d 391, 397 (9th Cir. 1983); and *Hamman v. County of Maricopa*, 775 P.2d 1122, 1125 (Ariz. 1989).

220. *See, e.g.*, *Ortega v. Flaim*, 902 P.2d 199, 204 (Wyo. 1995); and *Gates v. Richardson*, 719 P.2d 193, 194 (Wyo. 1986).

221. Professor Cooper has comprehensively analyzed the case and the subsequent debate. Cooper, *supra* note 166.

of numerous articles for practitioners.²²² That body of literature tends to take a different, more pragmatic approach, generally suggesting that lawyers act as if they have a duty to warn.²²³

The reception in the courts has been mixed. The California Supreme Court itself has interpreted the opinion narrowly, refusing to extend its applicability beyond the situation where a therapist knows, or should know, of a patient's specific threat to harm an identifiable person.²²⁴ Other courts have given the case a more expansive reading, suggesting that a duty to prevent harm may exist even where there is not a specific, identifiable victim (as it is not possible to warn a potential victim in such a case, appropriate steps might include initiating commitment proceedings).²²⁵ The divergent and often conflicting opinions make it impossible to say, with any degree of certainty, what the "rule" of *Tarasoff* is, especially outside of California.

Whatever the precise legal effect of *Tarasoff*, the opinion has had a significant effect on the medical profession, especially the mental health profession. Some states have responded by enacting laws which require or allow mental health professionals to warn.²²⁶ In others, courts have imposed

222. See, e.g., Cooper, *supra* note 166; Nancy J. Moore, "In the Interests of Justice": *Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 *FORDHAM L. REV.* 1775 (2002).

223. I belong to the latter group, and have advised lawyers that:

Whether a lawyer has a duty to disclose confidential information to protect a third party is, ultimately, a question of foreseeability. That is, is it foreseeable that your client will cause harm to a third party? The only time it is foreseeable is if the client makes a threat to harm a specific, identifiable person, and you reasonably believe that the client will act on the threat. In such circumstances, the potential benefits of breaching the confidential attorney-client relationship and taking steps to protect the potential victim seem to outweigh the costs of breaching the confidentiality of the attorney-client relationship and giving a potentially false warning.

Burman, *supra* note 163.

224. *Thompson v. County of Alameda*, 614 P.2d 728, 736 (Cal. 1980) (refusing to require action in response to a juvenile's threat to kill a young child in the neighborhood).

225. See, e.g., *Hamman v. County of Maricopa*, 775 P.2d 1122, 1128 (Ariz. 1989).

226. See 740 *ILL. COMP. STAT. ANN.* 110/11(ii) (West 2002). ("Records and communications may be disclosed . . . when, and to the extent, a therapist, in his or her sole discretion, determines that . . . a clear, imminent risk of serious physical or mental injury or disease or death being inflicted upon the recipient or by the recipient on himself or another.") *MICH. COMP. LAWS ANN.* § 330.1946(1) (West 2002). ("If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in subsection (2).") (West 2002); *WYO. STAT. ANN.* § 33-38-113(a)(iv) (Lexis 2000). (A mental health professional may disclose confidential

a *Tarasoff*-like duty to warn.²²⁷ The AMA has gone so far as to advise physicians that they may have a duty to warn potential victims of domestic violence.²²⁸ The failure to do so, concludes the AMA, may lead to medical malpractice lawsuits.²²⁹

D. Lawyers and the Duty to Warn

Lawyers are among the professionals who may receive confidential information suggesting that a third party is at risk of serious harm from a client. And, not surprisingly, lawyers have been the targets of lawsuits based on their failure to warn. Surprisingly few reported cases, however, involve lawyers and the duty to warn. Thus far, no reported case has held a lawyer liable under a *Tarasoff*-type theory of failure to warn a non-client about a dangerous client. The issue is not about to go away, however, and it seems inevitable that the case will arise in which a lawyer is found to have had knowledge of a client's danger to an identifiable third party, the lawyer failed to warn that party, the client harmed the third party, and that failure is found to have been a legal cause of the third party's injury or death. The question is not, therefore, whether such a case will arise, but when and under what circumstances. When it does, it will be easy for a court to, as the *Tarasoff* court did, find a special relationship between the lawyer and the client or the victim, and that injury was foreseeable. As a result, a court could easily find a duty to warn, which was breached, and that breach was a legal cause of the injury. Liability, in short, will be imposed on a lawyer for failing to warn. The question has both ethical and legal implications, implications which boards of professional responsibility and courts will need to confront and resolve. Until they do, lawyers will need to try to bring order to the chaos which surrounds the issue of when a lawyer must disclose confidential information to warn a potential victim. That issue is likely to arise in a case involving domestic violence.²³⁰

Since an act of domestic violence against another would be likely to result in substantial bodily harm, or be a criminal act, an attorney in those

information when "an immediate threat of physical violence against a readily identifiable victim is disclosed . . ." to the professional.).

