DO ASK AND DO TELL: RETHINKING THE LAWYER'S DUTY TO WARN IN DOMESTIC VIOLENCE CASES

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Empirical data document that while domestic violence victims face high risk of recurring abuse, batterers' lawyers may be privy to information that could avert further harm. Attorneys owe a duty of confidentiality to their clients that can be breached only in extraordinary circumstances, such as when counsel learns her client plans to commit a crime. To resolve the tension between client confidentiality and victim safety, this Article argues that, in the context of domestic violence cases, lawyers have an affirmative duty to (1) screen battering clients who have indicated a likelihood of harming others, (2) attempt to dissuade them from carrying out planned violent crimes, and (3) warn identifiable abuse victims whom their clients have threatened. Using doctrinal and normative analyses, the Article posits that attorneys who fail to take these pre-emptive actions may be held liable in tort for their omissions. In addition to clarifying the lawyer's obligations, this Article provides guidance as to the steps necessary for avoiding tort liability while increasing victim safety. It concludes with specific recommendations for remedial statutory changes consistent with fundamental precepts of a lawyer's professional responsibility.

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I. INTRODUCTION

In this Article, we develop the argument that lawyers who suspect that their clients pose a serious threat to third parties have a legal and ethical duty to inquire as to the client's intention and ability to carry out such threats. We contend that a lawyer handling domestic violence[1] cases has a higher duty to recognize risk factors unique to those matters, including verbal and non-verbal clues a client might give that a third party is at heightened risk. Attorneys then have a duty to attempt to dissuade clients from carrying out planned violent crimes and to warn potential abuse victims whom their clients have threatened. Lawyers must, of course, use their judgment in determining the safest and most effective means of gathering client information concerning specific plans to harm a third party. Apart from whether an attorney discloses client threats, she may be held liable in tort for failure to properly investigate, attempt to dissuade, or warn in the context of domestic violence cases.

We focus, first, on the doctrinal, and then, the normative aspects of ethics and tort law implicit in handling domestic violence cases. A conflict arises because lawyers owe a duty of confidentiality to their clients that can be breached only in extraordinary circumstances, such as

1. "Domestic violence" occurs when one intimate partner uses physical violence, threats, stalking, harassment, or emotional or financial abuse to control, manipulate, coerce, or intimidate the other partner. *See* Roberta Valente, *Domestic Violence and the Law*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK 1–3 to 1–4 (1996). Note that within this article we will use the terms "domestic violence," "domestic abuse," and "intimate partner violence" interchangeably.

when counsel learns that the client plans to commit a crime.[2] Part II addresses the current status of ethical rules that require or permit revelation of client confidences. The states are not uniform in their disclosure requirements, varying in levels of obligation to divulge client confidences and often varying substantially from the ABA Model Rules. While some states' professional rules provide a general framework for warning third parties of impending harm, significant variation also occurs among jurisdictions. This variability suggests that implementing clear policy is, in part, voluntary. In fact, the laws of many states, such as Wyoming[3] and Massachusetts[4] make explicit the voluntary nature of disclosure.

Under these legal regimes, lawyers are not required to implement plain disclosure standards; they are governed by permissive guidelines and, seemingly, must explain only if they disclose potential harm to a third party.[5] This policy is as illogical as it is unwise in domestic violence cases. The legislative intent of every state's abuse prevention laws is protection of the victim[6] and is consistent with a substantial body of case law validating the importance of prioritizing victim safety.[7] Discretionary disclosure may not only sabotage the legislative intent, but also place lawyers in the untenable position of choosing preservation of their bar licenses over victim safety as well as expose them to liability in tort. None of the state professional rules protect the attorney from tort liability in the decision to disclose. Mandatory disclosure rules provide greater protection to practitioners, yet most state rules employ

2. *See*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003) (providing in part that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal . . . .").

3. WYO. R. PROF'L. CONDUCT R. 1.6(b)(1) (2006) (stating that a lawyer may disclose confidential client information if reasonably necessary "to prevent the client from committing a criminal act . . . .").

