To Protect or to Serve:
Confidentiality, Client Protection and Domestic Violence

I. Introduction

> *[I]n a cold blooded executioner's style, [he] murdered his wife and his mother-in-law …. The weapon, a shotgun, is hardly known for the surgical precision with which it perforates its target. The murder scene, in consequence, can only be described in the most unpleasant terms…. The police eventually found her facedown on the floor with a substantial portion of her head missing and her brain, no longer cabined by her skull, protruding for some distance onto the floor. Blood not only covered the floor and table, but dripped from the ceiling as well.*[1]

As counsel sits at the courthouse waiting for her client to appear for a civil protective order hearing, thoughts run through the attorney's head. The client is fifteen minutes late, twenty, and then thirty. The judicial assistant has advised that the case will be dismissed in the next fifteen minutes and counsel has already made five unsuccessful attempts to contact the client by telephone. Counsel spoke to the client the night before and confirmed that she would appear for the trial. The client seemed nervous and had some doubts about following through with the matter but agreed to appear. The client is victim of serious physical abuse spanning the past seven years, has made three

[1] Godfrey v. Georgia, 446 U.S. 420, 449 (1980). The description of the murder scene by Justice White in his dissenting opinion in *Godfrey*, joined by Justice Rehnquist, is used merely as an illustration. The facts in *Godfrey* provide the reader with a vivid picture of the heinous and deadly results domestic violence can have on battered women, children and, as in this case, other family members.

unsuccessful attempts to leave her abuser in the past, and has been hospitalized once as a result of a beating she received from her abuser. He fractured her ribs, blackened her eye, broke her tooth, bloodied her mouth and caused contusions to her face and neck. The perpetrator has hit, kicked and slapped the victim on a routine basis. He has threatened to kill her on two prior occasions, neither reported to the police. The victim has been locked in the basement and held against her will for extended periods of time. Further, the abuser has isolated the victim from friends and family to such extremes that all personal relationships have been terminated. There are no neighbors, friends or family members for counsel to call to find out if the client is on her way to court. The victim refused to stay in a shelter and remained in the marital home after obtaining an ex parte order the week prior to the scheduled trial. Pursuant to the ex parte order, the abuser was removed from the household pending the full hearing. Respondent, who has threatened suicide in the past, has not appeared for the trial either. The first thought counsel may have is, "has the victim been threatened or harmed by the abuser in an attempt to prevent her from going forward with the case?" What should counsel do?

One possibility is to request a continuance, informing the judge that counsel is concerned for the victim's safety and can only imagine that the client has a very good reason why she has not appeared. This option can be accomplished without providing any confidential information and simply referring to the information contained in the record from the filing of the civil petition for protection. If the case is continued, counsel has some time to locate the client and proceed with the matter.

A second option is to advise the court that counsel is concerned that some harm has come to the client given the severity of the past abuse in this case and request

guidance from the court. Such an option may require a more extensive dialogue with the court and the need to disclose some confidential information not contained within the petition for protection or the court record.

A third approach is for counsel to contact the police and request that they go to the victim's residence to check on her. However, this option may require the disclosure of confidential information. Suppose counsel chooses to have the police drive by the victim's home only to find the client on her front lawn speaking with neighbors. The client is, at that moment, fine and later advises counsel that she has no interest in pursuing the matter. Does the attorney have an obligation to take further action for the protection of the client under such a set of facts?

A fourth option is to simply do nothing. Allow the case to be dismissed and attempt to reach the client at a later time in an effort to file for protection in the future. Such a decision would be in keeping with a cautious approach to client confidentiality and in support of the autonomy of the victim-client. Would our perspective change, however, if the result is deadly? Imagine the next day counsel picks up the morning newspaper only to find that the client was shot and killed by her abuser.

To determine which of these or other options should be chosen, we must first determine whether it is counsel's role to step beyond the bounds of the attorney-client relationship and become decision maker for the client, a protector or even an extension of law enforcement.

Representing victims of domestic violence presents choices and dilemmas unlike those faced by most lawyers because domestic violence involves shocking and horrible

acts that occur behind closed doors with few, if any, witnesses.[2] The abuse battered women experience is very real. Victims are beaten, burned, kicked, punched, hit, slapped, choked, and threatened with a variety of weapons. Battered women endure a multitude of verbal attacks by their perpetrators in an attempt to denigrate and humiliate them on a daily basis. Sadly, victims are rarely able to free themselves from the violence given the increased risks associated with separation,[3] the dynamics of the abusive relationship,[4] and the failure on the part of our society to provide the battered woman with the resources necessary to safely and permanently stay away.[5]

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[2] The author knows all too well that these situations do occur, having represented clients brutally beaten and in some instances ultimately murdered by their abusers. There is something about having a client killed that forever alters the thought process and deliberation of that attorney in the representation of subsequent clients and the handling of similar situations. As a member of the Delaware bar since 1992, the author has represented hundreds of battered women in court and provided advice to many more representing over 3015 hours of legal advice and service to victims of domestic violence. As the former supervising attorney and now the director of the Delaware Civil Clinic, in partnership with Delaware Volunteer Legal Services (DVLS), law students under my supervision have provided legal advice and representation to 1210 abused women and children. I have also worked with and provided training to many attorneys doing pro bono work through DVLS in their representation of hundreds more battered women.

[3] *See* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 Oct Colo. L. Rev. 19, 19 (1999)(citing Barbara Hart, *National Estimates and Facts About Domestic Violence*, NCADV Voice, p. 12 (Winter 1989) "a battered woman is 75 percent more likely to be murdered when she tries to flee or has fled, than when she stays.")) Perpetrators are typically unwilling to give up their perceived control of the victim even after the battered woman ends the relationship. Such an increased desire on the part of the batterer to regain control over the victim often places the battered woman in greater danger. *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 6-7 (1991)(assigning a name to the invisible link that remains between the battered woman and her abuser once she attempts to end the relationship. Mahoney explains that, "by emphasizing the urgent control moves that seek to prevent the woman from ending the relationship, the concept of separation assault raises questions that inevitably focus additional attention on the ongoing struggle for power and control in the [battering] relationship."

[4] Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68-OCT Fla. B.J. 24 (1994). According to Dutton domestic violence is a pattern of behavior that over time changes the nature of the relationship causing both individuals to understand the "meaning of specific actions and words." *Id*. at 24. Dutton explains that as a result of this special relationship the victim learns to read the abuser's actions, the meaning of which "extends far beyond what is being said or done in the moment." *Id.* The victim learns that a certain look from the perpetrator may mean that she is in significant danger if she does not conform to his wishes, for the battered woman it is this simple act that alters her behavior in such significant ways.

[5] Videotape: Defending Our Lives (Cambridge Documentary Films, Inc.1993). Professor Sarah Buel outlines the total failure on the part of our system to protect and support the battered woman in her struggle to end the violence in her life.

An attorney faced with a client who voluntarily returns to or remains in an abusive relationship will likely have to make difficult choices. This article will discuss situations in which an attorney might wish to notify the authorities about a risk to the client and weigh those situations against his or her duty to maintain client confidences, respect client autonomy and, most importantly, ensure the safety of the victim.[6] For the attorney who wishes to act for the protection of the client, the 2002 amendments to the Revised Model Rules of Professional Conduct, Rule 1.6(b)(1),[7] in particular, may provide a safe harbor in limited situations and in those states adopting the changes. According to Revised Model Rule 1.6(b)(1):

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to prevent reasonably certain death or substantial bodily harm;[8]

All too often the risk of serious physical injury faced by those who endeavor to survive domestic violence is very real. Research, however, shows that future violence is difficult to predict.[9] Cases that appear life threatening may not result in additional acts of violence while others that seem harmless may end in serious injury or even death.

The safest option for the victim may be temporarily to remain in or return to the abusive relationship. For some legal scholars, the decision may appear to be clear, do

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[6] It should be noted at the outset that the writer is not making the case that the issue is as simple as a choice between the protection of life and the protection of information. One would hope that such a dilemma would be resolved in favor of the protection of a human life, but the choice as it relates to domestic violence is not as clear as it may be in any other area of practice. Preventing harm in the context of intimate partner violence may in fact require the protection of information to ensure the protection of a human life. *See infra* Section IX, notes xxx (265-274) and accompanying text.

[7] Model Rules of Professional Conduct Rule 1.6 (2002) [hereinafter Revised Model Rules].

[8] Revised Model Rule 1.6.

[9] *See generally* Symposium, *Playing the Psychiatric Odds: Can We Protect the Public by Predicting Dangerous?* 20 Pace L. Rev. 263 (2000)(detailing the difficulty of predicting risk in domestic violence cases).

what is morally right, not what may be considered professionally correct.[10] Hence, act for the protection of the client even if that should require the unauthorized disclosure of confidential information. But doing what is right is not always as clear as it may seem. The right answer as it relates to duty and integrity in the context of domestic violence may be very different from what seems obvious.

What then is the lawyer to do? Domestic violence cases are complex and do not lend themselves to a one size fits all mentality. Likewise, victims of domestic violence cannot be viewed as a "single group with the same problems."[11] These complex cases involve individuals with unique circumstances which require individualized responses, given the facts of each case.

The attorney who conducts a thorough investigation with the victim-client for the purpose of assessing the case will likely gain information that could be used to assess the risk of harm to a battered woman. As a result, an attorney may be inclined to make rash

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[10] *See generally* Professor Susan R. Martyn, *Are We Moving in the Right Dimension? Sadducees, Two Kingdoms, Lawyers, and the Revised Model Rules of Professional Conduct*, 34 Val. U.L. Rev. 121 (1999). The ultimate outcome of a particular case may depend in part upon the decision making process of the attorney involved. This is particularly true in situations resulting in possible disclosures of confidential information pursuant to Rules 1.6, because it does not mandate action. The attorney is not told what to do but instead is faced with the exercise of discretion. Although beyond the scope of this article, for analysis of the role of morality and legal decision-making *see* Benjamin H. Barton*, The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. Rev. 411, 452 (2005); Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 Cath. U. L. Rev. 45, 46 (1986)(defining morality and moral in varying terms such as right or wrong, good and bad); Gordon J. Beggs, *Proverbial Practice: Legal Ethics From Old Testament Wisdom*, 30 Wake Forest L. Rev. 831, 846 (1995)(Beggs suggests that the ethical practice of law "is not possible absent foundational moral values." His essay is a look at the Old Testament book of Proverbs and uses them as a guide for ethical legal practice.); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 Ohio St. L.J. 551, 609 (1991)(arguing that in the process of balancing legal and moral obligations, attorneys may chose to disregard their duties, "so long as their reasons for doing so are good reasons."); and Samuel J. Levine, *Taking Ethical Discretion Seriously, Ethical Deliberation as Ethical Obligation*, 37 Ind. L. Rev. 21, 48 (2003).

[11] Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 Geo. L.J. 605, 627 (2000).

judgments about the need for legal intervention in a particular case. But rash judgments can prove to be deadly, as the act of disclosure may place the client at greater risk.

The issue, in fact, comes down to who should be making decisions about client safety for an individual who is made fully aware of the risks associated with her actions. If we are to believe that confidentiality "promotes respect for human autonomy by guaranteeing trust and privacy in the lawyer-client relationship,"[12] how are we to behave? The concept of promoting autonomy for our client runs contrary to any argument that we as lawyers are to make life altering decisions for our clients. Instead, if we are to see the battered woman as a strong survivor and not as weak and helpless victim, we can arm her with the information necessary to make critical decisions about her own safety. Moreover, these issues may not be at odds because preventing harm to a battered woman may in fact require the protection of information to ensure the protection of a human life.

And so, the goal of this article is to provide information about the ethical realities of representing battered women. The article begins in Section II with a brief overview of the unique characteristics of the victim-client and provides basic information to help counsel make informed decisions in representing her. The victim of domestic violence is unique given the treatment she has received from her batterer, society and the legal system. It follows that counsel's response to the victim-client must consider those differences.

Section III discusses circumstances under which an ethical dilemma can arise, with concrete examples of the problem as it exists when the client returns to or remains in the abusive relationship.

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[12] *See* Professor Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality…And Its Exceptions…*, 81 Neb. L. R. 1320, 1323.

Section IV considers the special and unique relationship that can exist between the victim-client and her counsel, which is not typically found in other areas of practice. To properly respond to ethical issues, counsel must be aware of this relationship and how the attorney's actions can affect the safety of the victim. The victim-client requires a connection with her counsel different from the standard attorney-client relationship and counsel must learn to adapt to the different requirements of the association to safely represent the client.

Section V discusses the duty of confidentiality and how the rules that guide our profession must be adapted to serve the victim-client. Confidentiality is the foundation of the relationship between any client and her counsel. A client must be able to trust and confide in her attorney to enable the attorney to provide appropriate advice and representation.[13] However, the duty to protect the client's information can cause an ethical dilemma for an attorney desiring to do what is appropriate for a client who faces a serious risk of harm and yet feels she has no choice but to remain in or return to the abusive home.

The attorney's decision whether to disclose to authorities, even if protected, is a difficult one. Section VI will focus on the potential reaction of courts and disciplinary

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[13] *See* Revised Model Rule 1.6, comment 2 for the underlying policies of confidentiality as it relates to the attorney-client relationship ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.")

bodies to issues of protection and confidentiality. The issue is not just a question of client protection but also a matter of ensuring that the attorney's decisions will not be subject to review. Creating a safe harbor for attorneys may provide the assurances necessary to encourage them to engage in the ethical deliberation necessary to reach the best decision for the client.

Section VII will focus on the complex process of predicting harm to the client and provides examples of potentially useful risk assessment tools. Research in the area of risk assessment is very new and there is extensive debate on the usefulness of the tools available. The problems inherent in risk assessment and its influence on the outcome of the decisions made by counsel will be addressed, as will be the extent to which the victim's own assessment of risk should be taken into consideration.

For the victim-client who has been, in many cases, stripped of her independence by her batterer, counsel's attempts to substitute his or her judgment for the victim may only replace "the control of the batterer with the control of [counsel]."[14] Further, what counsel may believe is in the best interest of the client may in fact be the most dangerous decision for a battered woman. Understanding the risks associated with leaving a battering relationship and the need to empower the victim is critical to providing competent representation. Although the Model Rules permit the lawyer to take the steps

[14] Linda G. Mills, *Institution and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA Women's L. J. 183 (1997). Mills considers the issue in the context of mandatory prosecution, arguing that by forcing the decision to prosecute upon the victim the attorney replaces the control of the batterer with that of the prosecutor. *Id.* Mills contends that placing the choice in the victim's hands may be just what she needs to stop the battering and conversely by removing the victim's power counsel may inadvertently force the battered woman to side with the abuser. *Id.* at 190-191.

he or she deems reasonably necessary to protect the client, Section VIII will balance the limited role of Rule 1.14,[15] with the importance of client autonomy in Section IX.

Sections X and XI are designed to provide the practicing attorney with examples of how risk assessment tools and other techniques can be used to enhance representation, minimize the number of times the dilemma arises, and help the client make better choices. Counsel must also understand that risk assessment has its limits and that safety planning is the key to ensuring that the client is equipped with the tools necessary to one day permanently and safely leave an abusive relationship.

The article concludes by suggesting education and training, as well as changes to the Model Rules to help guide the attorney to make better choices and to protect the attorney under those limited circumstances when he or she may need to act to save a human life.

II. The Victim-Client[16]

> *...[women] seek assistance in proportion to the realization that they and their children are more and more in danger. They are attempting, in a very logical fashion, to assure themselves and their children protection and therefore survival. Their effort to survive transcends even fearsome danger, depression or guilt, and economic constraints. It supersedes the "giving up and giving in" which occurs*

[15] Revised Model Rule 1.14 (2003).

[16] Although ethical issues arise in the representation of perpetrators of domestic violence, the subject addressed in this article is the representation of victims of domestic violence only, not abusers. Attorneys who represent perpetrators of domestic violence may very well have a duty to warn potential victims; however, such an analysis is beyond the scope of this examination. For a look at counsel's duty to warn third parties in the context of domestic violence litigation *see* John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 Mich J. Gender & L. 207, 232 (2003). Further, the focus of this examination applies to civil matters, not the criminal prosecution of domestic violence cases. Civil protective proceedings differ from the criminal prosecution of cases in a number of ways. In criminal proceedings the prosecutor makes the decision whether to proceed with the matter or dismiss the case, such decisions can be made with or without the consent of the victim. The difference is significant in the civil context because the decision to proceed is that of the client, not the attorney. If the client decides not to seek protection the civil attorney may not go forward with the case no matter how dangerous the situation or how serious the potential risks faced by the victim-client. In the criminal context, the prosecutor may always choose to proceed for the protection of the victim, as the state is the client, not the battered woman. Whether it is appropriate for the prosecutor to choose to proceed without the consent of the victim is certainly an issue, but it is one that is beyond the scope of this article.

according to learned helplessness. In this effort to survive, battered women, are, in fact, heroically assertive and persistent.[17]

To represent a battered woman,[18] an attorney must understand that her situation is unique. Victims of domestic violence may remain in abusive relationships out of fear,[19] love, shame, denial, background,[20] financial constraints,[21] limited choices, lack of social services,[22] family, children,[23] religion,[24] and even "hope that the abuser will change."[25]

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[17] Edward W. Gondolf and Ellen R. Fisher, Battered Women as Survivors: An Alternative to Treating Learned Helplessness at 18 (Lexington Books 1988).

[18] All reference to the victim in this article will be of the female gender. Although males are victims of domestic violence, statistics reveal that the majority of intimate violence victims are women. *See, e.g.,* Bureau of Justice Statistics Selected Findings: Violence Between Intimates (NCJ-149259), November 1994, (providing that 90 – 95% of all victims of domestic violence are women).

[19] Supporting the view that victims have a realistic fear of their abusers, *see* Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, 1997, p. 47 (providing that 65% of intimate homicide victims physically separated from the perpetrator prior to their death); *See also* Bureau of Justice Statistics Special Report: Violence Against Women: Estimates from the Redesigned Survey (NCJ-154348), August 1995, p.4 (confirming that women separated from their spouses were three times more likely to be victimized by their spouses than their divorced counterparts, and twenty-five times more likely than their married counterparts); *See generally* Neil Websdale, Understanding Domestic Homicide at 33 (1999).