227. See, e.g., *State v. Agacki*, 595 N.W.2d 31 (Wis. Ct. App. 1999).

228. AM. MED. ASS'N, *supra* note 19, at 18. The AMA provides a general exception to the duty of confidentiality "[w]here a patient threatens to inflict serious bodily harm to another person . . . and there is a reasonable probability that the patient may carry out the threat" AM. MED. ASS'N, CODE OF MEDICAL ETHICS, 72 (1994).

229. AM. MED. ASS'N, *supra* note 19, at 19.

230. For a discussion of a lawyer's duty to warn in a domestic violence situation, see Cooper, *supra* note 166, at 519–22.

jurisdictions which follow the ABA's position "may" disclose the client's intention to commit such an act. Although the ethical duty is discretionary, the commentary to the rule says that "a lawyer may be obligated or permitted by other provisions of law to give information about a client."²³¹

So the legal question remains: Does a lawyer have a duty to disclose a client's intent to harm a specific, identifiable individual? Rather surprisingly, there is not a lot of case law involving the issue. What case law there is suggests that the duty, if it exists, is the narrow one outlined in *Tarasoff*.

In *Hawkins v. King County*,²³² the Washington Court of Appeals directly addressed the issue of whether a lawyer has a duty to warn. The Court held that a lawyer has no duty to warn a third person "unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person."²³³ Since the potential victims in the case knew of the client's violent tendencies and of his release from confinement, the court affirmed a summary judgment in favor of the defendant lawyer.

A threat to a Washington judge involved both the common law duty to warn and an attorney's obligations as an officer of the court. In *State v. Hansen*, a recently discharged felon (Hansen), told a lawyer of his intent to get a gun and "blow them all away, the prosecutor, the judge and the public defender."²³⁴ The lawyer told the prosecutor and the judge of the threat, leading to Hansen's arrest and conviction for the crime of intimidating a judge. On appeal, Hansen urged reversal on the basis, *inter alia*, that the lawyer had violated the attorney-client privilege in warning the judge.

The Washington Supreme Court found that Hansen had no attorney-client relationship with the attorney who had disclosed the threat, but even if there had been such a relationship, the privilege would not have applied to the threats. Further, the court found that although the Washington Rules of Professional Conduct did not require disclosure (Washington's Rule 1.6 is permissive²³⁵), a lawyer, as an officer of the court, has a duty to warn a judge of threats where the lawyer "has a reasonable belief that the

231. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 21.

232. 602 P.2d 361 (Wash. Ct. App. 1979).

233. *Id.* at 365 (internal quotations omitted).

234. 862 P.2d 117, 118 (Wash. 1993).

235. Although Washington has adopted a form of the ABA's Model Rules, one of the changes was to Rule 1.6. The Washington rule permits the disclosure of a client's intent to "commit a crime," not just a crime which will result in "imminent death or substantial bodily harm" as the ABA suggested. WASHINGTON COURT RULES, 40 (2002) (stating that a lawyer may reveal client confidences if lawyer reasonably believes it necessary "[t]o prevent the client from committing a crime.").

threat is real.”²³⁶ The court distinguished *Hansen* from *Hawkins* because the judge had been unaware of the threat, while the potential victims in *Hawkins* had known of the client’s dangerous tendencies.

The most recent reported decision involving a lawyer’s alleged breach of the duty to warn is *In re Goebel*.²³⁷ The case arose in the context of a lawyer disciplinary proceeding. In upholding a sanction against a lawyer, the court noted that Indiana is a permissive disclosure state,²³⁸ and, therefore, the lawyer had no ethical duty to warn the potential victim (who turned out to be the actual victim), even when that victim was the husband of one of the firm’s other clients.²³⁹ The case did not involve, and the opinion does not address, the lawyer’s potential tort liability for failing to warn the victim.

Where does that leave lawyers? It depends on the jurisdiction. In the majority of jurisdictions, lawyers have no ethical obligation to disclose a client’s threats of harm to another. In eleven they do.²⁴⁰ The failure to give a warning when there is an ethical obligation to do so could easily give rise to a tort claim. It is, after all, well-established that the violation of a statute, administrative regulation, or ordinance that has been enacted to protect the public or a segment thereof, will often result in tort liability.²⁴¹ Such a result is reasonably likely, even though the rules generally provide that violation of them should not give rise to civil liability.²⁴²

Courts have taken three general views of the admissibility of rules of ethics in malpractice or other actions against lawyers.²⁴³ The most restrictive view, adopted only in Arkansas and Washington, is that the rules are not

236. *Hansen*, 862 P.2d at 122.

237. 703 N.E.2d 1045 (Ind. 1998).

238. Indiana is one of the twenty-one states which permits a lawyer to disclose otherwise confidential information when the lawyer “reasonably believes” that disclosure is necessary to prevent the client from committing “a crime.” See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.6(b)(1). See also *supra* note 184 for the other twenty states which permit such disclosure. Another eighteen states, and the ABA, take the more restrictive view that a lawyer may only disclose information to prevent the commission of a crime by the client which is likely to result in “imminent death or substantial bodily harm.” See *supra* note 183.