4. MASS. R. PROF'L CONDUCT R. 1.6(b)(1) (1998) (stating that a lawyer may disclose confidential client information "to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm. . . .")

5. *See infra* Part II B for further discussion.

6. Every state now has a domestic violence protective or restraining order law focusing on the prevention of further harm to the victim. *See, e.g.*, ALA. CODE § 30-5-1(a) (1975) (specifying that "[t]his chapter shall be known as . . . the 'Protection From Abuse Act,'" and that, "[t]his chapter shall be liberally construed and applied to promote all of the following purposes: (1) To assure victims of domestic violence the maximum protection from abuse that the law can provide."); MASS. GEN. LAWS. ANN. ch. 209A, §§ 1–9 (2006) (referred to as the "Abuse Prevention" Law); 46 OHIO JUR. 3D *Family Law* § 316 (2005) (noting that in Ohio, "[t]he purpose of a civil protection order issued pursuant to RC § 3113.31 is to provide protection from domestic violence . . . .").

7. *See, e.g.*, Maldonado v. Maldonado, 631 A.2d 40, 42 (D.C. 1993) (holding that the District of Columbia's "Intrafamily Offenses Act is a remedial statute and as such should be liberally construed for the benefit of the class it is intended to protect.").

permissive language. This is another reason why we argue for compulsory disclosure of serious client threats.

Part III discusses how lawyer competency in domestic violence cases (including a wide range of matters, such as family, criminal, estate planning, and tax law) requires substantial knowledge of the warning signs of escalating abusive behavior and the subsequent risk to the intended target.[8] The knowledge itself may be sufficient to obligate the attorney to warn a victim, even absent a client's verbal threat to harm a specific individual. This section starts by engaging in a necessary policy discussion on balancing perceived ethical duties with individual and public safety. We then tackle the thorny issue of the "zone" encompassing those who may be intended targets and thus entitled to warning. Next, we review the factors that may be considered as the lawyer reaches a conclusion on whether the obligation to disclose has been triggered. It is clear that once an attorney reasonably believes that a client might pose a threat of death or serious harm to another, he may not ignore such information.

Non-tort consequences of disclosure are discussed in Part IV. Although it is malpractice for a lawyer to ignore knowledge of domestic violence dynamics in making strategic case decisions,[9] divulging threats will likely alter the attorney-client relationship—perhaps necessitating change of counsel. This section also attends to the issues of safety planning for a lawyer's physical well-being, as well as steps to preempt allegations of ethical improprieties.

Beyond the attorney's ethical duty to inquire about harm and warn potential victims, Part V posits that doctrinal and normative notions of tort can be used to engender ethical conduct on the part of lawyers handling cases involving domestic violence. Part V starts by considering Professor Leslie Levin's illuminating study of eight hundred lawyers regarding their decisions to warn third parties of potential client harm. Part V then appraises the underpinnings of tort policy, which strengthens our arguments for pre-emptive action by lawyers. Part V also explores the criminal aspect of domestic violence since most such acts that involve physical abuse are criminal offenses. In representing a perpetrator of domestic violence, the lawyer must appreciate the extremely high recidivism rate of abusers, making the likelihood of their

8. *See generally* THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK (Margaret Drew et al eds, 2d. ed. 2004).

9. *See* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?* 39 FAM. L.Q. 7, 7 (2005) (stating that "[f]ailure to recognize when a client or opposing party is or has been abused by a partner and failure to consider abuse in making strategic decisions are forms of legal malpractice.").

committing further offenses correspondingly great.[10] Thus, when assessing the seriousness of a client's threat in domestic violence cases, the lawyer must acknowledge the likelihood that an untreated batterer will offend again.

Part VI offers arguments for a mandatory duty to initiate inquiry about planned harm once the batterer has cued counsel. We submit that focused inquiry is neither overly burdensome nor beyond the scope of attorney responsibility in cases involving domestic violence and stalking. We consider under which circumstances a lawyer may be required to ask the client if he intends to perpetrate harm on his victim, particularly if counsel observes past or present conduct that raise red flags.