[20] Despite what we would like to believe, our society continues to foster the view that the woman is subordinate to the man and that she should defer to his decisions. Further, some women are raised to believe that they should "stand by" their man no matter what happens in the relationship. *See* Lisa M. Martinson, *An Analysis of Racism and Resources for Aferican-American Female Victims of Domestic Violence in Wisconsin*, 16 Wis. Women's L.J. 259, 281-282 (2001).

[21] Some victims believe that they will simply be unable to survive without financial support from their abuser, a fear that is valid for many abused women. One actual and very unfortunate outcome of battering is homelessness, statistics show that domestic violence is one of the primary causes of homelessness for women and children in the United States. *See* ACLU Women's Rights Project, Domestic Violence and Homelessness (2004) *available at* http://www.aclu.org/WomensRights/WomensRights.cfm?ID=16885&c=173 referring to the National Conference of Mayors, Hunger and Homelessness Survey 71 (December 2003) ("In 2003, 36 percent of U.S. cities surveyed reported that domestic violence was a primary cause of homelessness. These cities included Denver, Nashville, New Orleans, Phoenix, Norfolk, Portland, Salt Lake City, and Seattle."). *See also* Center for Impact Research, Pathways to and from Homelessness: Women and Children in Chicago Shelters 3 (January 2004) ("In 2003 in Chicago, 56 percent of women in homeless shelters reported they had been victims of domestic violence and 22 percent stated that domestic violence was the immediate cause of their homelessness").

[22] Our state and local governments fail to provide the financial resources necessary for battered women to survive. The resources available are not sufficient for many women to feed, clothe and house themselves and their children, nor sufficient to provide for care of those children should the victim attempt to procure employment. Because of the lack of funding, shelters are only able to provide temporary housing for victims and their children. When time runs out, the victim and her children are often homeless. Further, our legal system provides protective orders and yet many hearing officers refuse to provide the financial support necessary to enable victims to remain independent from their batterers. When support is ordered through the court, batterers rarely comply and when they are brought to court for violations of those orders

Many of the reasons victims stay in a violent home are the same forces that lead a battered woman to conclude that her only viable option is to return to the abuser. [26]

Contrary to popular belief, the most dangerous time for a battered woman is not when she remains in the abusive relationship. In fact, the victim of domestic violence is at a substantially greater risk of being killed by her abuser when she attempts to leave him.[27] Given the risks associated with leaving, it is understandable that many survivors of domestic violence are reluctant to end the abusive relationship.

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they are rarely held accountable. As a result of this failure to provide for the victim and her children, we place the battered woman in the impossible position of having to choose between poverty and abuse. *See generally* Defending Our Lives, *supra* note 6.

[23] Perpetrators will use the children as a way of maintaining control over their partner by threatening to harm or kidnap the children if the victim attempts to leave. In the alternative, some batterers will convince the victim that they will be able to gain custody of the children if she leaves given the lack of financial resources available to battered women. *See* Patricia K. Susi, *The Forgotten Victims of Domestic Violence*, 54 J. Mo. B. 231, 232(1998)("In order to protect their children, the victims of domestic violence have little choice but to stay in an abusive relationship perpetuated by the fear that their children will become the focus of the batterer's aggression.") *See also* Deborah M. Goelman, *Shelter From the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000,* 13 Colum. J. Gender & L. 101,106-107 (2004).

[24] Although religion can be a source of strength and support for many victims of domestic violence it can also act as a barrier to ending the abusive relationship. *See* Martinson, *supra* note 21. According to Martinson:

> Many churches are patriarchal and use the scriptures to rationalize that a woman should stay and try to work out the problems of her marriage because she is subordinate under the word of God to her husband. In the traditional American Christian family the father/husband is the decision-maker and authority figure for the family. The decisions of the father/husband are not to be questioned. For example, "one minister told a sociologist that wife-beating was on the rise because men are no longer leaders in their homes." Research on domestic violence shows that "one of the significant factors contributing to a woman staying in an abusive relationship is a traditional religious belief that the man is to be obeyed." *Id.*

[25] See Kathleen Waits, *Battered Women and Their Children: Lessons From One Woman's Story*, 35 Hous. L. Rev. 29, 43 (1998). Waits finds that statistics lack the personal element necessary when telling the full story of domestic violence. In an effort to demonstrate the personal side to the issue, Waits conveys the story of "Mary" a victim of domestic violence. In her story Mary explains that "battered women stay with their abusers out of hope and fear. They hope the batterer will change; they fear what might happen if they leave." *Id.* The contradictory nature of such a statement captures the complexity of the battered woman's situation as she seeks to live both an ordinary and safe life.

[26] *See generally,* Buel, *supra* note 6. Buel provides a comprehensive look at the real life difficulties that survivors of domestic violence face trying to end the violent relationship and offers concrete reasons why a victim may be forced to remain in or return to the batterer.

[27] *See* Buel, *supra* note 6. For an extensive discussion of the danger level faced by the battered woman when she attempts to leave the perpetrator *see* Sharon L. Gold, *Why are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws,* 91 Ky. L.J. 935, 940 (2002-2003). Gold explains that when the victim leaves the abuser the perpetrator's power is threatened because he has lost his control over the victim. Thus, he is likely to resort to more serious

The system's historic apathy also makes the battered woman's plight unique.[28] Survivors of domestic violence have been blamed for their circumstances and, in many instances, punished for the actions of their abusers.[29] Historically, police have been slow to react to domestic calls, refusing to arrest perpetrators, [30] and leaving the victim to fend for herself.[31] The message has been loud and clear, your safety is not a priority.

Our system of justice inconsistently enters orders of protection, inadequately enforces those orders when they are entered and fails to provide the resources necessary

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measures to prove his power over the victim, which may include ultimately killing the battered woman. *Id*. *See also* statistics *supra* note 20.

[28] *See* Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 Suffolk U.L. Rev. 983 (1998).

[29] *See* Nicholson v. Williams, 203 F.Supp. 2d 153 (E.D.N.Y 2002). The *Nicholson* case provides a good example of how our society fails to hold the abuser accountable for his actions. The Court in *Nicholson* found that New York's child welfare system was punishing the victim for the actions of the perpetrator because it was "simply easier" to take children away from their mothers than to hold the perpetrator accountable. Further, although the agency had the ability to force the removal of perpetrators from the home, the court found that they rarely did so. *Id*. at 210. The court quoted expert Laura M. Fernandez who explained that this sends a message to victims that they are "more responsible for getting help and more 'sick' for being in an abusive relationship than the actual person who committed the violence." *Id*. at 211.

[30]Women seeking protection from their abusers continue to advise our legal clinic that police officers still choose to allow the perpetrator to leave for a period of time to "cool off," instead of making an arrest. A recent illustration of the issue involves the facts in *People v. Jones*, 3 N.Y.3rd 491, 493 (2004), which support the position that the police continue to refuse to arrest perpetrators of domestic violence. In *Jones* the defendant was convicted of manslaughter in the death of his live-in girlfriend. At the trial evidence was presented that the police, prior to the killing, asked the defendant to leave "… the premises for a short time to cool off." When Jones returned to the home, an argument ensued and the victim was subsequently killed. *Id. See also* Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation,* 68 Fordham L. Rev. 1285, 1294 (2000)*(*citing Eve S. Buzawa & Carl G. Buzawa, Diomestic Violence: The Criminal Justice Response 51 (1996) "Studies have shown that in domestic abuse situations, there is 'still persistent bias against the use of arrest,' and the more closely related the two parties are, the less likely officers are to arrest." Tsai explains that one factor encouraging this failure on the part of officers to arrest perpetrators of domestic violence is departmental policies.). S*ee also* Jane Gordon, When Police Are Caught in the Middle, New York Times, January 23, 2005 at 3. As recent as January 2005, a spokesman for the Connecticut State Police, Sargent J. Paul Vance, admitted that domestic violence police training is relatively new. He explained that in the past officers would respond slower to subsequent domestic disputes from the same address and acknowledged that officers were known to respond to domestic calls by having people "cool off." *Id.*

[31] *See generally* Thurman v. City of Torrington, 595 F. Supp. 1521 (1984). The Torrington case provides terrifying insight into the way law enforcement has historically responded to victims of domestic violence. The court acknowledged that the police failed to protect Tracey Thurman over an eight month period ending with her abuser brutally assaulting her. Ms. Thurman was stabbed in the chest, neck and throat; beaten; kicked; and threatened. The facts reveal that some of these final abusive acts occurred while at least one officer stood by and watched. *Id*. at 1525-26. *See also* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1851 (2002) (relying on Del Martin, Battered Wives 93 (1976); Murry A. Straus et al, Behind Closed Doors: Violence in the American Family 232-33 (1980)).

for victims and their children to remain safe and independent.[32] Key players such as judges, lawyers and the police fail to understand the dynamics of intimate abuse and the impact their actions will have on the safety of the victim.[33]

Abusers are often master manipulators who use any means available to prevent their victims from leaving. If threats to harm the victim are unsuccessful, the abuser may threaten or harm what the victim cares about more than herself, such as other family members,[34] pets,[35] or personal items.[36] In many domestic violence cases, despite the

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[32] ACLU Women's Rights Project *supra* note 22.

[33] The decisions made by lawyers, judges and other interveners can have similar dangerous consequences to victim safety as do the decisions made by the victim herself. For example, if a judge enters an order of protection but fails to provide the relief necessary for the battered woman to survive on her own, she will be forced to return home only to face greater danger. To enter a protective order which fails to provide the financial support necessary for the victim to survive on her own can, in some instances, be as useful as providing no protection at all. Hence, the legal system needs to address the whole problem and respond accordingly given all the needs of the victim.

[34] Godfrey v. Georgia, 446 U.S. 420 (1980).

[35] The author has encountered countless women and children who survive the violence only to live with the memory of the horrors inflicted by their abusers on the family pet. In one case in particular the perpetrator timed his act so that the victim and the children would arrive home after school to find the horrifying scene of the family pet hacked into so many pieces that it took several garbage bags to clean up the bloody mess. The perpetrator knew that his act would strike fear in the victim, who had just advised him the prior evening that she wanted a divorce. The message is clear, "Leave me and this will happen to you." For more on the subject s*ee* Howard Davidson, *The Link Between Animal Cruelty and Child Maltreatment*, ABA Child Law Practice, June (1998) *available at* http://www.abanet.org/child/8-4tip.html ("A survey of women seeking refuge in a Colorado Springs domestic violence shelter found 23.8% had observed animal cruelty by their abusers, and a similar study in Utah found 71% of battered women with pets reporting their animals had been threatened, harmed, or killed by their abusers. Another study of battered women's shelters found more than 60% of shelter directors reporting that children disclosed pets being hurt or killed.") See also Melissa Trollinger, *The Link Among Animal Abuse, Child Abuse, and Domestic Violence*, 30-SEP Colo. Law. 29 (2001) (confirming the link between animal abuse and domestic violence). *See also* Gareth Rose, Pets suffer more as cruelty worsens, 2005 WLNR 11517677(citing a spokeswoman for a local SSPCA, "And in some cases pets are used as pawns in blackmail threats by controlling partners. You get instances where one partner, usually the man, says: 'If you don't do what I tell you I will beat the dog.' We had one case where a man killed a Labrador puppy in front of his wife and children.") *Id.*

[36] In recognition of the power an abuser holds over a victim by the act of destroying her property, some states include the destruction of property in their definition of domestic abuse. *See, e.g.,* 10 *Del. C.* §1041(c) ("Intentionally or recklessly damaging, destroying or taking the tangible property of another person" is considered abuse pursuant to Delaware's protection from abuse act.) *See also* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2121. According to Fischer, abusers often destroy personal property "in an effort to gain control" over the victim "or keep them in a state of fear." *Id*. In support of her position Fischer cites her unpublished Ph. D. thesis on file with the author: Karla Fischer, *The Psychological Impact and Meaning of Court Orders of Protection for Battered Women* at 62 (1992)(as part of the thesis interviews were taken of 83 battered women. Fischer found that 70% of the women surveyed acknowledged that the abuser destroyed personal items.)

serious nature of the abuse, there is little or no provable evidence of those acts of violence. Intimate violence usually occurs under circumstances that provide few, if any, witnesses.[37] Those who do witness the violence are often incapable of articulating the acts due to their tender age or as Leigh Goodmark explains, are too frightened to provide any meaningful information.[38]

To further compound the problem, many victims who turn to the police or our courts for help are mistreated by the system.[39] For example, family services and our courts remove children from the custody and care of women simply because the children observe the perpetrator beat and abuse these survivors.[40]

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[37] Information based on the representation of hundreds of battered women seeking civil protective orders against their abusers. A majority of the battered women seeking protection have been isolated from family and friends who are unable or unwilling to appear at trial on the victim's behalf. Moreover, because of the nature of intimate abuse there are typically few, if any, adult witnesses to the acts of violence.

[38] Information based on extensive work with child witnesses in domestic violence and related custody trials. *See also* Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. Va. L. Rev. 237, 295-296 (1999). Goodmark explains that children are faced with unique problems when asked to testify in a case that involves family members who have engaged in domestic violence. "Child victims and witnesses often feel responsible for the abuser's actions, especially when a family member is committing the abusive acts. Children are pressured by their parents to testify/not testify, fear physical retribution if they do testify, and often don't want to take sides. Children become 'informational pawns, caught between two beloved parents and facing catastrophic loss no matter how they choose' to testify." *Id.*

[39] *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Role of Prosecutors, Judges and the Court System*, 11 Yale J.L. & Feminism 3, 39 (1999)("Most judges come to the bench with little understanding of the social and psychological dynamics of domestic violence and, instead bring with them a lifetime of exposure to the myths that have long shaped the public's attitude toward the problem." Epstein explains that such a lack of knowledge causes judges and others in the court system to become frustrated with the victim.) *See also* A. Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of A Realistic Legal Definition of Battered Woman Syndrome*, 3 Am. U. J. Gender & L. 117, 120 (1994) ("Society's growing awareness of the prevalence of domestic violence resulted in an increasing perception that women were victimized not only by their partners, but also by an uncaring judicial system.")

[40] Nicholson v. Williams, 203 F. Supp.2d 153, 250 (E.D.N.Y. 2002) (finding that the Administration of Children Services (ACS) had a policy and practice of removing children from the care of their mothers based solely on the fact that these women were victims of domestic violence, in violation of their procedural and substantive due process rights). *See also* Nicholson v. Scopetta, 820 N.E.2d 840 (2004)(considering three certified questions of law: (1) does the definition of neglected child include instances in which the sole allegation of neglect is that the parent allows the child to witness domestic violence; (2) can witnessing domestic abuse constitute danger or risk; and (3) whether witnessing abuse is sufficient for removal of a child pursuant to the State's laws. As to the first questions, the Court held that more than merely witnessing domestic violence is necessary to find the child has been neglected. *Id.* at 844. In considering the second question the court held that the standard is a "stringent one" and that "…

It is with this multitude of problems in mind that victims are faced with the difficult decision of how and when to safely leave. The complex decision making process[41] of the victim-client may result in an outcome that could cause a moral or ethical dilemma for counsel. Consequently, the issues faced by an attorney representing battered woman,[42] far surpass the rules that guide our profession and call into question the moral values of the lawyer.[43]

III. The Problem

> *...the average domestic violence victim leaves and returns to their relationship five times. [They have been] battered an average of three times before law enforcement or before anybody even knows that there is a problem. That[ ] ... [is] clouded in a tremendous amount of shame and a tremendous amount of secrecy. Leaving is a process like it is for any relationship, the dissolution of any relationship is a process. Very rarely do we wake up one day and say, 'Okay. I'm done. See you later... Even though we know that it's bad, there's a process that*

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emergency removal is appropriate where the danger is so immediate… that the child's life or safety will be at risk before an ex parte order can be obtained." *Id*. at 853. Finally, the Court found that "… there can be no 'blanket presumption' favoring removal when a child witnesses domestic violence." *Id*. at 854. *See generally* Maureen K. Collins, *Nicholson v. Williams: Who is Failing to Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services to Better Protect and Support Battered Mothers and Their Children*, 38 New Eng. L. R. 725 (2004)(addressing the need for collaboration among the domestic violence community and child welfare agencies to better serve and protect victims and their children).

[41] *See* Burman, *supra* note 17, at 213 ("… a victim's reaction to domestic violence often appear counter-intuitive, [and therefore] traditional approaches and assumptions to resolving a client's problem may prove ineffective in meeting a client's objectives.") For further clarification *see* Callahan *supra* note 39, at 150-151 (explaining that although the battered woman's decision to remain in the abusive relationship at first glance may appear irrational, further consideration of the barriers she faces leaving demonstrate that her actions are in fact reasonable.)

[42] It should be noted that there are many attorneys representing battered women who do not focus on domestic violence work in particular and are not familiar with this specialized area of practice. For an general overview of the malpractice issues inherent in the representation of abused women *see* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 Fam. L. Q. 7 (2005)(considering how often family law attorneys are willing to retain experts or seek outside assistance for complex issues unfamiliar to counsel. Drew raises the question, "Why then are family law practitioners so willing to risk malpractice by ignoring the facts and circumstances of family law cases that arise around issues of domestic violence?" *Id.* at 9. Drew explains that there is no reason why an attorney should handle these complex cases alone, for the client who has sufficient funds the lawyer can hire experts, for those who do not, shelters and domestic violence advocates can provide the support and guidance necessary. *Id.* at 25).

[43] According to the preamble although many of a lawyer's professional responsibilities are prescribed in the rules, a lawyer is also guided by personal conscience. The guiding principle requires that the attorney balance his or her personal conscience with conflicting duties to the client and the court, not an easy task for any individual. *See* Revised Model Rules of Professional Conduct, Preamble.

> *has to go on in terms of mourning and grieving and all the things that we do, domestic violence [victims] do that, too. So the process is not different for them. The stakes are a little bit higher in terms of their safety….*[44]

The adult client,[45] who returns to the abusive relationship, presents a moral and ethical dilemma for the attorney. If the battered woman returns to the abusive home and into serious danger, is it the responsibility of the lawyer to disclose confidential information to protect the client? This issue regularly presents itself in domestic violence

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[44] People v. Basulto, 2003 WL 22456800, 4 (Cal.App. 2 Dist.), quoting the testimony of Jeri Darr, expert witness in the area of domestic violence.