239. *In re Goebel*, 703 N.E.2d at 1048

240. See *supra* note 185 and accompanying text.

241. See *supra* note 189 and accompanying text.

242. The scope section of the Model Rules, adopted in the vast majority of jurisdictions, says: “Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.” MODEL RULES OF PROF’L CONDUCT Scope 18.

243. See *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102 (1996) (discussing the admissibility of rules of ethics in civil actions against lawyers).

admissible.²⁴⁴ The second view, adopted in the vast majority of states, is that the rules are admissible if an expert testifies that they reflect the standard of conduct.²⁴⁵ Finally, in Michigan, the rules create a presumption regarding the standard of conduct.²⁴⁶ It is very likely, therefore, that in those jurisdictions which require a lawyer to disclose information to prevent a client from committing a crime which is likely to result in serious, physical harm, the rules will become evidence in a civil trial against a lawyer who did not meet the standard of conduct by failing to warn.

A lawyer, who practices in a jurisdiction where disclosure is ethically discretionary, should not be sanguine. The absence of an ethical obligation simply does not mean that no legal duty exists. Even assuming that the rule of ethics which makes disclosure discretionary is admitted, it will not be difficult for a plaintiff's lawyer to argue that a duty to warn existed because: (1) a special relationship existed between the lawyer being sued and the lawyer's client or the intended victim; and (2) serious bodily injury was foreseeable. Those are the circumstances, of course, which led the California Supreme Court to its holding in *Tarasoff*. And while that opinion has yet to lead to liability for a lawyer, the analysis which led to the holding is neither far-fetched nor easily disregarded.

First, many courts have cited *Tarasoff's* discussion of when a duty exists, focusing on the foreseeability of harm, just as the *Hawkins* court did. Second, there will be cases where a client makes a specific threat to harm an identifiable individual, and that is likely to occur in a case involving domestic violence. Third, in such circumstances, it may be foreseeable, given what the lawyer knows or reasonably believes about the client, that the client intends to carry out the threat. Finally, there will be times where the potential victim is unaware of the threat. In such circumstances, it will be easy for a plaintiff's lawyer to argue, and for the court to find, that the lawyer had a duty to warn because of the foreseeability of the harm. It will then be easy for a jury to find that the lawyer's breach of that duty caused the harm.

Given the ease with which the *Tarasoff* court dealt with the issue of a special relationship, whether a lawyer has a duty to disclose confidential information to protect a third party is, ultimately, a question of foreseeability. That is, is it foreseeable that a client will cause harm to a third party? The only time it is foreseeable is if the client makes a threat to harm a specific, identifiable person, and the lawyer reasonably believe that the client will act on the threat. In such circumstances, the potential

244. See *id.* at 1104.

245. See *id.* at 1105.

246. See *id.*

benefits of breaching the generally confidential attorney-client relationship and taking steps to protect the potential victim seem to outweigh the costs of breaching the confidentiality of the attorney-client relationship and giving a potentially false warning.

VI. SUMMARY

Domestic violence has always been and will likely always be a significant issue. For too long, everyone, including lawyers, pretended it did not exist. As domestic violence has emerged from the shadows, the magnitude of the problem has become apparent, and it is staggering. While we might all wish the problem would just go away, it's not going to, and all of us, especially lawyers, need to modify our behavior to take the problem into account.

The legal and ethical standard for lawyers will likely always be to act reasonably. While that standard has not changed, what a lawyer must do to act reasonably is changing. It is simply no longer reasonable for a lawyer to assert that he or she is not aware of the pervasiveness of domestic violence or its potential impact on the representation of a client. With that knowledge comes an obligation, the obligation to act reasonably to protect a client's interests. The only way to effectively discharge that obligation is to know if a client is a victim or perpetrator of domestic violence. The only way to know if your client is affected by domestic violence is to screen the client for domestic violence.

If screening reveals that a client or prospective client is a victim of domestic violence, a lawyer needs to take at least one more important step. The lawyer needs to either assist the individual in assessing the possibility of future domestic violence (a lethality assessment) or refer her to someone who will perform that assessment. If the lawyer's lethality assessment suggests that the individual is in danger of further domestic violence, the lawyer has another decision to make. Should the lawyer help the individual develop a safety plan or should the lawyer refer her to someone who will? A lawyer's choice to refer a victim or potential victim to an appropriate expert or agency at any stage is perfectly reasonable. Similarly, a lawyer's choice to assist an individual directly is also reasonable provided the lawyer has taken the time to gain an understanding of the dynamics of domestic violence and how to respond properly and promptly. A lawyer's choice to do neither is not reasonable.

Finally, the traditional view that lawyers owed no obligations to anyone other than their clients is changing. The existence of an attorney-client relationship is no longer critical to maintaining a successful civil action

against a lawyer. Although the case has yet to arise, it is only a matter of time before a court imposes liability on a lawyer for failing to warn the victim of a client's intended crime. Many lawyers already have an ethical duty to warn. All lawyers should have a legal duty to do so. ♣