Part VII addresses the need for a lawyer, once he knows of the batterer-client's dangerous plan, to attempt convincing the client of the folly of the intended criminal action. Counsel may be the batterer's sole confidant, in part because of skilled questioning. Since the lawyer may also be the only person with the power to dissuade the abuser, public policy dictates that greater responsibility befall her.

Using the negligence framework, Part VIII provides the arguments for a mandatory duty to warn within the circumstances outlined herein. We argue further that even where a client may disavow any intention of injuring a third party, the warning signs of escalating abuse in domestic violence and stalking cases cannot be ignored arbitrarily by a batterer's counsel, and the denial then used to justify failing to warn the intended victim. This section considers similar expectations in products liability cases as well as those placed on other professionals. The difficult ethical and legal quandaries of inadvertently colluding with the batterer are considered with the proposition that counsel has a duty to warn once there are indicators that the intended victim may be at risk of serious harm.

Opponents of these mandates will likely argue that the duty of confidentiality a lawyer owes to a client is firmly rooted in centuries of American jurisprudence and should not be eroded absent an unusually compelling public interest. Domestic violence presents a persuasive exception to non-disclosure and imposes on lawyers an affirmative duty to ask and tell. The Department of Justice reports that approximately four American women per day are murdered by their intimate partners.[11]

10. *See, e.g.*, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 19 (1996) (discussing one study reporting recidivism rates among batterers to be as high as sixty percent).

11. *See* CALLIE MARIE RENNISTON, UNITED STATES DEP'T OF JUSTICE, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993–2001 (2003).

If foreign terrorists were attacking citizens at this rate, the Department of Defense would likely have long ago fired up the F-16's and dispatched elite, special forces to stop this obvious danger.[12] Yet, because the perpetrators are the current or former intimate partners of the victims, a different standard is imposed by which these cases are often treated less seriously at every stage in the legal system.[13] Sometimes complicit in the perpetuation of this double standard are lawyers, judges, and other community stakeholders with the power to radically alter the dangerous behavior of batterers.[14]

II. CURRENT ETHICS REQUIREMENTS FOR DUTY TO DISCLOSE CLIENT DANGEROUSNESS TO OTHERS

There is an ever present tension between client confidentiality and victim safety when handling legal matters involving domestic violence. Some may argue that any obligation to disclose client confidences erodes the relationship between the attorney and client and contributes to the recent assaults on attorney-client privilege. These arguments have merit. The reality is, however, that the ABA Model Rules, as well as state rules of professional responsibility, require some level of consideration and disclosure should a client make a threat to cause substantial injury to a third party or disclose the intention to commit a crime.

A. ABA Model Rules

In 2002, the American Bar Association's Model Rules of Professional Conduct (hereinafter the Model Rules) expanded Section 1.6 to reflect many states' growing exceptions to client confidentiality.[15] Section 1.6 (a) makes clear that a lawyer may not disclose case information without client consent; however § 1.6(b) permits revelation of confidential information to prevent the client's commission of an act reasonably certain to cause death or serious bodily harm.[16] Interestingly, although the original draft of the Model Rules mandated warning a third party if

12. It is likely the Dept. of Homeland Security, CIA, FBI, ATF and other relevant entities would also be enlisted to ensure maximum resources were procured to effectuate eradication of the harm.

13. *See, e.g.*, NAT'L INST. OF JUSTICE, *supra* note 10, at 3–4.

14. Based on the combined fifty years of experience the authors have in working with victims, offenders, and the state in domestic violence cases [hereinafter "Authors' experience"]; *see also supra* notes 11–13 and accompanying text.

15. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

16. *Id.* at 1.6(b)(1).

required to avert death or serious injury,[17] vocal critics managed to revise this to merely permit notice.[18] As discussed below, there may not be a significant difference between "notice" and "warning" when tort liability for disclosure or non-disclosure is examined.