[45] This article does not address the child-victim or the adult-victim with children. The writer has chosen not to address the issue as it relates to the protection of children or risks associated with remaining in the abusive home when children are involved. Such a discussion is beyond the scope of this article and would require the extensive attention of a separate piece devoted to the issue of child protection alone. Admittedly, the mere fact that a child is present in the abusive home can drastically change the process of deliberation, as we are no longer dealing solely with a knowing adult victim who can make informed decisions for herself. Now there exists a living human being who in most cases is incapable of extracting him or herself from the situation. The issue of child protection has been hotly debated among legal scholars with some contending that the decision to remain in the abusive home is the safest action for both the victim and her children. *See* Gold, *supra* note 28, at 940. While others argue that children are the "forgotten victims" of domestic violence and that the violence they observe has both short and long-term effects on the child. *See* Susi, s*upra* note 24, at 231 The use of the words "decision" or "choice" as they relate to a victim remaining in a battering relationship, however, is an ineffective way of considering the problem. For too long our society has focused on the victim's actions and pondered the matter in relation to the victim's need to remove herself from the situation. *Id.* at 232. Instead, if we agree that it is the perpetrator who should be held accountable for his actions and not the victim, we can stop blaming the victim. *Id.* But regardless of who is to blame for the violence, one fact remains, if the victim fails to seek assistance and as a result her children continue to reside in an abusive home, is there a duty on the part of counsel to act for the protection of the children? The answer to this difficult question may depend in part on the nature of the abuse and the laws of the particular state where the attorney practices. Fortunately, ethical reflection on the reporting of child abuse by lawyers who represent victims of domestic violence has been the subject of attention by legal scholars. *See generally* Christine A. Picker, *The Intersection of Domestic Violence and Child Abuse: Ethical Considerations and Tort Issues for Attorneys Who Represent Battered Women With Abused Children*, 12 St. Louis U. Pub. L. Rev. 69 (1993). According to Picker:

> The measure of whether to impose a duty on attorneys to report child abuse must be whether it protects children. The majority of abused children are better off with their mothers…. if women are discouraged from seeking restraining orders because they are fearful their attorney may contact DSS, not only is the woman harmed, but so are the children.

Id. at 105. Picker further suggests that requiring counsel to report child abuse will not help the children if our social service agencies are ill equipped to respond appropriately in domestic violence cases. *Id.* at 112. *See also* Robin A. Rosencrantz, *Rejecting 'Hear No Evil Speak No Evil': Expanding the Attorney's Role in Child Abuse Reporting,* 8 Geo. J. Legal Ethics 327 (1995); Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases,* 64 Fordham L. Rev. 1621 (1996).

cases.[46] Either the client decides not to file for protection after consulting with counsel, fails to appear at trial, chooses to withdraw a petition for protection prior to trial, or seeks to rescind a civil protective order once it has been entered by the court.

The most difficult situation involves the client who seeks representation and divulges confidential information which leads counsel to "reasonably"[47] conclude that the victim is in danger of serious bodily harm or death. Subsequent to the consultation and prior to any legal action through the court system, the client chooses to remain in or return to the abusive relationship for a variety of reasons.[48] As a result, counsel is left wondering what, if any duty, he or she has to protect the client.

The first option an attorney may choose is to advise the client to follow through with seeking protection.[49] Such a dialogue, however, is likely to prove unsuccessful. What next? Should the attorney divulge confidential information to protect of the client? If so, to whom should the information be provided? The option of disclosure should be an option of last resort for the domestic violence attorneys because the victim-client, in particular, must be able to rely on the belief that counsel can be trusted. As we know

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[46] Information based on years of experience representing countless battered women seeking civil protection orders against their abusers, as well as information from other practitioners working in the field of domestic violence.

[47] Revised Model Rule 1.6. The reference to the term reasonably comes from Revised Model Rule 1.6(b)(1). Comment 6 of Rule 1.6 describes "reasonably certain" in terms of the likelihood of harm taking place. The comment provides that the "harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that the person will suffer such harm at a later date if the lawyer" does not act.

[48] It should be noted that the words "choose" or "choice" in the context of a battered woman's decision to return to or remain in an abusive home are used with some hesitation, given the possibility that the statements will be misconstrued. The choice is in fact one that is forced upon the battered woman by the abuser, society, social service agencies and a general failure on the part of our legal system to adequately respond to the needs of the battered woman. For an overview of why the battered woman is unable to leave the perpetrator s*ee generally* Buel, *supra* note 6.

[49] Revised Model Rule 1.6. Comment 14 of Rule 1.6 suggests that an attorney should first seek to counsel the client to take appropriate action to eliminate the need for disclosure. Revised Model Rule 2.1 provides guidance as to the lawyer's duty to "provide straightforward advice expressing the lawyer's honest assessment." *Id.* and Comment 1. The obligations pursuant to Model Rule 2.1 are beyond the scope of this article.

from the information available, it can take a victim of domestic violence five or more attempts to leave an abusive relationship before she is able to successfully stay away.[50] The battered woman often does not have adequate resources available to remove herself from the abusive relationship or to successfully free herself from the batterer. Financial reasons alone, not considering other factors, cause many victims to return. In fact, the greatest cause of homelessness for women and children in the United States is domestic violence.[51] If a victim is not truly ready to break free from the abusive relationship, a decision to divulge confidential information may in effect cause the victim to remain in the battering relationship longer in the future. If the victim comes to believe that her lawyer cannot be trusted she will be reluctant to turn to the legal community in the future.

If a court is involved, it would be logical to expect that a hearing officer would intervene and address safety issues with the victim prior to dismissing the petition or order. This expectation, however, would not be well founded. Infrequently judges do refuse to terminate civil protective orders given the seriousness of the allegations of abuse but it is not predictable.[52] Judges have been known to rescind protective orders without questioning the safety of the litigant and, in extreme cases, have even advised the victim that they are granting their request to rescind the order but, as a condition, they never want to see that victim back in their courtroom again.[53]

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[50] People v. Basulto, 2003 WL 22456800, 4 (Cal.App. 2 Dist.), quoting the testimony of Jeri Darr, expert witness in the area of domestic violence; Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution*, 28 Seattle U. L. Rev. 301, 319 n.133 (2005) (citing Elaine Weiss, Surviving Domestic Violence: Voices of Women Who Broke Free 41 (2000), providing that "[s]tatistics indicate that, on average, battered women return to their batterers five times before they leave for good.").

[51] *See* ACLU Women's Rights Project, *supra* note 22.

[52] Information based on twelve years of experience representing battered women and data gathered from student observations of civil protective order hearings as a requirement of their domestic violence seminar course (on file with the author).

[53] Information based on data gathered from student observations of civil protective order hearings as a requirement of their domestic violence seminar course (on file with the author). *See also* Epstein, supra

Similarly, counsel for the battered woman may have concerns regarding the victim's return to the abusive relationship and in response could request permission to withdraw from the case on the grounds that the client insists upon taking action with which the lawyer has a fundamental disagreement.[54] Withdrawing from a domestic violence matter, however, rarely solves the problem or reduces the danger.[55] Further, upon considering a motion to withdraw, it is doubtful that the court will understand the attorney's cryptic message that the client's desire to rescind the protection order is not in the client's best interest.

Some would argue that an attorney who learns that a battered woman will remain in or return to what can reasonably be defined as a dangerous relationship, should take steps to protect that individual and "save" her from the abusive relationship.[56] Others argue that it is critical to support the victim, provide her with the appropriate resources, but under all circumstances allow her to maintain autonomy.[57]

Counsel must also understand why a victim might remain in an abusive relationship.[58] The two leading theories that attempt to explain why the victim remains in an abusive relationship are *Learned Helplessness* and the *Survivor Theory*.

The theory of Learned Helplessness was fashioned by Lenore E. Walker in 1979, in her revolutionary and controversial book *The Battered Woman*.[59] Walker uses Martin

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note 39, at 40 (explaining that as a result of their lack of understanding of the dynamics of domestic violence, some judges mistreat victims when they seek assistance after dropping a prior charge or civil protective order. Epstein provides an extreme example of a Judge in North Dakota who told a victim, "If you go back [to the perpetrator] one more time, I'll hit you myself.")

[54] *See* Revised Model Rule 1.16 (2003).

[55] If the attorney withdraws from the case another lawyer or the judge must deal with the problem. Moreover, the client receives the message that counsel is no longer willing to assist her should she need representation in the future, a message that the attorney may not have intended to communicate.

[56] *See* Mia McFarlane's discussion on the desire to "rescue the victim," *infra* Part IX, note 268 and accompanying text.

[57] *Id*.

[58] *See* Buel, *supra* note 6 (providing a comprehensive list of reasons why domestic victims stay).

Seligman's scientific research on dogs, which showed that "noncontingent negative reinforcement" could cause the loss of motivation to respond, as a basis for why the battered woman remains in the abusive relationship.[60] As part of Seligman's work he placed dogs in cages and administered electrical shocks at random, the animals learned that they could not control the shock not matter what their response.[61] Although the dogs attempted to escape initially, they soon learned that nothing they did stopped the violence. Those conducting the experiments concluded that as a result of the shocks, the "dogs ceased any further voluntary activity and became compliant, passive, and submissive."[62] The researchers altered the experiment by leaving the doors to the cage open, allowing the dogs an escape route. The dogs however, did not attempt to escape or avoid the shocks and "it took repeated dragging of the dogs to the exit to teach them how to respond voluntarily again."[63] Walker likens the battered woman to the dogs in Seligman's experiments and portrays her as a weak and "helpless" individual who has been beaten into submission.[64] She explains how repeated battering diminishes the victim's motivation to respond causing her to become passive.[65] Walker provides that the theory has three basic components: (1) information about what will happen; (2) cognitive representation (i.e., learning or expectation); and (3) behavior, explaining that the second component is what is critical to the theory of learned helplessness; if the individual believes that she has no control, even if that it not accurate, she will act according to her

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[59] *See generally* Lenore E. Walker, The Battered Woman (1979).
[60] Walker at 45-47.
[61] *Id*.
[62] *Id*.
[63] *Id*. Walker discusses similar experiments conducted on cats, fish, birds, rats and other animals to support the phenomenon of learned helplessness. The concept, however, of comparing a battered woman to a dog or other animal shocks the conscience.
[64] *Id*. ("Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, 'helpless'.")
[65] *Id*. at 44 – 54.

belief.[66] Walker's solution to the plight of the victim who is experiencing learned helplessness is to persuade her to leave the batterer, a psychological "dragging" of the victim from the abusive relationship.[67] She suggests that the victim must learn that she can control what happens to her, possibly through psychotherapy or counseling. Such a notion, however, supports the view that it is the victim and not the abuser who is in need of treatment.[68]

Edward Gondolf and Ellen Fisher reject Walker's theory and propose that the battered woman is a survivor who responds to battering through help-seeking efforts.[69] Gondolf and Fisher explain that past research in the area of domestic violence has addressed the wrong question, "Why do battered women return to their batterers?"[70] The authors explain that the question we should be asking is why do we allow this abuse to continue?[71] Through this alternative theory they explain that if the battered woman is provided with appropriate resources she will be able to remove herself from the abusive relationship.[72] According to research conducted by Gondolf and Fisher, victims make an "average of five out of eleven positive efforts to stop the abuse."[73] They argue that the victim seeks help in relation to her safety and the safety of her children. Further, that the battered woman has not learned to be helpless but has in fact made a conscious choice to

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[66] *Id.* at 47. ("Once we believe we cannot control what happens to us, it is difficult to believe we can ever influence it, even if later we experience a favorable outcome.")
[67] *Id*. Walker's use of the word "dragging" is not in the literal sense but in terms of the victim's need for some undefined psychological cleansing before she can truly rid herself of the batterer.
[68] The writer has a fundamental disagreement with the notion that the victim is in need of psychotherapy. Such a theory only supports the misguided belief that it is the victim and not the abuser who should receive treatment.
[69] Gondolf and Fisher, s*upra* note 18, at 11.
[70] *Id*. at 3.
[71] *Id.*
[72] *Id*.
[73] Callahan citing Gondolf and Fisher, *supra* note 39, at 125.

maintain the relationship because it is simply safer to do so.[74] They describe the victim who remains in the abusive relationship as a "heroically assertive and persistent individual,"[75] debunking the theory that the battered woman is passive and helpless. According to the survivor theory, the problem lies with society and its ineffective response to victims, leaving them no meaningful and safe way out. [76] Others who have considered the help-seeking strategies of the battered woman maintain that research available on this subject supports Gondolf and Fisher's belief that the victim does in fact respond to domestic violence through help-seeking efforts and not by helplessness.[77]

The theory an attorney accepts will ultimately influence his or her response to the victim-client's decision to remain with the abuser. Those who support a *Learned Helplessness* theory may argue that the victim must be rescued from the abusive household at any cost, even at the price of compromising client safety. Those who agree with the *Survivor Theory* may conclude that the victim is the best predictor of her own safety and that in order to assist her in eventually and safely removing herself from the abuse, counsel must protect her confidences, win her trust and provide her with an open door through which she will one day safely walk.

IV. The Unique Relationship

> *Believe her. When a victim seeks legal assistance, she is trusting you despite the fact that she has been betrayed by others…. Understand that you alone are not responsible for saving any person's life...*[78]

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[74] Gondolf and Fisher, *supra* note 18, at 17-18.
[75] *Id.* at 18.
[76] *Id.* at 18-19. The survivor theory supports the view that it is not the victim, but instead the abuser who needs to change his behavior.
[77] Callahan, *supra* note 39, at 128.
[78] *See* American Bar Association Commission on Domestic Violence, *The Impact of Domestic Violence on Your Legal Practice* at I-2 (1996) (quoting *A Letter to Lawyers* by Melissa Morbeck, a survivor of domestic violence).

It is important to understand that the special relationship between the attorney and the battered woman must alter and influence the lawyer's decisions in determining how and when to act for the protection of the victim-client.

An attorney-client relationship is one based on trust and confidence. [79] The "core component"[80] of that relationship is the preservation and protection of confidential information. Legal scholars have described the duty of confidentiality as an integral part of the "trusting relationship."[81] Further, courts have held that not only is confidentiality the cornerstone of the attorney-client relationship but that a client seeks representation not simply to win the case, "…. but for the peace of mind that their interests are being taken into account and protected."[82] The rules that guide our profession similarly define the fundamental principle of the relationship as the attorney's protection of information that relates to that relationship.[83]

In contrast, the domestic violence relationship is one of distrust and fear. Victims learn that they cannot rely on those who society suggests should love and protect them. As a result, the victim-client may be slow to believe others who are placed in a position of protecting her interests. In order for a victim to feel safe with her attorney she must learn to trust counsel and be secure in the knowledge that confidences will not be betrayed.

Because of the unique relationship between the victim and her attorney, counsel must be acutely aware of how his or her actions will affect the victim's decision-making

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[79] *See generally* Geoffrey Hazard and William Hodes, The Law of Lawyering (3rd ed. 2001). xxx
[80] In re Thomas Pressly, 628 A.2d 927, 931 (Ver. 1993) (mandating discipline for counsel's disclosure of confidential communications.)
[81] *See* Martyn, *supra* note 12, at 1328 (2003)("Confidentiality promotes both the individual rights of citizens and the trust that is central to a client-lawyer relationship. It is a fundamental ethical value, part of the implied understanding integral to a trusting relationship.")
[82] *In re* Thomas Pressly, 628 A.2d 927, 931 (1993).
[83] Revised Model Rule 1.6, Comment 2.

now and in the future. Counsel must earn the victim's trust through a series of interactions demonstrating to the battered woman that the attorney understands her plight and will act in a manner that is in keeping with the victim's choices regarding her case.[84] All victims of domestic violence are unique and will require a different time table. Some victims will be slow to trust their counsel and others will welcome the relationship and have confidence in their attorney rapidly. Similarly, some attorneys will have the ability to connect with particular victims-clients in a greater way than with others.

Further, victims will not always fit the prototypical mold of what society envisions for them. Some women are strong survivors, which may lead counsel and others to questions the veracity of their stories.[85] Attorneys, judges and others may ask, "If she is so strong, how could she have lived in the abusive relationship for so long?" Other victims will come to the table with problems such as drug or alcohol use or abuse which can cause counsel to judge them and possibly find them to be less deserving of assistance because of these challenges. According to Julia Weber, one result of a victim's substance abuse problem may be a shift in the court's focus from the issues of domestic violence and the perpetrator, to the parental fitness of victim.[86] Somehow the battered woman is now seen as responsible for her problems.[87] For a victim of domestic violence, this can be the ultimate betrayal from a system that asked her to come and seek

[84] *See* Revised Model Rules 1.2, for the attorney's ethical obligation to "abide by the client's decisions".
[85] *See* Linda Kelly, *Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act,* 92 Nw. U. L. Rev. 665, 700 (1998). Kelly explains that, "to avoid the misconception that all battered women are 'helpless victims,' special concerns are raised when confronted with a female victim who appears to be a 'strong' woman, expressing not only strength, but anger, aggressiveness, or power." Kelly cautions that "restraint must be practiced" to ensure that the victim is not denied "credibility" as a result of her strength. *Id.*
[86] *See* Julia Weber, J.D., M.S.W., *Domestic Violence Courts,* 2 J. Center for Families, Child. & Cts. 23, 26 (2000).
[87] *Id.*

help only to respond to her plight by declaring that the abuse is in some way her fault.[88] The legal profession must move beyond these, as well as other stereotypes, to meet our professional duty to provide competent representation to clients who come to the table with multiple and complex issues.

As noted above, it can take a survivor of domestic violence five or more attempts to leave the abusive relationship before she can permanently and safely stay away.[89] Unlike other areas of practice, the victim-client may seek advice from counsel over an extended period of time before she is prepared to take action. Further, we have seen that mandatory arrest initiatives and "no drop" policies which attempt to force the victim to leave her abuser before she is ready can backfire.[90] The adult victim must be prepared to leave on her own accord. If the victim has learned from past experience that she is unable to trust her attorney, it is unlikely that she will seek assistance from any lawyer in the future. Victims who return to an abusive relationship and then learn that counsel has violated their confidence will quickly learn that the relationship is not one of trust.

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[88] *Id*. Weber describes this phenomena as the "bait-and-switch," explaining that:

> In this scenario, a mother experiencing domestic violence seeks recourse in the family court. The court, faced with the need to make a decision regarding child custody, considers both parties' behavior and decisions within the context of the relationship…. From the court's standpoint, there may be genuine concern about a child's well-being for a number of reasons. For example, the court may have evidence of an abused parent's drug use…. However, in this scenario, from the standpoint of the victim the guiding principle of 'best interest of the child' ultimately pits the state against a mother who chose to access the court system.

Weber maintains that at such a point the court is concerned with child safety only, to the detriment of the victim and her safety concerns, in the end the result could be detrimental to the help-seeking efforts of victims. *Id*. at 27.

[89] King-Ries, s*upra* note 50.

[90] *See generally* Linda G. Mills, *Institution and Insight: A new Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA Women's L. J. 183 (1997)(data suggests that arrest actually increases violence for some women and that mandatory prosecution may be harmful to the victim in some cases); *Contra* Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA Women's L. J. 173 (1997)(rejecting the argument that choice empowers the victim and counters with the position that "[s]upporters of 'no drop' domestic violence policies realize that empowering victims by giving them the discretion to prosecute, in actuality, only empowers batterers to further manipulate and endanger their victims' lives…").

Further, if the attorney as a representative of the legal system is seen as a traitor, the legal system becomes a system to distrust for the battered woman.

V. The Rules that Guide Us

An uncertain privilege…. is little better than no privilege at all.[91]

The history and transformation of the duty of confidentiality is important in the context of client protection because that history provides insight into how we come to know one of the most liberal exceptions to the duty to protect client communications to date. The 2002 changes to Model Rule 1.6(b)(1), allow the attorney to act for the protection of any individual whom the lawyer is reasonably certain faces substantial bodily harm or death.[92] The rule no longer requires that the disclosure be dependent upon the client's intent to commit a criminal act that would result in physical harm or death, but can be made pursuant to a "broader" set of circumstances .[93] This new exception opens the door to an unlimited number of situations upon which the attorney might act for the protection of the client or other individuals, while providing little guidance on how and when to apply the rule. Moreover, the new exception creates an uncertainty for the client who puts her trust and faith in an attorney she believes will keep her confidences.

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[91] Upjohn v. United States, 449 U.S. 383, 393 (1981).

[92] Revised Model Rule 1.6(b)(1)(2002). *See* American Bar Association, Report 401, amendments to model rules of professional conduct (ethics 2000) to the house of delegates (2002) (According to the report's explanation of changes, "[t]he commission is proposing a substantial expansion of the grounds for permissive disclosure under Rule 1.6. While strongly reaffirming the legal profession's commitment to core value of confidentiality, the Commission also recognizes the overriding importance of human life and the integrity of the lawyer's own role within the legal system." *Id.* at 49.)

[93] *Id*. See ABA Report 401, supra note 92 at 49 (explaining that Original Model Rule 1.6(b)(1) be replaced with "a *broader* [emphasis added] exception for disclosures to prevent reasonably certain death or substantial bodily harm, with no requirement of client criminality.")

The duty of a lawyer to protect his or her client's confidences has long been recognized by the legal profession.[94] The Canons of Professional Ethics first established a duty of confidentiality in 1928, although the tenets were originally codified in 1908.[95] While Canon 37 made clear counsel's duty to protect client confidences, the drafters also acknowledged that the duty was not absolute. According to Canon 37:

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.
>
> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.[96]

Other than protecting himself, expressly enumerated within Canon 37 is an exception that specifically allows the attorney to disclose client confidences to prevent a crime or to protect those who are threatened. The canon, however, required the expressed intention of the client to commit a crime in order for the disclosure to be made and did not contemplate situations under which crimes are not involved.

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[94] *See* David Lew, *Revised Model Rule 1.6: What Effect Will The New Rule Have on Practicing Attorneys?,* 18 Geo. J. Legal Ethics 881, 882 (2005); *See also* Emiley Zalesky, *When Can I Tell a Client's Secret? Potential Chages in the Confidentiality Rule*, 15 Geo. J. Legal Ethics 957, 959 (2002) (providing a comprehensive overview of the history of confidentiality).

[95] Canons of Professional Ethics Canon 37 (1928)[hereinafter Canons]. The Canons were first established in 1908 and did not address confidentiality until some twenty years later when Canon 37, among others, was added. *See* Lew *supra* note 94, at 882. *See generally* James M. Altman, Considering the ABA's 1908 Canons of Ethics, 71 Fordham L. Rev. 2395 (2003). Altman provides a comprehensive look at the historical development of the Canons. *See also* Charles W. Wolfram, Modern Legal Ethics §2.6.2 at 53 (1986).

[96] Canon 37.

In 1969, the American Bar Association replaced the Canons with the Model Code of Professional Responsibility.[97] The canons contained in the new Model Code continued the tradition of placing a high value on the duty of confidentiality but was more restrictive than Canon 37. Canon 4 of the Model Code did not expressly allow an attorney to reveal confidential information to prevent physical harm.[98] Instead, the canon required that the lawyer preserve the confidences and secrets of the client as part of the fiduciary relationship.[99] Several exceptions to the duty can be found in Disciplinary Rule 4-101(C) of the Model Code, one of which allows the attorney to reveal the client's intention to commit a crime if revealing the information is necessary to prevent the commission of that crime:[100]

> (C) A lawyer may reveal:
>
> ….
>
> (3)The intention of his client to commit a crime and the information necessary to prevent the crime.[101]

The Model Code fails to address the potential for harm or injury to anyone. It appears that the focus of the Code is the prevention of the commission of crimes and not the protection of individuals.

The ABA significantly revised the applicable standards in 1983 when it published the Model Rules of Professional Conduct.[102] Model Rule 1.6 relating to client confidentiality allowed for disclosure, absent client consent, in only two circumstances:

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[97] *See* Wolfram, *supra* note 95, at §2.6.3. The Model Code was made up of canons, ethical considerations and disciplinary rules. According to Wolfram, the canons were made up of "preliminary statements" containing "general concepts," whereas the disciplinary rules were mandatory in nature and the ethical considerations provided aspirational goals. *Id.* at 58-59.
[98] Model Code of Professional Responsibility (1969) Canon 4 [hereinafter Model Code].
[99] Model Code Canon 4.
[100] Model Code DR 4-101(c)(3).
[101] *Id.*

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information 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 death or substantial bodily harm;[103]

Original Model Rule 1.6(b)(1) requires both an intended criminal act on the part of the client and at least a serious physical injury before the attorney is permitted to disclose confidential information. Lawyers are prohibited from disclosing confidential information relating to the likely physical harm to others unless the client intends to commit a crime that would result in "imminent" death or substantial bodily harm. By requiring that death or harm be imminent it would appear that the drafters intend to allow disclosure in only those circumstances where the harm is likely to result in the near future and not to provide an exception for remote occurrences. In fact, the comments consider the issue of an attorney's ability to predict harm and suggest "[t]hat is very difficult for a lawyer to 'know' when such a heinous purpose will actually be carried out, for the client may have a change of mind."[104] It seems apparent that the framers of the Original Model Rules anticipated how problematic it would be to require counsel to attempt to predict when an individual may or may not act in a harmful manner in the future. Further, attorneys could take some comfort in the knowledge that their decisions should not be the subject of review by disciplinary bodies. The language contained in the Scope of the

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[102] *See* Wolfram, *supra* note 95, at §2.6.4.
[103] Model Rules of Professional Conduct Rule 1.6 (1983) [hereinafter Original Model Rules].
[104] *See* Original Model Rule 1.6 Comment 13. It should be noted, however, that the comments serve as guides to interpretation of the rules and are not intended to be authoritative. *See* the Scope of the Original Model Rules Paragraph 21. The same language regarding the purpose of the comments can be found in the Scope of the Revised Model Rules.

Original Model Rules, expressly recognizes the attorney's ability to exercise discretion *not* to disclose confidential information pursuant to Rule 1.6 and recommends that such discretion should not be subject to reexamination.[105] This language, however, did not survive future revision of the Model Rules.

In 1997, the ABA established the Ethics 2000 Commission to review and if necessary to propose changes to the Model Rules.[106] One of the rules affected by this review is Model Rule 1.6(b)(1) which was amended in 2002, maintaining the most liberal exception relating to an attorney's discretion to disclose confidential information for the protection of a human life to date. The new rule allows for the disclosure of confidential information to prevent reasonably certain death or substantial bodily harm regardless of an intended criminal act on the part of the client.[107] The following language of Revised Model Rule 1.6 (b)(1), provides the privilege to protect against harm as follows:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;[108]

Revised Model Rule 1.6(b)(1) may be brief but it is far from uncomplicated. By removing the "crime" component of the rule the ability of attorneys to disclose

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[105] Paragraph 20 of the Scope of the Original Model Rules contained the following language: "The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure." The Scope of the Revised Model Rules contains no such language. It should be noted that the Scope of the both versions suggests that no disciplinary action should be taken when a lawyer exercises professional discretion pursuant to permissive rules. *See* Revised Model Rules, Scope paragraph 14 and Original Model Rules Scope paragraph 13. This, however, is little assurance to a lawyer who is aware of the changes to the Scope of the Model Rules by the Ethics 2000 Commission.

[106] See Lew, *supra* note 94, at 883-884.

[107] *See* Ronald D. Rotunda & John S. Dzienkowski, Professional Responsibility, A Student's Guide 204 (2005-2006)

[108] Revised Model Rule 1.6.

confidential information to protect against harm is broader. No crime must be contemplated for the attorney to make a disclosure. In addition, the removal of the qualifier "imminent" broadens the scope of harms included within the meaning of the rule, requiring extensive analysis on the part of the attorney in determining the possibility of future harm.

In addition, the Scope of the Revised Model Rules no longer cautions against the reexamination of the attorney's decision not to disclose under Rule 1.6, thus opening the door to the possibility that disciplinary bodies, courts and juries could revisit the attorney's decision. Further, although the Scope of the Revised Model Rules holds that a violation of the rules should not give rise to a cause of action against the attorney, additional new language specifically provides that the Rules *do* establish standards of conduct.[109] This new language may support the possibility of private tort actions on the part of the client or third parties against counsel for failing to act reasonably within the standards of conduct expressed by the revised rules. It remains to be seen what, if any, unintended consequences will result from these significant changes to Rule 1.6(b)(1) and the Scope of Revised Model Rules.[110]

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[109] Scope of the Revised Model Rules paragraph 20.

[110] *See* Restatement (Third) of Law Governing Lawyers (2000), (hereinafter Restatement Third). The Restatement Third §66, acknowledges a lawyer's right to disclose client confidential information to prevent death or serious bodily harm, not withstanding the lack of criminal intent or act. Section 66 provides guidance to the lawyer on what he or she must do prior to disclosing confidential information. According to the Restatement Third, the attorney should make a good-faith effort, if possible, to persuade the client not to act or take the action that would result in the harm. The language does not leave the attorney guessing how he or she should proceed. The lawyer should advise first and disclose only after any reasonable attempt to avoid the situation has taken place. And as for the client who has already acted, the lawyer must advise the client, if possible, to take subsequent action that would prevent the harm. Moreover, counsel must tell the client that if he or she does not take measures that would prevent the harm the lawyer may disclose confidential information to prevent the harm. *Id.*

Because Revised Model Rule 1.6(b)(1) is relatively new, approved by the ABA in 2002, not all states have adopted the language.[111] Some states continue to use the language of Original Model Rule 1.6(b)(1) or the Model Code. As a result, there would seem to be some relief for attorneys practicing in states that have chosen not to adopt the language of Revised Model Rule 1.6(b)(1) and the new language in the Scope of those rules.[112]

It has been argued that one reason for the revision of Model Rule 1.6(b)(1), is that the new version of the rule places the protection of life over what some maintain is less important, trust.[113] But quite the opposite can be argued in the context of intimate partner violence, where trust may equate to life. Without trust in one's counsel there may be no way out of the abusive relationship for a victim of domestic violence.[114] Proponents of the recent change to the bodily harm exception also claim that historically

[111] As of October 2005, eighteen states (Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Montana, Nebraska, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, and Tennessee) adopted language similar to Revised Model Rule 1.6, allowing for the disclosure of confidential information in order to prevent harm, notwithstanding the commission of a crime. A majority of the states have adopted a permission version of the rule similar to the language contained in Revised Model Rule 1.6(b)(1). Four states, Florida, Illinois, North Dakota and Tennessee, adopted mandatory language requiring the attorney to disclose. For the purposes of this article, the ability to disclose is considered in the context of a right not a duty, given the permissive nature of the Revised Model Rule 1.6(b)(1) and the majority of states adopting a permissive version of the new rule. Attorneys in the four states requiring disclosure should be aware of the difference. All other states require the commission of a crime prior to granting the right or obligation to disclose confidential information, adopting language similar to either the Original Model Rules or the Model Code.

[112] Attorneys in jurisdictions that lack an exception within their confidentiality rules may still have the privilege to disclose confidential information for the protection of individuals as a result of Model Rule 1.14, which will be addressed in detail below in Section VIII. *See* discussion of cases considering this issue in the context of the Code and the Original Model Rules below.

[113] See Martyn, *supra* note 10, at 140 (arguing "life matters more than client trust"). For a discussion on the arguments for and against the 2002 change to the bodily harm exception *see* Amanda Vance and Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 Geo. J. Legal Ethics 1003, 1013-5 (2004).

[114] Buel, *supra* note 6, at 19 (explaining that if the victim does not have an advocate she may "…feel intimidated, discouraged, and, ultimately, hopeless about being able to navigate the complex legal and social services needed to escape the batterer.")

the rules protecting client confidentiality have prevented attorneys from "doing the right thing."[115] But, in the case of domestic violence the "right thing" may not be so obvious.

Some legal scholars assert in support of the protection exception that the need to act for the protection of the client or others is so remote and unlikely to occur in practice that it is not a pressing issue. Professor Susan P. Martyn argues that a lawyer is justified in disclosing confidential information "to promote the greater good of preserving human life," basing that assumption on the additional conclusion that "… the situations in which a lawyer might act to prevent this kind of harm are *so few* [emphasis added] that creating such an exception does little to destroy the utility of confidentiality in encouraging clients to speak."[116] Although Professor Martyn accurately reports that the issue rarely arises in other areas of practice, the exception is very important to the practice of domestic violence law. "Domestic violence", by definition, involves violence. It logically follows that violence is foreseeable in this area of practice.

VI. Confidentiality, Client Protection and Our Courts

> *The lawyer's obligations will depend in part upon the circumstances of each case, and upon the experience, wisdom and skill at human relations of the lawyer to whom the disclosure is made. There is also a need to balance the law's longstanding policies concerning the protection of human life against customary professional standards involving the preservation of client confidences and secrets.*[117]

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[115] *See* Vance and Wallach, *supra* note 113, at 1013 (suggesting that Revised Model Rule 1.6 strikes a balance between the need for confidentiality and the attorney's ability to do the right thing by recognizing the value of human life, making reference to Sarah Boxer, Lawyers are Asking, How Secret is Secret?, N.Y. Times, Aug. 11, 2001 at B7.)

[116] Martyn, *supra* note 12, at 1335.

[117] N.Y. State Bar op. 486 (1978) (New York State Bar Journal, August 1978 p. 442).

For the attorney faced with the difficult decision of how and when to act for the protection of the client, the potential reaction of our courts and disciplinary bodies may be significant.

a. Confidentiality and the Attorney- Client Privilege

The duty of confidentiality applies generally to all communications made by the client to the lawyer, as well as "all information relating to the representation, whatever the source."[118] The attorney-client privilege on the other hand applies only to situations in which the lawyer is called to testify or produce evidence related to those confidential communications, in a judicial or related proceeding.[119] The distinction is important because permitting the attorney to disclose information for the protection of a life should not necessarily waive the privilege to avoid testifying against one's clients. To hold otherwise may make lawyers reluctant to act for the protection of those who are in serious danger.[120]

Our courts have long recognized the duty of confidentiality and the attorney-client privilege. In 1826 the Supreme Court found in *Chirac v. Reinicker* that "[t]he general rule is not disputed, that confidential communications between client and attorney, are not to be revealed…"[121] Justice Story delivered the opinion of the Court in *Chirac* explaining that to ensure justice is served, the privilege must be held by the client, not the attorney.[122] And in *Upjohn,* Justice Rehnquist provides a historical overview of the Court's response to what it considered to be the oldest of the privileges for confidential

[118] Revised Model Rule 1.6 Comment 3.
[119] *Id*.
[120] Purcell v. Suffolk District, 676 N.E.2d 436, 440 (1997)
[121] Chirac v. Reinick, 24 U.S. 280, 294 (1826).
[122] *Id*.

communications, the attorney-client privilege.[123] Providing that the purpose of the privilege "… is to ensure full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[124] Justice Rehnquist reasons that the public is served by the client receiving "sound" legal advice which can only be provided once the attorney has been fully informed by the client.[125] The privilege allows the client to inform the attorney without fear that those confidences will be disclosed.

The Court of Appeals of Maryland considered the issue of disclosure in the context of the attorney-client relationship in *Newman v. State of Maryland*.[126] The attorney in *Newman*, during a conference with his client and her friend in preparation for an upcoming custody case, learned that his client intended to kill one of her children and blame the killing on her husband.[127] As a result, counsel disclosed the statements made by his client to the judge assigned to the case. The trial was postponed twice and the client was ordered to undergo supervised visitation. Prior to the trial the client's friend broke into the husband's home and shot him. The State attempted to use the statements previously made by counsel to the judge in the subsequent conspiracy case against his

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[123] Upjohn at 389.
[124] *Id.* at 389.
[125] *Id*. (referring to "Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): 'The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.' And in Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.E.2d 39 (1976), 'we recognize the purpose of the privilege to be 'to encourage clients to make full disclosure to their attorneys.' This rationale for the privilege has long been recognized by the Court, *see* Hunt v. Blackburn, 128 U.S. 464, 470, 9 S.Ct. 125. 127, 32 L.E.d 488 (1888)…")
[126] Newman v. State of Maryland, 863 A.2d 321 (2004). The court in *Newman* considered the disclosure of confidential information for the protection of another and what effect that disclosure may have on the attorney-client privilege in subsequent judicial proceedings. Maryland Rule 1.6 at the time of the *Newman* decision was similar to pre-2002 ABA Model Rule 1.6, allowing disclosure to prevent the client from committing a crime that is likely to result in death or substantial bodily harm. The court held that the disclosure under Rule 1.6 did not necessarily defeat the attorney-client privilege. *Id*. at 333.
[127] Newman at 331. The court found that the presence of a third party at the time of the communication did not necessarily destroy the attorney-client privilege.

client. The Court decision supports the notion that the attorney's disclosure of client confidential communications to prevent injury or death is *discretionary* in nature.[128] In addition, the Court confirmed that the testimonial privilege remains, supporting the notion that the disclosure of confidential information to protect another does not necessarily destroy the attorney-client privilege. According to the Court in *Newman,* anything less would have both a *chilling* effect and create an adversarial relationship between the attorney and the client.[129] Courts have been cautious in allowing the use of disclosed confidential communications in subsequent judicial proceedings based on the valid concern that lawyers will be less likely to "come forward" if they believe that such information will be used against their client in the future.[130]

b. An Obligation to Protect the Client

Keeping in mind counsel's duty of confidentiality, we turn to whether there is any obligation on the part of counsel to protect the client who is placing herself in a life threatening situation. Model Rule 1.6(b)(1) is permissive in nature providing that the lawyer *may* reveal information necessary to prevent the harms considered by the rule. It would seem from a reading of the rule that the decision to disclose is at the sole discretion of the lawyer and not mandated by the rule.

Although there is no case law or bar opinions directly on point, there may be some guidance in cases dealing with an attorney's duties and responsibilities after a client has disclosed the intent to commit suicide. Cases, such as *People v. Fentress*, suggest that lawyers may have a higher moral obligation to protect our clients from their own

[128] Newman at 340. *See also* Purcell v. Suffolk District, 676 N.E.2d 436, 440 (1997) (finding that counsel had no ethical duty to disclose a client's intention to commit a crime but did have the *discretion* to disclose such information to protect the lives of others).
[129] Newman at 333. *See also* Purcell, 424 Mass. 109, 676 N.E.2d 436 (1997)
[130] Purcell at 440.

actions.[131] In that case, an attorney, Wallace Schwartz, received a call from an old friend Albert Fentress, who informed Schwartz during that telephone conversation that he just killed someone and was about to take his own life. [132] The New York County Court in *Fentress* found that the client waived confidentiality because he intended to have the homicide revealed to the police.[133] Despite the conclusion that there was no duty of confidentiality given the waiver and thus no attorney-client privilege in any subsequent judicial proceeding, the court chose not to ignore the broader social issue and the potential impact its decision could have on future cases. The court maintained that in general the ethical obligation to keep client confidences secret "must be measured by common sense."[134] Further, that if the duty of confidentiality exist for the protection of the client, "…. what interest can be superior to the client's life itself?"[135] The court suggested that it would be morally wrong, in the face of such dangers, to choose to be silent in name of confidentiality.[136] The decision stopped short of providing any clear answer to the issue of client protection in accordance to any ethical rule of conduct. It is possible that the court chose not to decide the issue of a disclosure outside the facts of the

[131] *See* e.g., People v. Fentress, 425 N.Y.S.2d 485 (1980).
[132] Fentress at 489 (According to the facts, Schwartz advised Fentress that the police should be called and Fentress agreed. Fentress also requested that Schwartz and a local rabbi, Rabbi Zimet, be present when the police arrive. Given the urgency of the situation, Schwartz contacted his mother, Enid, a colleague of Fentress to contact the rabbi. Enid contacted Fentress first to verify the situation at which point Fentress advised her that either he had killed someone or that there had been a killing. Enid advised Schwartz that the police must be called and she believed that Fentress agreed. Enid could not reach the rabbi and thus contacted the police).
[133] Fentress at 494.
[134] Fentress at 497. *Compare* Spaulding v. Zimmerman, 116 N.W.2d 704, 710 (Minn. 1962) (finding that while there exists no ethical obligation to disclose information known to one side of the case that could prevent serious bodily harm or even death, the existence of an aneurysm, the court crafted an equitable solution by later vacating the settlement on the basis that the agreement did not address that information).
[135] *Id*.
[136] *Id.* (According to the court in Fentress, "to exalt the oath of silence, in the face of imminent death, would, under these circumstances, be not only morally reprehensible, but ethically unsound…. If the ethical duty exists primarily to protect the client's interests what interest can there be superior to the client's life itself?")

case because to do so would require extensive analysis unrelated to the issue at hand and unnecessary given the waiver. On the other hand, the court may have chosen to avoid directly addressing the sole issue of protecting a client who threatens suicide and the duty of confidentiality because New York ethical rules did not appear to allow disclosure unless the client intended to commit a crime.[137] Pursuant to New York law at the time of *Fentress*, the decision to commit suicide was not a crime.[138]

The *Fentress* court cited a New York State Bar Opinion from 1978, written a few years prior to the decision.[139] The Opinion directly addressed the issue of whether an attorney may disclose a client's intention to commit suicide.[140] Of note is its opening paragraph.[141] The New York State Bar skillfully summed up in a few words the conflict faced by the attorney under such difficult circumstances, as a choice between the moral obligation to protect "human life" and the professional obligation to protect client confidences. The drafters explained that the easy choice presents itself when the disclosure occurs under circumstances unrelated to legal advice. Under such circumstances the obligations pursuant to the Model Code in place at the time, would not apply and thus the attorney is advised to take "whatever steps" he or she deems appropriate to prevent the client from attempting to commit suicide.[142] The drafters

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[137] N.Y. State Bar Op. 486-6/19/78, Topic: Confidences of Client; suicide, disclosure of intent to commit, New York State Bar Journal, August 1978, 441 (N.Y. followed the language of the Model Code DR 4-101(C), allowing for the disclosure of confidential information necessary to prevent a crime.
[138] *Id.* at 197 (noting the repeal of suicide as a crime).
[139] N.Y. State Bar Op. 486-6/19/78, Topic: Confidences of Client; suicide, disclosure of intent to commit, New York State Bar Journal, August 1978.
[140] *Id.*
[141] See introductory paragraph to Section VI and note 111(suggesting that "The lawyer's obligations will depend in part upon the circumstances of each case, and upon the experience, wisdom and skill at human relations of the lawyer to whom the disclosure is made. There is also a need to balance the law's longstanding policies concerning the protection of human life against customary professional standards involving the preservation of client confidences and secrets.") N.Y. State Bar op. 486 (1978) (New York State Bar Journal, August 1978 p. 442).
[142] *Id.*

explained that in such a situation the attorney is no different than a "friend or other confidant."[143]

The more difficult situation arises when the client discloses the intention to harm oneself during the course of representation. The Bar Opinion acknowledged that the provisions of Canon 4 of the Model Code, in place at the time of the decision, would apply. Thus, the information would be considered confidential within the meaning of DR 4-101(a) and no exception to the rule appears to be applicable because attempted suicide is not a crime under New York law. Nonetheless, the drafters reason that the information could still be disclosed. The Opinion provided a winding analysis arriving at an interesting and yet somewhat baffling conclusion. First, the exception pursuant to DR 4-101(c)(3), allows disclosure to prevent a crime and so, in states that consider attempted suicide a crime, attorneys would be permitted to disclose confidential information should they deem such actions necessary to prevent the harm.[144] Interestingly, because New York repealed attempted suicide as a crime in 1919, the writers of the opinion could not easily argue disclosure pursuant to the exceptions to their confidentiality rule. In order to justify disclosure the argument was made that, "there are certain principles of conduct which a lawyer is obligated to uphold by the very nature of his office and its relationship to society," explaining that the preservation of human life is the most basic of the principles to which they are referring.[145] The writers suggested that the repeal of attempted suicide as a crime did not in any way change the intended social goal of the preservation of human life and in so finding, they were "compelled" to argue that a client's disclosure to commit suicide is akin to proposed criminal conduct pursuant to DR

[143] *Id.*
[144] *Id.*
[145] *Id.* at 443.

4-101(c)(3).[146] How they make the argument that a non-crime is considered akin to a crime within the meaning of the Code is fascinating and should cause attorneys in states that have not adopted the Revised Model Rules pause. Do all lawyers, despite the rules of their particular jurisdiction, have the moral obligation to place the potential risk of harm above all other interests?

The question of disclosure, however, is dependent upon the specific facts and circumstances of the case presented.[147] Even the drafters of the New York Bar opinion acknowledge that there are circumstances under which an individual's decision to end his or her life should be kept confidential.[148]

c. Common Law Duty & Tort Liability Cases

Although there are tort cases holding that under particular circumstances some professionals have a duty to reveal professional confidences to protect third parties, such cases involve situations far different from those faced by the domestic relations attorney. For example the Supreme Court of California in its landmark decision in *Tarasoff*[149] considered the issue of patient statements relating to potential harm to third parties and the resulting question of disclosure of that confidential information by therapists for the protection of third persons. The Court held that when a therapist determines, or should

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[146] *Id.*

[147] *Id*. (explaining that "…a lawyer's actions… must depend upon the particular circumstances present, taking into account policies respecting the protection of human life…").

[148] *Id*. The opinion provides as an example the client who may be contemplating suicide over a painful, terminal illness and how counsel may choose to keep confidential such a revelation by the client who is competent and is knowingly making such as choice over an obviously unpleasant alternative.

[149] Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, (Cal. 1976). It is undisputed that Prosenjit Podder, a patient of Dr. Lawrence Moore, advised Moore that he intended to kill Tatiana. Subsequent to his statement to his psychologist, Podder killed Tatiana Tarasoff. *Id.* at 339-340. For detailed facts *see* People v. Poddar, 518 P.2d 342, 344-345 (Cal. 1974), Tanya Tarasoff met Prosenjit Poddar in the fall of 1968 at folk dancing classes and although Podder thought otherwise, Tarasoff was not interested in an intimate relationship with him. *Id*. Upon learning that Tarasoff was not interested, Podder became depressed and finally sought the assistance of a psychologist but did not continue seeing him. *Id*. On October 27, 1969, Podder arrived at the home of Tanya Tarasoff "armed with a pellet gun and a kitchen knife." *Id.* Podder shot her, she ran, but he caught her and stabbed Tarasoff to death with a kitchen knife. *Id.*

determine, that a patient is a serious risk of violence to another, that individual "… incurs an obligation to use reasonable care to protect the intended victim against such danger."[150] *Tarasoff* can be distinguished from others cases because a failure on the part of the therapist to predict future harm was not at issue, the therapist in *Tarasoff* believed that his patient would in fact kill Tatiana Tarasoff.[151] The issue in the case was not a failure to predict, but a failure to warn.[152] Another important factor is that the Court in Tarasoff considered the matter in the context of the professional standards of the medical profession, specifically the duty of therapists,[153] and not as to the general ability of the average citizen to predict future harm.[154] There were those on the California Supreme

[150] Tarasoff at 340.
[151] *Id*. at 345.
[152] *Id*.
[153] *Id*.
[154] Some courts reject *Tarasoff* entirely, given the difficultly of predicting future dangerousness. For example, because of the significance of this issue the District Court of Appeals of Florida for the Third District in *Boynton v. Burglass*, on its own motion granted rehearing en banc to determine whether to adopt the decision in *Tarasoff. See* Boynton v. Burglass, 590 So.2d 446, 447 (Fla. 3d DCA 1991). The Court in *Boynton* explained that to impose a duty to warn or protect others "… would require the psychiatrist to foresee a harm which may or may not be foreseeable, depending on the clarity of his crystal ball." *Id*. at 450. The Court ultimately refused to find that a psychiatrist has a duty to control a voluntary outpatient or to warn potential victims because the psychiatrist in *Boynton* lacked the control necessary to find a duty given the voluntary outpatient status of the patient. *Id*. at 499. The outcome seems to be dependent on the existence of control in the relationship, if the ability to control the patient is removed than there may be no duty. *Id*. This is an interesting perspective because the same argument can be made in the case of the attorney representing the victim of domestic violence. The relationship between the attorney and the battered woman does not give rise to the ability to control her actions. Not only is control an issue but the Court in *Boynton* also expresses concern about the reliability of predictions of future harm in any situation. *Id*. at 488. The court in *Boynton* also stressed that currently the science of predicting dangerousness is just not sufficient to provide for accurate predictions of future harm. *Id.* at 451. The Supreme Court of Delaware in *Naidu v. Laird* also considered this issue and maintained that as a general rule an individual has no duty to prevent harm to others by controlling the conduct of another. Naidu v. Laird, 539 A.2d 1064, 1072 (1988). The Court noted, however, that there are exceptions to that rule where a "special relationship exists" which would impose an obligation to control the conduct of another or which gives rise to a right to protection." *Id*. (citing Restatement (Second) of Torts 315 (1965)). According to Justice Christie, of the Delaware Supreme Court, there is no bright line rule as to whether there is a duty and that the finding of a duty "must be formulated in each particular case in light of its particular facts." *Id*. at 1070. The Court in *Naidu* ultimately concluded that because a special relationship existed between Dr. Naidu, a psychiatrist, and his patient Mr. Putney and because of a broad-based obligation on the part of psychiatrists to "protect the public from unreasonable danger," that Dr. Naidu owed a duty to protect the victim in that case. *Id.* at 1072. The determination of the special relationship was based on two facts: (1) the eight year relationship between the psychiatrist and the patient and (2) the doctor's firsthand knowledge of his patient's "longstanding and continuing dangerous propensities." *Id.* The Court did clarify that, "recognition of an

Court who did not entirely support the decision in *Tarasoff,* arguing that predictions of violence are unreliable.[155] Judge Mosk, in his concurring and dissenting opinion, explained that he concurred in part because the therapist did predict harm and thus the issue "was very narrow." [156] What Judge Mosk did not agree with is the majority's decision that a therapist has an obligation "pursuant to the 'standards of the profession'" to predict harm in the first place.[157] Mosk questioned what professional standards would be used to make such predictions.[158]

Tarasoff and cases like it involve the duties of psychiatrists, psychologists and psychotherapists, persons professionally trained to assess intent and human emotions. Lawyers, by contrast, lack such training. Second, and more important, *Tarasoff* and like cases, involve disclosures of intent made by the potential attacker, not the potential victim.

Determining whether the *Tarasoff* rule can be extended to attorneys is the first step in deciding whether a lawyer owes an affirmative duty to protect a victim-client.[159] Although courts such as *Fentress* have been willing to support the choice of an attorney to act for the protection of others, [160] they have been reluctant to find an absolute duty on

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affirmative duty owed persons other than the patient does not mean that the psychiatrist is liable for negligence of the patient. Rather, the psychiatrist will be liable only when his own negligence is responsible for the injury in question." *Id*. at 1074. Using the Court's logic in *Naidu*, the initial inquiry would be whether the attorney owes an affirmative duty to protect the victim-client. The second issue relates to the question of whether the attorney's failure to act for the protection of the client is the proximate cause of the victim's injury.

[155] *Id.* at 354 (Mosk, J., concurring and dissenting).

[156] *Id*.

[157] *Id.*(referring to People v. Burmick, 535 P.2d 352 (1975)).

[158] *Id*.

[159] *See* People v. Dang, 93 Col. App.4th 1293, 1297 (Cal. Ct. App 2nd Dist 2002). The Court in Dang raises but never answers the question of "whether the principles announced in [Tarasoff] apply to attorneys."

[160] *See* Section V., Subsection b. *An Obligation to Protect the Client*, notes 125 - 141 and accompanying text.

the part of lawyers to warn foreseeable victims.[161] In *Hawkins v. Kings County,* Frances M. Hawkins unsuccessfully attempted to sue her son's court appointed attorney, Richard Sanders, for negligence and malpractice.[162] The facts of the case reveal that the client's psychiatrist informed Sanders that his client, Michael Hawkins, posed a danger to himself and to others, and warned that Michael Hawkins should not be released from custody.[163] At a subsequent bail hearing, counsel failed to provide information to the court about the danger his client posed and the client was released from custody.[164] A few days after his release, Michael Hawkins assaulted his mother and attempted to kill himself.[165] As a result of his attempted suicide, jumping off a bridge, Michael's legs were amputated.[166] The Court in *Hawkins* explained that disclosure of confidential information by an attorney in order to prevent harm to others is not required by the ethical rules.[167] The *Hawkins*' court did, however, agree that the common law duties addressed in *Tarasoff* support the position that an attorney must warn foreseeable victims, once counsel has learned that a client intends to harm another.[168] Interestingly, *Hawkins* makes clear that any protective action on counsel's part should be optional "unless it appears *beyond*

[161] Hawkins v. Kings County, 602 P.2d 361 (Wash. Ct. App. 1979) (finding that disclosure of confidential information is not required by law and further any common law duty to warn would not apply unless there exists an unknowing victim). Contra, Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Inplications of Tarasoff for Psychiatrists and Lawyers*, 31 Emory l.J. 263, 333-336 (1982) (arguing that *Hawkins* can not be so easily distinguished from *Tarasoff*). Other courts have found that a lawyer has a duty to warn at least in the context of a real threat made to a Judge. *See* State v. Hansen, 852 P.2d 117 (1993). The Court in *Hansen* explained that it could be distinguished from *Hawkins* because the third party in *Hawkins* had notice of the danger; in *Hansen* the judge was unaware of the danger. *Id.* at 122. Further, the court in *Hansen* concluded that the attorney, as an officer of the court, had a duty to warn the judge. *Id.*
[162] *Id.*
[163] *Id.* at 340
[164] *Id.*
[165] *Id.*
[166] *Id*.
[167] Hawkins at 365.
[168] *Id*.

reasonable doubt" that harm is likely to occur to an unknowing individual.[169] In this case the court concluded that Frances Hawkins, the victim, was fully aware of the risks her son posed and as a result was a knowing victim.[170]

Even *Hawkins*, however, did not have before it the question of what, if any, duties the lawyer had to his or her client, especially a client who knows as much or more than the lawyer about the risk she is facing.[171]

Clearly the attorney owes a duty of care to his or her own client.[172] The standard of care for an attorney has been defined by the Restatement (Third) of Law Governing Lawyers as "the competence and diligence normally exercised by lawyers in similar circumstances."[173] What, however, is the standard of care normally exercised by attorneys representing victims of domestic violence under similar circumstances? Unlike therapists who receive extensive training to identify and deal with individuals who pose a risk to society, attorneys are not trained in or possess such knowledge. As a consequence, if we expect an attorney to act for the protection of a victim of domestic violence the lawyer may be required to make decisions about how and when to act for the protection of the client based on risks that even the experts are unable to predict.[174]

In addition, there are significant public policy reasons why we should not find civil liability on the part of an attorney for failing to act for the protection of their victim

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[169] Hawkins at 365 (referring to the position presented by amicus curiae).
[170] *Id.* at 345.
[171] It may be logical to conclude, given the court's position in *Hawkins,* that there should be no duty on the part of an attorney to disclose or warn unless there is an unknowing victim and there is no question that harm is likely result. Further, that any decision to protect would be purely optional so long as the attorney were to act reasonably and ensure that the client is made fully aware of the risks associated with remaining in or returning to the abusive relationship.
[172] *See* Restatement (Third) of Law Governing Lawyers § 50 (2000).
[173] *See* Restatement (Third) of Law Governing Lawyers § 52 (2000). Further, a violation of a rule of professional ethics does not necessarily give rise to a cause of action for negligence. *Id.*
[174] *Playing the Psychiatric Odds supra* note 12; *See also* Neil Websdale, Ph.D, Lethality Assessment Tools: A Critical Analysis (2000).

client. Recognizing a duty to protect may result in over reporting by attorneys thus resulting in the reluctance on the part of victim of domestic violence to seek legal representation, for fear that their confidences will be violated. Moreover predictions of future harm in domestic violence cases are unreliable and sometimes the act of disclosure can put the client at greater risk. Although there are important reasons why an attorneys should not have a duty to disclose confidential information to protect a victim client, that does not mean that the attorney does not have a duty to inform the client of the risks she faces, and provide her with the information necessary to make an informed decision about how to act in her own best interest.[175]

VII. Predicting Lethality and Dangerousness

> *...we are asked to embark upon a journey that "will take us from the world of reality into the wonderland of clairvoyance."*[176]

Advocates maintain that domestic violence is the single major cause of injury to women in the United States and that in one hour more than 200 women are battered by their husbands.[177] The risks are undeniable. The problem is that it is difficult, if not impossible, for the average attorney to determine which cases will end in further violence and which will not. As a result, the response to a victim-client who returns to a violent relationship may require the use of risk assessment measures that counsel may not know of or be ill equipped to employ.

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[175] *See* text sections XI and XII.

[176] Boynton v. Burglass, 590 So.2d 446, 448 (Fla. 3d DCA 1991)(citing the concurring and dissenting opinion in *Tarasoff*, 551 P.2d at 354). The foregoing statement sums up accurately the difficulty of predicting future harms.

[177] Barbara J. Hart, *Parental Abduction and Domestic Violence*, Unpublished paper presented at American Prosecutors Research Institute, Boston (1992) (on file with the author).

Although it is difficult, if not impossible, to predict lethality in domestic violence cases, experts suggest that many of the risk factors associated with domestic homicide are good predictors of "dangerousness."[178] Some of those risk factors include access to guns, use of a weapon in abusive episodes, a history of domestic violence,[179] threat of suicide, drug or alcohol abuse, sexual abuse and control issues.[180] These factors alone or in combination can be found in many domestic violence relationships that do not end in death or serious bodily injury.[181] In fact, research has shown that less than one percent of battered women are ultimately killed by their intimate partners, confirming that homicide is rare in most domestic violence cases.[182] This finding alone may lessen counsel's concerns regarding the issue of certain death,[183] but the question of substantial bodily harm is not so easily dismissed.

The matter of recidivist battering is difficult to assess given the conflicting research available. Risk assessment in the area of domestic violence is very new.[184] The

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[178] Websdale, *supra* note 174, at 5.
[179] *See* Judge Amy Karan and Lauren Lazarus, *A Lawyer's Guide to Assessing Dangerousness for Domestic Violence*, 78-MAR Fla. B.J. 55 (2004) (the number one indicator of risk of future harm or lethality is a history of domestic violence).
[180] Websdale, *supra* note 174, at 2. *See also* Etiony Aldarondo & Fernando Mederos, *Men Who Batter: Intervention and Prevention Strategies In A Diverse Society*, NY Civic Research Institute, Ch2 at 9 (2002) (identifying the following risk factors to be assessed: (a) prior history of domestic violence; (b) access to handguns; (c) estrangement from the abuse victim; (d) history of depression; (e) stalking behavior; (f) abusive behavior during her pregnancy." Further, acknowledging that the likelihood of lethality increases with the following additional factors: (a) the presence of threats or fantasies of homicide or suicide, (b) history of dependency or jealousy, (c) rape history, access to abuse victim or her family, (d) sense of entitlement, (e) ownership of abuse victim, and (f) sociopathic and narcissistic tendencies.")
[181] Information based on extensive experience representing victims of domestic violence.
[182] Websdale, *supra* note 174, at 1 (citing the Bureau of Justice Statistics, 1998). *See also* Aldarondo and Mederos, *supra* note 180, at 9 (finding that "it is important to recognize that risk assessment has its own dangers. Incorrect predictions of violence (i.e. false positives) are the rule because homicides are relatively rare events").
[183] This is not to say domestic homicide is insignificant. According to the U.S. Department of Justice, Bureau of Justice Statistics for 2003, approximately 1,300 women are killed each year by an intimate partner. *See also* Karan, *supra* note 179.
[184] P. Randall Kropp, *Some Questions Regarding Spousal Assault Risk Assessment*, 10 Violence Against Women 676, 693 (2004)("…spousal violence risk assessment methods are in their infancy…"); *See also* Janice Roehl, et al., *Intimate Partner Violence Risk Assessment Validation Study: The RAVE Study*

only issue upon which experts seem to agree regarding risk assessment in intimate violence cases is that there is little consensus on how to assess risk in this area.[185] In fact, it has been said that those studying this issue cannot even agree on how to define risk.[186]

Some research shows that approximately 50% of domestic abusers reassault their victim once an abusive incident has occurred,[187] while other studies indicate that a majority (61%) of abusers who commit a violent act against their intimate partner do not engage in violent acts in the future.[188] Even from this conflicting research, however, it appears that abusers tend to reassault at a rate of at least 39%. The risk is very real.

Given the high percentage of battered women who may be reassaulted, there is a great need to determine which clients are at greater risk of future harm. Several risk assessment tools are available to interveners who wish to attempt to determine the dangerousness of the situation. Of note are the following methods:[189] (1) Danger

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Practitioner Summary and Recommendations: Validation of Tools for Assessing Risk from Violent Intimate Partners, U.S. Department of Justice at 15("…the science of risk assessment is young.")

[185] Kropp at 677.

[186] Kropp at 679 (explaining that the lack of consensus in defining risk causes several problems, one of which may be comparing risk assessment studies).

[187] *See* Sarah M. Buel, *Taking Domestic Violence Seriously: The Role of Lawyers, Judges and Probation Officers* at 32 (2003) *available at* http://safestate.org/documents/dv_seriously.pdf (citing Edward W. Gondolf, Batterer Intervention Systems; Issues, Outcomes and Recommendations 200 (2002)("Professor Gondolf's research indicates that while almost half of the men recidivated within the 4-year follow-up, most did so within the first 9 months after starting a batterer's intervention program." *See also* AMA Diagnostic & Treatment Guidelines on Domestic Violence, SEC: 94-677:3M:9/94 (1994) *available at* http://abanet.org/domviol/stats.html ("47% of men who beat their wives do so at least 3 times per year.").

[188] Brian K. Payne & Randy R. Gainey, Family Violence and Criminal Justice: A Life-Course Approach 123 (2002) (reviewing several studies that followed wife assault over a period of time found that although one-third of men who abused their partners in the first year of the relationship continued that abuse in the future, the majority of abusers (61%) did not commit acts of violence in future years. The authors, however, acknowledge that a follow-up study confirmed that higher levels of conflict in the marriage and lower socioeconomic status were predictors of continuing violence over time). See also Edward W. Gondolf , Do Batterer Programs Work?: A 15 Month Follow-Up of Multi-Site Evaluation 3(5) Domestic Violence Report 65-66, 78-79 (June/July 1998) (finding reassault rates were approximately one-third. Interestingly, over half of those who committed future abusive acts did cause physical injury to their victims, confirming the likelihood of serious bodily injury.

[189] Roehl, *supra* note 184, at 2 (providing a comprehensive study of the risk assessment tools available in the area of domestic violence).

Assessment Instrument;[190] (2) DV-MOSAIC;[191] (3) Domestic Violence Screening Instrument;[192] and (4) Kingston Screening Instrument for Domestic Violence.[193]

The first assessment tool mentioned, the *Danger Assessment Instrument* was created by Jacqueline C. Campbell in 1985.[194] The instrument is available at no cost for use by individuals working with victims of domestic violence to assist in making determinations about the risk of homicide to a particular victim.[195] The form consists of two sections to be filled out in the course of interviewing the victim. The first section asks the victim to use a calendar and indicate the approximate dates during the past year when the victim was beaten by her perpetrator, indicating the severity of the abuse using a scale provided. The second section of the form is a survey comprised of yes or no questions relating to the increase in severity or frequency of violence; use of weapons; drug and alcohol use; threats to kill victim, children or self; control issues; threats by the abuser to commit suicide; possessiveness and other issues.[196] On June 2, 2005, Campbell was interviewed regarding her danger assessment tool. Campbell acknowledged that, "[w]hile the danger assessment is available online, the results of the self-tests are best interpreted by professionals, who can more accurately determine lethality, or the chances

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[190] Jacqueline C. Campbell, Danger Assessment (1985,1988, 2001) *available at* http://www.ncdsv.org/images/DANGERASSESSMENT.pdf; Roehl, *supra* note 184, at 2 (describing the *Danger Assessment* survey by Campbell as a 20 yes or no question survey for the victim to determine the risk of dangerousness or lethality).

[191] Roehl, *supra* note 184, at 2 (describing the DV-MOSAIC by Gavin de Becker & Associates as a "computer-assisted method that includes 46 multiple response items about risk and protective factors….")

[192] *Id*. (recounting the Domestic Violence Screening Instrument by Williams & Houghton as a 12 question survey for the abuser relating to criminal history, employment and other risk factors).

[193] *Id*. (explaining the Kingston Screening Instrument for Domestic Violence by Gelles involves 10 questions to be answered from abuser and victim interviews, as well as a review of other information).

[194] Danger Assessment supra note 190.

[195] Danger Assessment Instrument *available at* http://www.ncdsv.org/images/DANGERASSESSMENT.pdf or for the prior version *available at* http://www.nvaw.org/research/instrument.shtml. The form is provided at no cost to users, however, Campbell requests that those who duplicate the instrument provide the results of any research which is conducted based on use of the instrument or the approximate number of participants with whom the instrument was used.

[196] *Id.*

of the abused woman being killed."[197] Although at first glance Campbell's statement might appear discouraging it is actually beneficial because it provides a warning to the attorney to seek the assistance of experts when interpreting the data.

The second assessment tool evaluated is the DV-MOSAIC. The DV-MOSAIC, among six mosaics,[198] was created by Gavin de Becker for use by law enforcement and domestic violence advocates as a tool to assess and ultimately determine which domestic violence cases are likely to escalate.[199] The tool is available for purchase online.[200] In 1995, de Becker began developing the MOSAIC system for assessment of domestic violence matters, which is now used by police departments for case assessment.[201] Although the DV-MOSAIC has been described as a computer program, de Becker explains that it is not a computer program per se, although it draws on computer technology to teach the method. He explains the MOSAIC as follows:

> MOSAIC is a way of breaking down a situation to its elements, then organizing and identifying the most important factors. MOSAIC includes a computer-assisted guide that takes users through assessments in a step-by-step format, suggesting the specific areas of inquiry experts feel will most contribute to a quality assessment. MOSAIC asks the user questions about the situation, and offers a range of possible answers.
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> As answers are selected, MOSAIC prompts the user to explain why a particular answer applied to the situation. That information is automatically organized into a written report that sets forth what areas of inquiry were explored or considered, what information was learned, what conclusions were reached, and why.

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[197] Katherine Rosenberg, *Danger Assessment System Targets Domestic Violence*, expert from Johns Hopkins University to speak in Rialto, Victorville, California Daily Press, June 2, 2005 *available at* http://www.vvdailypress.com.

[198] Gavin de Becker has created six different mosaic systems including: (1) DV MOSAIC for assessing domestic violence cases; (2) MAST to be used by high-school and elementary schools for assessing student threats; (3) MAST-U for use by university police and administrators for assessing student threats; (4) MAT-W to be used by various agencies and businesses to assess threats made in the workplace; (5) MAPP for government agencies for assessing threats to public figures; and (6) MAJ available to government agencies to assess threats made against judges *available at* http://www.mosaicsystem.com.

[199] Mosaic Threat Assessment Systems, a Gavin de Becker company, *available at* http://www.mosaicsystem.com.

[200] *Id.*

[201] *Id.*

> At relevant points in the process, users are presented with training videos by leading experts, and resource material including articles, reports, instructive case histories, research papers, statistical information, summaries of past incidents, relevant laws and public policies, and important cautions and suggestions from leading experts. [202]

The MOSAIC is more involved than the hands-on approach by Campbell, which requires the completion of a simple handwritten form and/or interview.

The third tool is the Domestic Violence Screening Instrument (DVSI) by Williams & Houghton which is described as a 12 question survey for the abuser relating to criminal history, employment and other risk factors.[203] It is different from the Danger Assessment tool in that the assessment is based primarily on data provided by the abuser, not the victim. The Kingston Screening Instrument (K-SID), the fourth tool, is a ten question survey for both the abuser and victim, with the additional requirement of a criminal history evaluation of the abuser. Neither the DVSI nor the K-SID, are readily available for general use by the public. Further, because these two approaches require data from the abuser that may not be feasible to obtain, they may not be as useful to the domestic violence attorney.

Several experts considered the foregoing tools in a comprehensive study to assess the accuracy of different approaches to predicting future harm in domestic violence cases.[204] In addition, they considered the victim's own "assessment of risk" as part of the study.[205] The findings show that all of the forgoing risk assessment methods were far

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[202] *Id.* The DV-MOSAIC is available for purchase through de Becker's company website.
[203] Roehl *supra* note 184, at 5.
[204] Roehl, *supra* note 184, at 1 (interviews were conducted of 1307 victims of domestic violence and the history of arrest of all perpetrators involved was determined).
[205] *Id.* (explaining Goodman and Dutton's victim assessment of risk is comprised of two questions asked of the victim as to her belief that she may be physically abused or injured).

from perfect in predicting risk.[206] Although the experts agree that Campbell's *Danger Assessment* performed slightly better than the other three assessment tools,[207] without additional research, they could not firmly recommend any one approach over another for risk assessment in intimate partner violence.[208] The authors acknowledge that the tools could yield results that are not much better than chance, but recommend that those working in the area of domestic violence continue to assess risk with any means available,[209] warning that when assessing risk great weight should be given to the victim's own view about the possibility of danger.[210]

There has been extensive debate about the amount of weight to give to the victim's perception of risk in a particular domestic violence case. Although some academics have argued that battered women do not always appreciate the risk they face,[211] the majority of victim advocates maintain that the victim is the best predictor of her own safety, stressing the importance of considering the victim's own assessment of risk.[212] Given the lack of research relating to this proposition and some indications from

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[206] *Id.* at 14 (explaining that they found both false positives and false negatives with all methods and that more accurate methods could reduce such problems.)
[207] Roehl *supra* note 184, at 13.
[208] *Id.* at 14.
[209] Some advocates suggest that assessing lethality is not necessarily counsel's responsibility. *See* Burman *supra* note 17, at 242, who finds that it would be reasonable for the lawyer to "discharge that responsibility" by referring the client to an advocate or other individual who may be better trained to handle such functions. Although Burman is clear in his belief that it is not reasonable for the lawyer to do nothing at all.
[210] Roehl, *supra* note 184, at 14 (explaining that "victims are fairly good predictors of their own risk, yet not accurate enough to depend on alone for risk assessment."). Kropp, *supra* note 184, at 685 (clarifying that although one of the most significant predictors of harm is the victim's perceptions, that victims may be better at predicting when they are at risk than when they are safe).
[211] Karan, *supra* note 179 (citing a study by Oregon Health and Science University, Portland. "out of 30 women who survived an attempted homicide by an intimate partner, 14 stated they were 'completely surprised' by the attack.").
[212] Dr. Lesley Laing, *Risk Assessment in Domestic Violence*, Australian Domestic & Family Violence Clearinghouse at 8 (2004)("Victim advocates have stressed the importance of listening to women's assessments of their partner's dangerousness," referencing Hart 1994 and de Becker 1997 as cited by Weisz, Tolman & Saunders 2000, Assessing the risk of severe domestic violence: The importance of survivors' predictions', Journal of Interpersonal Violence, vol 15 no 1 pp 75-90.)

past studies suggesting that there is merit to considering the victim's own perceptions of danger, D. Alex Heckert and Edward W. Gondolf conducted a study to test the predictive power of the victim's perceptions of risk.[213] They began by considering some risk indicators relating to the abuser's characteristics that have been identified as factors in predicting continuing violence, although the indicators have been deemed to be weak in their predictive power.[214] The risk factors are prior assault, alcohol or drug abuse, criminal history, the existence of psychological problems, failure to follow through with support programs and being abused as a child.[215] The study was extensive, including 840 batterers and 82% of their victims (688 women) and was conducted over a fifteen month period with interviews performed every three months.[216] To evaluate the victim's "perceptions of risk," victims were asked two questions at the time of the initial intake. The responses to the first question, "[h]ow safe do you feel at this point?" were placed in three answer categories: "*1 = uncertain, not safe, in much danger, 2 = somewhat safe, 3 = very safe.*"[217] The responses to the second question, "[h]ow likely is it that your husband will become violent towards you during the next 3 months?" were placed in four answer categories: "1 = *very likely*, 2 = *uncertain/don't know*, 3 = *unlikely*, and 4 = *very unlikely*."[218] The first aspect of the assessment conducted by Heckert and Gondolf was "how much women's perceptions contribute to prediction of repeated reassault above and

[213] *See generally,* Heckert and Gondolf, *Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault,*19 Journal of Interpersonal Violence 778, 779 (2004) available at http://jiv.sagepub.com/cgi/reprint/19/7 (examining the predictive power of the battered woman's perceptions of her own risk of harm).
[214] *Id*. at 778-779.
[215] *Id*. These risk factors relate to the abuser.
[216] *Id.* at 782.
[217] *Id.* at 786.
[218] Id. at 786.

beyond men's characteristics and reports."[219] What they found was the prediction rate went from 55% when considering just the abuser's variables and reports to a 70% prediction rate when a woman's perceptions were added.[220] They did, however, discover that the findings were not straightforward because when a victim felt at greater risk she was more likely to take protective action, thus reducing the risk.[221] But, when the victim felt uncertain about her safety she was less likely to seek help and as a consequence was at a greater risk of harm. The findings do show, however, that a victim's perception that she is at risk of future harm is "a reasonably accurate predictor of repeated reassault by themselves and improve the prediction of risk factors and instruments."[222] Heckert and Gondolf maintain that these findings are important not only because they support the longstanding argument that many victims are good predictors of their own safety but also because they send a message to those working with battered women that they should pay attention to the victim's self appraisal of risk.[223]

Given these findings, it may seem illogical that disciplinary bodies and our courts could place attorneys in the difficult position of evaluating and predicting what experts can not even begin to determine. Dr. Neil Websdale has described risk assessment in domestic violence cases as an "art not a science."[224] In fact, he agrees that it is the victim who in some instances is the expert.[225] If the victim, who may be a good predictor of her

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[219] *Id*. at 791.
[220] *Id.*
[221] *Id*.at 791 and 794
[222] *Id.* at 796.
[223] *Id*. at 797 (concluding that "the predictive power of women's perceptions suggests the importance of obtaining and heeding women's appraisal of their situation, as advocates have long argued, and including them in risk instruments.")
[224] *Playing the Psychiatric Odds, supra* note 12, at 278.
[225] *Id.* at 281 (supporting the position that the victim is an expert concerning her abusers behavior and thus in the best position to determine her safety). *Contra* Karan, *supra* note 179, at 56 (citing a study that found domestic victims of near lethal incidents did not appreciate the risk they faced).

own safety, concludes that it is safer to remain in or return to the abusive relationship, who are we as non-experts to conclude differently. The foregoing tools, the *Danger Assessment Instrument* in particular, along with the client's own assessment of the risk she faces, can certainly aid counsel in helping the client make those difficult decisions.

VIII. Limited Role of Model Rule 1.14

... embrace the world of gray...[226]

It has been suggested that aggressive intervention may be necessary for the protection of those battered women who are so "coercively controlled," that they are unable to act in their own best interest.[227] Proponents argue that a guardian may be required to act for the victim, under extreme circumstances, when she is unable to make appropriate decisions on her own behalf.[228] The problem with such an argument is that it opens the door for abuse of discretion by those individuals making the determination of what choices are in the best interest of the client. Is counsel truly faced with a circumstance where the client is unable to make appropriate choices on her own behalf or is it a situation where the client is making decisions with which the attorney has a fundamental disagreement? Given this dilemma, Model Rule 1.14, which allows the attorney to take protective action for a client at risk, may prove to be of limited usefulness in the area of domestic violence.[229] According to Revised Model Rule 1.14:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

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[226] Elizabeth Laffitte, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 Geo. J. Legal Ethics 313, 315 (2004).
[227] Jones, *supra* note 11, at 628.
[228] *Id.*
[229] Revised Model Rule 1.14.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[230]

Not unlike Rule 1.6, Model Rule 1.14 has undergone some revisions in recent years.[231] Elizabeth Laffitte suggests that one of the most notable changes is in the title of the Rule itself. Prior to Ethics 2000, the rule was titled "Client Under a Disability," now the rule is titled "Client with Diminished Capacity."[232] The title of the Rule's new version suggests that there is no expectation that the client has a disability but, instead, that the client's impairment, however short lived, in some way adversely influences the decisions she makes, thus placing the client in danger. This change appears to allow

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[230] *Id.*

[231] Consider the redline version of the rule showing the changes from Original Model Rule 1.14 to the 2002 version:

(a) When a client's ~~ability~~ capacity to make adequately considered decisions in connection with ~~the~~ a representation is ~~impaired~~ diminished, whether because of minority, mental ~~disability~~ impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) ~~A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when~~ When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

[232] Laffitte, *supra* note 226, at 315.

attorneys to act for the protection of a greater number of individuals by broadening the definition of impairment. Laffitte suggests that this significant change "urges the lawyer to embrace the world of gray—the real world where the lawyer ideally will take each client and each fact pattern into consideration, thus acknowledging that there is a continuum of capacity rather than absolutes."[233]

The title, however, was not the only change to the rule. Original Model Rule 1.14 required that the attorney must reasonably believe that the client cannot adequately act in his or her own interest before taking protective action.[234] Revised Model Rule 1.14, on the other hand, requires that three specific elements must be met prior to taking protective action: (1) that the client has diminished capacity; (2) that there is a substantial risk of physical, financial or other harm; and (3) the client cannot adequately act in her or his own best interest.[235] The new version of the rule, however, does not define what should be considered when making a determination of impairment. Laffitte contemplates the dilemma faced by counsel in determining whether the client is impaired and suggests the attorney could borrow from the medical profession's model as follows: "The health profession relies on 'decisional capacity' which consists of three elements: (1) possession of a set of values and goals; (2) the ability to communicate and understand information; and (3) the ability to reason and deliberate about one's choices."[236] The third element, the ability of the client to reason and deliberate about her choices, may be the most helpful factor to legal practitioners when assessing whether a victim-client has diminished capacity. If the client lacks the ability to reason and deliberate about her

[233] *Id.*
[234] Original Model Rule 1.14 (1986).
[235] Revised Model Rule 1.14 (2003)
[236] Laffitte *supra* note 226, at 325-326.

choices the attorney could find pursuant to the rule that the client is in need of protective action, if such inability to make decisions places the client in danger.

The inability to reason is very different from the ability of the client to reason and ultimately make a choice with which counsel has a fundamental disagreement.[237] There are many life decisions that competent adults make on a daily basis that, were they subject to review, would not be considered prudent by other adults acting under similar circumstances.[238] Similar arguments have been made under the old rule as we will see below. The power of either version of Rule 1.14 is tremendous, creating the potential for abuse by providing counsel with the ability to override the client's wishes anytime the attorney deems those decisions imprudent.[239] Moreover, taking action pursuant to Model Rule 1.14 runs counter to the general presumption of that an attorney should abide by the client's decisions in accordance with Model Rule 1.2. As a result, the comments to Model Rule 1.14 consider the potential adverse effect such disclosure may have on the client's interests, cautioning the lawyer to first determine whether his or her disclosure will adversely affect the client's interests.[240]

If the lawyer is able to determine that client is in need of protective action, figuring out what protective action should be taken is another difficult issue faced by counsel in applying this rule. The comments to Model Rule 1.14, consider the issue of taking protective action and provide that when the client lacks the ability to make

[237] Certainly such a fundamental disagreement would provide good cause for counsel to decline or terminate representation pursuant to Model Rule 1.16(b)(4), but not necessarily reason to take protective action under 1.14. See Model Rule of Professional Conduct 1.16(2003).
[238] The issues of morality and client autonomy will be explored further in Sections IX and X of this article.
[239] *See* James D. Gallagher and Cara M. Kearney, *Representing a Client With Diminished Capacity: Where the Law Stands and Where it Needs To Go*, 16 Geo. J. Legal Ethics 597, 608 (2003)(One concern the authors find with an attorney's decision to reject the client's wishes and substitute one's own judgment pursuant to Rule 1.14 is that the client's "rights to make his own decisions can be revoked anytime an attorney thinks that the [client's] decision is unwise.")
[240] Revised Model Rule 1.14, Comment 8.

adequately considered decisions the lawyer may take protective measures *deemed necessary*.[241] The comments provide examples of protective measures including contacting the client's family members or "other individuals or entities that have the ability to protect the client."[242] The rule does not provide further guidance regarding who those "other individuals" might be, leaving counsel to assume that the rule may be speaking of law enforcement or other protective agencies. Further complicating the issue is the concern raised by the comments that the lawyer must consider to whom they intend to make the disclosure and whether that individual will act adversely to the client's interests.[243] Will telling family members or law enforcement that the client is in danger adversely affect the client and if so, should the lawyer act for the protection of the client? One possible result of the disclosure to the police could be the removal of the children from the household by a state agency, which certainly would be adverse to the client's and possibly the children's best interest.[244] The comments to both versions of the rule acknowledge that the position in which the attorney is placed under such

[241] Revised Model Rule 1.14 (2003), comment 5.
[242] *Id.*
[243] Revised Model Rule 1.14 comment 8.
[244]Some legal scholars argue that witnessing domestic violence causes serious long-term negative effects on children, while others suggest that children are resilient and are able to overcome the violence. Although the debate about the impact of witnessing domestic violence on children may never be resolved, the response by our legal system to this issue has clearly been ineffective. Historically the answer to the plight of children who witness domestic violence has been to remove them from the victim's care, instead of holding the perpetrator responsible. *See* Nicholson v. Williams, 203 F.Supp. 2d 153 (E.D.N.Y. 2002). Experts argue that removals can do more harm to children than the act of witnessing domestic violence itself. According to Dr. Peter Wolf, "disruptions in the parent-child relationship may provoke fear and anxiety in the child and diminish his or her sense of stability and self." *Id*. at 199. Wolf describes the typical response of a child who is separated from his parent as follows: "At first, the child is anxious and protests vigorously and angrily. Then he falls into a sense of despair, though still hypervigilant, looking, waiting and hoping for her return." *Id*. In addition, Dr. Evan Stark has explained that, "for children who are in homes where there is domestic violence, disruption of that bond can be even more traumatic than in situations where there is no domestic violence." *Id*. And even those who argue that domestic violence has a negative effect on children agree that it is the batterer, not the victim who is responsible for the damage caused to children who witness domestic violence and that removal of the child from the battered woman is not the answer. *See* Susi, *supra* note 24.

circumstances is "*an unavoidably difficult one* [emphasis added]."[245] In the case of the victim of domestic violence, if the lawyer can determine that the protective action would in fact place the client in more danger does it naturally follow that the attorney should not act?

With regard to disclosure, the drafters of the new version of Rule 1.14 added paragraph (c) to directly address the issue of confidentiality.[246] While holding that communications are protected by Rule 1.6, the rule provides that disclosure is "impliedly authorized to the extent reasonably necessary to protect the client's interests."[247] The comments do caution that the rule limits what the attorney may disclose when acting for the protection of the client.[248] The standard is to disclose as little information as necessary.[249]

In line with the *Fentress* decision, what interest is more important than the client's safety?[250] A number of states with confidentiality rules which would otherwise forbid the disclosure of information for the protection of the client have used Rule 1.14 as an alternative means of allowing the attorney to act for the protection of the client.[251] As recently as 2005, a formal opinion of the Alaska Bar Association Ethics Committee

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[245] Revised Model Rule 1.14 comment 8.
[246] *See* Revised Model Rule 1.14(c).
[247] *Id*.
[248] *Id*. comment 10.
[249] *Id*. ("A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action.")
[250] Fentress at 497. *See* note 125 and accompanying text.
[251] *See generally* Attorney May Reveal That Troubled Client Is Threatening Suicide if Convicted of Crime, ABA/BNA Lawyers' Manual on Professional Conduct, 21 Law. Man. Prof. Conduct 336 (2005) (citing ABA Informal Ethics Op. 83-1500 (1983); Alabama Ethics Op. RO-90-06 (1990); Connecticut Formal Ethics Op. 49 (2000); Massachusetts Ethics Op. 79-61 (1979); New York State Ethics Op. 486 (1978); New York City Ethics Op. 1997-2 (1997); Pennsylvania Ethics Op. 93-43 (1993); South Carolina Ethics Op. 99-12 (1999); Utah Ethics Op. 95 (1989); Section 66 of the *Restatement (Third) of the Law Governing Lawyers* (2000); Alabama Ethics Op. 95-6 (1995); Arizona Ethics Op. 91-18 (1991); Connecticut Informal Ethics Op. 99-5; (1999); and Massachusetts Ethics Op. 01-02 (2001). Cf. New Mexico Ethics Op. 1987-1 (may reveal suicidal intentions only if client consents)).

maintained that Rule 1.14 permits disclosure "when the lawyer reasonably believes that the client cannot adequately act in the client's own best interest."[252] The question that gave rise to the Alaska opinion related to the possible statement to counsel that the client intended to commit suicide if convicted.[253] The Alaska Bar acknowledged that the State's current Rule 1.6,[254] would appear to prohibit the disclosure of a client's intent to commit suicide because the exception applies when the client engages in criminal conduct and suicide it not a crime in the State of Alaska.[255] However, in the committee's view Rule 1.14 can override Rule 1.6 in particular circumstances. [256] That circumstance is when the client cannot adequately act in his or her own best interest. In such situations the attorney may take protective action pursuant to Rule 1.14. The committee explained that in their view, the purpose of the "protective action" language is to allow the attorney to safeguard the health and safety of the client who is unable to act on his or her own behalf and in doing so may disclose the client's intent to harm him or herself.[257] In a similar opinion, the Connecticut Bar Association Committee of Professional Ethics considered the issue and concluded that although "a lawyer should be respectful of the client and not substitute her judgment for that of the client," the attorney may do so when

[252] Responsibilities of the Attorney Representing a Client Who, After Being Charged with a Felony Offense, Informs the Attorney of the Client's Intent to Commit Suicide if Convicted, Alaska Bar Ass'n Ethics Comm., Op. 2005-1, 5/10/05 *available at* http://www.alaskabar.org/ethops/05-1.htm.
[253] *Id.*
[254] Alaska had not, at the time of the opinion or to date, adopted Revised Model Rule 1.6.
[255] Alaska Bar Ass'n Ethics Comm., Op. 2005-1, 5/10/05.
[256] Alaska Bar opinion (holding "Generally, an attorney may not reveal a confidence or secret concerning the representation of a client without the client's explicit or implicit consent. ARPC 1.6(a). Of course, there are exceptions where the client engages in criminal or fraudulent conduct, or raises a claim against the attorney. Those exceptions, however, do not apply to the facts here because suicide is not a crime in Alaska. Because no crime or fraud is involved, it may appear that Rule 1.6 prohibits the disclosure of the client's suicidal intent. In our opinion, Rule 1.14(b) permits disclosure of such information and in this particular circumstance, overrides the prohibitions set forth in Rule. 1.6. *Cf.* 74 Conn. B.J. at 240.").
[257] *Id.*

the client's capacity to act in his or her own interest is compromised.[258] Although both the Alaska and Connecticut opinions support a privilege to act for the protection of the client they emphasize that the rule is permissive, not mandatory.

The State Bar of New Mexico had a very different view regarding the issue of a client's expressed intent to harm him or herself. According to an advisory opinion, the State Bar of New Mexico maintained that because suicide is not a crime, the lawyer who learns of the client's intent to commit suicide may only disclose such intent pursuant to client authorization.[259] Further, the committee found that if there is no possibility of any crime or fraud, the attorney has no duty to act. The committee, however, only considered the issue as it relates to confidentiality and not as it relates to the client's capacity to make informed decisions.

The question of how this issue relates to the battered woman can be understood by considering recent scholarship in the area of domestic violence. In line with the concept of Learned Helplessness,[260] it has been suggested that a few battered women are so "coercively controlled" that aggressive intervention is the only answer.[261] According to Ruth Jones, the coercively controlled battered woman is described in the context of the most severe domestic violence cases,[262] and distinguished from other abused women depending on the perpetrator's " strategy of 'violence, intimidation, isolation, and

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[258] Confidentiality: Disabled clients; Disclosure, Connecticut informal opinion 99-5 (3/5/99)
[259] New Mexico Ethics Op. 1987-1.
[260] *See* notes 57-66 and accompanying text.
[261] Ruth Jones, *supra* note 11, at 628 ("Coercively controlled battered women, immobilized by violence, need a more aggressive state intervention than those provided by empowerment-based remedies.")
[262] *Id*. at 605-606. Ruth Jones uses Hedda Nussbaum as the prime example of the coercively controlled battered woman. Joel Steinberg was Hedda's abusive partner and "[A]fter three years together, Joel began to beat Hedda and to control most of her daily decisions. During the course of their relationship, he permanently disfigured her face, broke her nose, and punched her so often that she developed a cauliflower ear. He damaged her vocal cords, injured her hands, and chipped and loosened her teeth." *Id*. Hedda's case was brought to public attention as a result of the brutal murder of their adopted daughter, Lisa. *See* People v. Steinberg, 573 N.Y.S.2d 965 (N.Y. App. Div. 1991).

control.'"[263] Jones maintains that because the coercively controlled battered woman is unable to act on her own behalf, she may require that someone else act for her. Supporters of this view insist that the appointment of a guardian on behalf of the battered woman is the solution for an individual who is unable to protect herself.[264] This is an interesting perspective as it assumes that the battered woman is unable to act in her own best interest.[265] It is suggested by those that support this model that a family member or other individual can petition for guardianship of the battered woman if they can demonstrate that the abuser has placed the victim at risk of serious bodily injury or even death.[266] This issue, however, has only been considered in the context of a guardianship proceeding by family or friends and not in relation to any ethical dilemma by counsel. Although the issue of attorney involvement is not addressed by theorists of the coercively controlled battered woman model, the argument could naturally apply in the context of the attorney faced with the victim-client who can be defined as a coercively controlled victim. That is, if you accept this theory in the first instance. If so, the argument that the battered woman has diminished capacity could be presented and thus relief would be available to counsel. As discussed, according to Model Rule 1.14, when an attorney reasonably believes that the client has diminished capacity and is at risk of substantial physical, financial or other harm, the attorney may take reasonably necessary protective

[263] *Id.* at 621 (quoting Dr. Evan Stark who has studied the battered women and the techniques used by the abuser to control the victim).
[264] Jones, *supra* note 11, at 628. (Jones argues on behalf of the appointment of a guardian for the "coercively controlled" battered woman, determining coercive control by examining the effect the abuse has on the victim and the amount of control the abuser exercises over the victim.)
[265] Jones, *supra* note 11, at 611-612.
[266] *Id.* at 610-611. (Citing the Uniform Probate Code, "[b]ased on allegations of life-threatening abuse, the family may initially petition for emergency or temporary guardianship. Emergency appointment proceedings permit a court to appoint a guardian immediately upon a showing of imminent harm. Unif. Probate Code §5-308(amended 1993).").

action.[267] The protective action provided by Rule 1.14, also includes the appointment of a guardian *ad litem*, conservator or guardian.

The question, however, relates to whether the client has the ability or lack thereof to make reasoned choices about her situation. Is the client unable to make appropriate decisions on her own behalf or is the client making a decision with which the attorney simply does not agree? It is the extreme set of circumstances involving a victim, who is so severely beaten, battered and controlled that may require drastic measures. Such decisions, as we have seen, are not easily made. Taking protective action, however, can be seen as a violation of the client's autonomy. If the facts reveal that a client is making a reasoned choice to remain with the abuser because it is the safest option, the attorney's professionalism could also be called into question.

IX. Client Autonomy

> *"Although tempting, practitioners should avoid the pitfall of rescuing the [client]."*[268]

The desire to assist others is why many lawyers enter the practice of law in the first place. But our goal to help others may sometimes get confused with the desire to "rescue" or save our client from what we deem to be the wrong or inappropriate course of action. In the area of domestic violence, such conclusions by the attorney can prove deadly for the battered woman.

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[267] Model Rules of Professional Conduct Rule 1.14 (2003). The rule also contemplates financial harm and other harms and provides protective alternatives.

[268] Mia M. McFarlane*, Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INTEREST L. J. 1, 27 (1998-1999) (citing Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do they Promote Patient Well-Being?*, 273 JAMA 1781, 1785)(the word "patient" is replaced with the word "victim" to put the quote in the context of legal representation as opposed to medical attention. When Hyman made this statement the warning was to physicians, cautioning them not to fall into the trap of trying to rescue their patients, the theory can easily apply to lawyer-client relationship as well.)

The client's absolute right to make decisions on her own behalf has been hotly debated. There is great support for client autonomy as evidenced by legal scholarship in the area,[269] as well as the language of Revised Model Rule 1.2. [270] As Professor Jason Kilborn explains, the attorney-client relationship and the view of client autonomy were clearly established by the Restatement (Third) of Law Governing Lawyers. "The Introductory Note to Chapter 2 of the Restatement, which is devoted to 'the client-lawyer relationship,' states at the outset that the relationship of the client and lawyer is one of principal and agent."[271] It naturally follows according to Professor Kilborn that the client, as principal, is in control, not the attorney. "Agents, after all, are not entitled to determine the principal's 'best interests' and act in contravention to the principal's stated desires; they must either follow lawful instructions or withdraw from service."[272] It is thus the position of some legal scholars that the relationship between lawyer and client precludes the attorney from interfering with the decisions of the client, with a few exceptions such as circumstances arising under Model Rule 1.14.[273] In keeping with this argument a review of Revised Model Rule 1.2, provides direction to the lawyer that he or she "shall abide by the client's decisions concerning the objectives of the representation."[274] The language recited from Revised Model Rule 1.2, is identical to the language of Original Model Rule 1.2.[275] Furthermore, similar language can be seen in the predecessor to the Model Rules, the Model Code of Professional Responsibility.

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[269] *See* Jason J. Kilborn, *Who's in Charge Here?: Putting Clients In Their Place*, 37 Ga. L. Rev. 1 (2002).
[270] Revised Model Rule 1.2 provides that the "lawyer shall abide by a client's decisions concerning the objectives of representation."
[271] Kilborn, *supra* note 269, at 40.
[272] *Id.*
[273] *Id.* at 56. "[a]fter almost a century of development, the American rules of legal ethics have incorporated a modern view of the individual, prohibiting lawyers from interfering with their clients' decisions on legal rights and obligations."
[274] Revised Model Rule of Professional Conduct 1.2(a)(2002).
[275] Original Model Rule of Professional Conduct 1.2 (1983).

According to DR 7 -101 of the Model Code, the lawyer shall not fail to seek the lawful objectives of the client.[276]

There are those who argue that sacrificing client safety in the name of client autonomy causes counsel to compromise his or her moral standards.[277] The analogy, however, is typically made in the context of a client's explicit threat to harm oneself or another individual. In such instances the decision to disclose information for the protection of the client is made when there is a high probability of immediate harm, "not merely a circumstantial possibility" that harm will occur.[278] This fine distinction can be seen in the context of domestic violence, as it is compared to a threat of suicide or an expressed threat to harm a third person. The threat *of* harm to the victim of domestic violence is merely possible, whereas the threat *to* harm oneself or another individual may be highly probable.

Mia M. McFarlane, in her look at mandatory reporting laws for healthcare professionals, argues that physicians should avoid the desire to "rescue their patients."[279] This is an interesting perspective, given the expectation by our society[280] and our courts to hold doctors and in some cases even lawyers responsible for protecting (i.e.

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[276] Model Code of Professional Responsibility DR 7-101(A)91) (1969).
[277] Kevin M. Ryan, *Reforming Model Rule 1.6: A Brief Essay From the Crossroads of Ethics and Conscience*, 64 Fordham L. Rev. 2065, 2069 (1996). Although Ryan considers the issue in the context of the child client, the basic concept of client autonomy is provided. Ryan considers the issue of the client placing him or herself in danger and the moral dilemma faced by counsel attempting to address the issue.
[278] *Id.* at 2073.
[279] McFarlane, supra note 268, at 27. (citing Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do they Promote Patient Well-Being?*, 273 JAMA 1781, 1785 "Physicians should help battered women regain a sense of control by providing information, offering choices, and letting women decide when a report should be made. Although tempting, practitioners should avoid the pitfall of 'rescuing' their patients. ")
[280] Sarah Teal, *Domestic Violence: The Quest for Zero Tolerance in the United States and China: A Comparative Analysis of the Legal and Medical Aspects of Domestic Violence In the United States*, 5 J.L. Society 313 (2003);

"rescuing") victims.[281] This motivation can be seen in the mandatory reporting in a few states which require physicians to report domestic abuse over an adult-victim's wishes.[282] Opponents of mandatory reporting of domestic violence involving adult victims argue that such reporting will discourage victims from seeking medical attention, compromise victim safety and ignore patient confidentiality.[283] McFarlane addresses the danger level victims face and how, although reporting may make the individual making the disclosure feel better, it may in fact place the victim in more danger.[284] Instead of actually helping the victim, deep down the reporter may be motivated not by a need to protect but by a desire to be taken "off the hook."[285] By reporting the potential threat of harm the actor "feels better,"[286] but at what price? Attorneys may find themselves falling into the same trap, wanting to rescue the clients when the victim, in fact, has no desire and possibly, no need to be rescued.[287]

Those who support mandatory reporting of domestic violence by physicians suggest that the potential dangers of reporting are not as great as the opponents suggest and that reporting may, in fact, benefit victims by encouraging physicians to learn more

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[281] McFarlane, *supra* note 268 at xxx.
[282] See Karen P. West et al., *The Mandatory Reporting of Adult Victims of Violence: Perspectives From the Field*, 90 Ky. L.J. 1071, 1074-1075(2001-2002)(reporting that although a select few states require the reporting of domestic violence by physicians, the American Medical Association has adopted a policy opposing the mandatory reporting of domestic violence over the objection of a competent non-elderly adult victim); *see also* Teal *supra* note 280, at 340-341.
[283] Virginia Daire, *The Case Against Mandatory Reporting of Domestic Violence Injuries*, 74-Jan Fla. B.J. 78, 79-80 (2000).
[284] McFarlane, *supra* note 268.
[285] *Id*. at 28, (citing Caroline W. Jacobus*, Legislative Responses to Discrimination in Women's Health Care: A Report Prepared for the Commission to Study Sex Discrimination in the Statutes*, 16 Women's Rts. L. Rep., 153, 216).
[286] McFarlane, supra note 268, at 28.
[287] Is it counsel's job to protect the client from perceived dangers that may or may not be real or is it counsel's role to act in accordance with the wishes of the client? Lawyers are trained to represent their clients and counsel them accordingly. The choice to represent a client in the area of family law, domestic violence in particular, requires the attorney possess the skill and knowledge "reasonably necessary for the representation." *See* Model Rule 1.1 (2003). We are not, however, trained as therapists nor should we be held to a standard that requires such knowledge.

about domestic violence, and thus provide enhanced services to victim-patients.[288] Could the same logic apply in the context of attorney disclosure for the protection of the victim-client? Some may argue that counsel will be forced to learn more about domestic violence in an effort to balance the competing issues involved. Such an outcome could be a positive one for battered women if the end result is a greater sensitivity on the part of the attorney. However, if the end result is a breach of trust, negative consequences will surely result.

X. Investigation

> *The sheer number of incidents of domestic violence in this country make it clear that lawyers who ignore domestic violence issues may profoundly harm their clients and violate their professional and ethical obligations.*[289]

Despite the difficulties, there is no question that it is appropriate and even ethically responsible to assess risk of further domestic violence in the general context of client representation. Risk assessment helps the attorney investigate facts, assess choices available to the client, determine whether there is a need for emergency or ex parte relief, and prepare for trial. The rules of professional conduct require all attorneys to make a reasonable investigation of facts provided by the client in order to confirm that a good faith argument can be made in support of the client's position.[290] In the course of this case investigation domestic violence counsel should ask many of the questions associated with risk assessment. This will help the attorney not only prepare for trial but will also

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[288] West, *supra* note 282, at 1082.
[289] American Bar Association Commission on Domestic Violence, *supra* note 78, at 1-1.
[290] Revised Model Rule 3.1 Comment 2 – Provides that the filing of an action is not frivolous simply because the facts have not first been fully substantiated. What is required, however, is that the lawyer informs herself about the facts of the case, the applicable law, and thus make a determination that a good faith argument can be made in support of the client's position; *See also* Martyn, *supra* note 12, at 1324 ("To do their job, lawyers need complete and accurate facts, both about what has already occurred and about what the client contemplates doing. Receiving these facts is essential to offering legal advice, because legal obligations and remedies depend upon factual circumstances that justify legal intervention.")

help him or her evaluate the need for emergency relief. Counsel must learn whether there is a past history of domestic violence because such information can be helpful in a number of respects. First, it may help her or him uncover acts of violence or a course of conduct serious enough to warrant entry of a civil protective order. It could also provide information about potential witnesses who can testify as to the acts of violence, thus bolstering the victim's case at a future trial. It will aid counsel in assessing the victim's ability to recall the facts and circumstances of the history in the victim's case thus supporting the client's claim that acts of violence have occurred. Further, the history of violence must be the subject of future discussions between counsel and client, should the victim decide to remain with or return to the abuser.

Similarly, counsel must learn about the perpetrator's access to weapons and /or use of weapons in prior acts of violence. Securing weapons is critical to ensuring victim safety whether she is severing all ties with the abuser or choosing to remain. Further, weapons introduced at trial can provide the kind of dramatic evidence lacking in many civil protection hearings.

Another important inquiry is whether the abuser has a controlling nature. This can help counsel assess how a particular perpetrator may react under certain circumstances. Abusers who have displayed highly possessive actions in the past may be more inclined to react negatively to a victim at the time she considers leaving. The victim needs to be made aware of the dangers she faces by attempting to leave the abusive relationship, just as she needs to be made aware of the dangers of remaining.[291]

[291] Based on experience representing victims of domestic violence seeking protection from their abusers, over the past twelve years.

A detailed interview with the client about the perpetrators mental state, as well as his drug or alcohol use can also shed light on the volatility of the abuser. Although evidence of the abusers mental state alone may not guarantee the entry of a civil protection order, in combination with acts defined by statute, such information can provide counsel with valuable information about risk factors to be communicated to the court when considering relief necessary to ensure the safety of the victim.

XI. Communication & Safety Planning

> *Family Law may be one of the few areas of law where malpractice may be committed solely by the attorney's aggressively pursuing all legal remedies available to the client…. Before the lawyer rushes into court… she may wish to discuss with the client whether or not such action will increase the client's safety risks.*[292]

Although counsel may not have an ethical duty[293] or moral obligation to disclose confidential information for the protection of the battered client, lawyers who represent battered women do have other ethical obligations. The attorney must communicate fully with the client, engage in safety planning, and put in place other safeguards to ensure the protection of the client.[294]

Pursuant to Rule 1.4(b) of the Model Rules of Professional Conduct, an attorney must explain the matter to the client in such detail that the client is able to make an informed decision.[295] In order for the client to make an informed decision about whether to stay in an abusive relationship, counsel must discuss with the client the risks of

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[292] Drew, *supra* note 42, at 13.
[293] There are those that may argue despite the permissive nature of the rule and the lack of an ethical duty on the part of counsel to warn or protect, there may be a legal duty by virtue of the fact the rule was created for the protection of others (i.e. resulting in tort liability). *See* Burman, *supra* note 17, at 256.
[294] American Bar Association Commission on Domestic Violence, *supra* note 78, at 12-4 and Model Rule 1.4.
[295] Revised Model Rule 1.4(b)

remaining, as well as the risks associated with leaving her abuser.[296] A legal remedy is not always the safest and best answer for a battered woman.

Whether the client seeks to end the violent relationship or concludes that she will remain, counsel must provide the client with the information necessary to develop a safety plan. If she has not yet left the abuser, the attorney must make sure that when she is ready to leave that she has identified a safe exit plan, a place to go and a way to get there.[297] The client should be ready if she needs to leave quickly by having a bag packed, a list of people to contact and some money readily available.

Lawyers must also keep in mind that the act of seeking legal assistance can potentially place a victim in greater danger.[298] The American Bar Association Commission on Domestic Violence addressed the issue of safety in *The Impact of Domestic Violence on Your Legal Practice*.[299] Attorneys are advised to institute safety measures when representing the victim.[300] It is all too easy for an attorney to focus on legal actions and outcomes and neglect to consider the unintended consequences of those legal actions. For example, the victim-client may agree to the filing of a petition for a civil protective order. The attorney drafts and files the necessary papers with the court but does not consider what will happen after service of process nor what could happen to

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[296] *See generally* Gold, *supra* note 28.
[297] Safety Plan – National Coalition Against Domestic Violence, http://www.ncadv.org/protectyoursel/SafetyPlan_130.html; See also Domestic Violence Handbook – Personalized Safety Plan, http://www.domesticviolence.org/pln.html.
[298] *See generally* Buel, *supra* note 187, at 7 (explaining that separation violence is a likely result for victims who attempt to leave the abusive home and stressing the need for safety planning by those who assist battered women separating from the abusers).
[299] American Bar Association Commission on Domestic Violence, supra note 78, at 2-11 through 2-16 (Deborah M. Goelman encourages attorneys to institute safety measures and other precautions when communicating with a victim who is currently living with her abuser, both through correspondence and by telephone).
[300] *Id.* *See also* Burman, *supra* note 17, at 240 ("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.")

the victim before trial. For example, a case involving name calling and stale allegations of low level physical abuse would not appear to warrant ex parte relief. In such a case, the victim could wait a period of time for the trial to be scheduled. If counsel fails to tell the client that papers will be served on the perpetrator prior to trial, a fact the victim may likely be unaware of, the outcome could be deadly. The victim could be home one evening with her abuser when the sheriff knocks on the door to serve a petition containing allegations of abuse, as well as requests for relief such as a no contact order, custody of the children, possession of the home, support and other ancillary relief. After the door is closed and the abuser has an opportunity to review the documents, retaliation could be swift and fatal.

In the alternative, service of process could cause the abuser to coerce the victim to drop the matter. If the client decides not to pursue a civil protective order, counsel should confirm that the victim was not encouraged by the abuser to drop the matter. Again, proper action requires accurate information. It is legally sound to attempt to communicate with the client to ensure she is safe and that her decision not to proceed was by choice. It is another matter altogether to conclude that the client has been coerced without sufficient information or to substitute the lawyer's judgment for that of the client because counsel believes that the only appropriate course of action for the client is to obtain a protection order.

XII. Conclusion

> *If we care about our character and conduct ourselves accordingly, we will be able to sleep well at night*[301].

[301] Carl Horn III, Lawyer Life: Finding a Life and a Higher Calling in the Practice of Law 106 (ABA 2003).

Duty, loyalty, integrity, trust, and confidentiality are all fundamental attributes of a member of the legal profession. There has been, nevertheless, a great deal of debate over the struggle between a duty to one's client and what many have argued is a higher duty to the profession and society as a whole. The duty of loyalty may appear to create a conflict between the attorney's ethical obligation to safeguard the client's confidences and a moral responsibility to protect the client from the risk of physical harm. But the issue as it relates to domestic violence is not as simple as choosing between the protection of information and the protection of the individual.

Although the decision to act for the protection of the client should not be made in haste, an attorney who has no question that the client is at risk may require an ethical privilege to act to save a human life. Attorneys practicing in jurisdictions that have adopted Revised Model Rule 1.6(b)(1), have such a privilege. But the decision to act should be a right, not a duty. And the answer to this difficult issue may not lie within the rules of professional conduct or any common law duty to protect individuals. The answer may be found within the facts and circumstances of each case and sometimes in keeping with the intuition of the lawyer making those decisions. There is no easy way to predict which cases are lethal or so dangerous that they will result in serious physical harm. And, there is also no way of determining when intervention will do more harm than good. As a result, guidelines should be created to direct the attorney and aid him or her in making the difficult decision of acting for the protection of the client. A written risk assessment tool similar to the *Danger Assessment Instrument*[302] should be added to Rule 1.6 to aid the attorney in the evaluation of each case. Further, the lawyer should be required to ascertain the victim's own assessment of the risk she faces and take such

[302] Campbell, s*upra* note 190.

views into account before making decisions about client protection. In addition, a panel of experts in the field of domestic violence should be available to serve as a resource for lawyers in need of guidance on risk assessment and to provide direction on ethical issues faced by lawyers representing victims of domestic violence.

Although there are obvious reasons to support the right of an attorney to act for the protection of a life, the lawyer who is considering disclosing confidential information for the perceived safety and protection of the victim-client should think long and hard about the unintended consequences of such benevolent actions. [303] You may not want to open one door only to close and lock all others, in the name of client safety.

Each case and client must be evaluated on the basis of the facts and circumstances presented. The evaluation must be conducted in the moment and not by some arbitrary process of retrospection. In keeping with the Scope of the Original Model Rules, an attorney's exercise of discretion not to disclose confidential information protected by the rules should *not* be subject to reexamination.[304] It naturally follows that the language of the Scope of the Original Model Rules should be restored and maintained by the drafter of the Revised Model Rules.[305] To do otherwise, is to force the attorney representing victims of domestic violence to predict the future.

Education is the key. Lawyers, who represent battered woman, must understand the importance of client communication and the role of risk assessment. Law schools must act as leaders and provide the knowledge and information necessary to prepare

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[303] For a alternative perspective *see* Karan, *supra* note 179, at 57 (arguing that "silence—in domestic violence cases—is not golden. Tell some one and become a part of a coordinated community response to end domestic violence.") .

[304] Original Model Rules, Scope paragraph 20. The language of paragraph 20 of the Scope of the Original Model Rules did not survive the revisions made by the Ethics 2000 Commission, and cannot be found in the Scope of the Revised Model Rules.

[305] *Id.*

future and practicing lawyers for the real possibility that, at sometime in their legal career, a human life may depend on the decisions they make.