Disclosure clearly applies to cases where the lawyer believes that her client is prepared to cause death or serious injury to another. This rule has special importance in cases involving domestic violence. There is little in the way of cultural support for protection of individuals who are victims of domestic violence. The idea of a wife and child being one's property and under the control of the husband is not in the so distant legal past.[19] The cultural attitudes of ownership and male privilege persist. The resulting minimization of abuse within the family, and in particular of intimate partner violence, may have removed from the consciousness of lawyers the duty to disclose client confidences when the threatened individual is a family member. The lawyer may minimize such threats toward the family member; just as society minimizes its acknowledgment of and response to domestic violence.

The lawyer has a particular responsibility when the individual is easily identifiable. This is often the case with domestic violence as the perpetrator's focus is almost always on one victim, the intimate partner. Harm to others, such as the victim's children, is usually collateral and once separation has occurred abuse of the children might escalate as a way of further controlling and abusing the former partner.[20] Threats within the family law practice may be more subtle and indirect than in other practices. Skilled family and criminal law practitioners, in particular, may understand the nature of threats very differently from attorneys in other fields.

Model Rule 1.6 describes circumstances under which a lawyer might disclose client confidences. One such circumstance includes disclosure to prevent the client from committing a crime. Since acts of domestic violence are often criminal in nature, disclosure may be mandated under local rules, even if disclosure of a client's intention to commit serious bodily injury appears discretionary. Likewise, client fraud that is reasonably likely to result in the substantial injury to the financial interests or property of another is generally within the scope of

17. *See* Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 491 (2000).

18. *Id.* at 492.

19. *See, e.g.*, Bradley v. State, 1 Miss. (1 Walker) 156 (1824).

20. *See* Lee H. Bowker, et al., *On the Relationship Between Wife Beating and Child Abuse*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 162 (Kertsi Yllö & Michele Bograd eds., 1998)

circumstances under which an attorney may disclose confidential information. Financial ruin of a domestic violence victim is often part of the perpetrator's control and abuse of the victim and may, in fact, be an indication that she is at increased physical risk. This portion of Model Rule 1.6 should be kept in mind when considering the risk factors that may trigger an obligation on the part of the attorney to warn the intended victim or, at a minimum, to provide notice concerning client statements. As referenced earlier, the initial debate over warning versus notice may have few practical differences for the attorney who represents a client intent on harming a third party.

The duty to warn in domestic violence cases may assume knowledge of a specific threat, an intention to act, and the client's ability to act on the threat. Because *Tarasoff* and post-*Tarasoff* cases primarily involve mental health professionals, the duty to warn may require direct communication between the practitioner and the intended target.[21] Mental health providers are charged with a duty to warn the victim directly.[22] The lawyer, however, is proscribed from direct contact with a party who is represented by counsel.[23] There are no exceptions to the prohibition on counsel's communicating with a represented opposing party. It is unlikely any protection exists for a lawyer who does so, even when the communication is made in an attempt to prevent death or serious bodily injury. Often ethical opinions in this regard are tempered by an acknowledgement of the serious circumstances that surrounded the breach, and those circumstances may mitigate sanctions. A violation is found nonetheless. This dilemma may be why few states actually incorporate "duty to warn" language.

Notice, on the other hand, may be accomplished in a variety of ways. Should the intended target be represented by counsel, notice from the abuser's counsel to counsel for the victim would be sufficient. Notice to the attorney is deemed notice to the client in a variety of legal circumstances including notice of hearing and notice of settlement offer. For example, notice to Children's Protective Services may be adequate

21. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (holding that a therapist's duty to warn arises when he determines or should have determined that his patient poses a serious danger to an identifiable third party).

22. For a more detailed discussion of Tennessee Rule 1.6 and its implications, *see* Kassie Hess Wiley, Note, *To Disclose or Not to Disclose, That Was the Question—Until Now: Tennessee's New Rule of Professional Conduct 1.6 Mandates Disclosure of Confidential Client Information to Prevent Physical Injury or Death to Third Parties*, 34 U. MEM. L. REV. 941 (2004).

23. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2003) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

if the intended target is a minor.[24] Notice to local police may be sufficient if one presumes that the police might take action to protect the victim. One must question, however, if a request for the local police to give warning to the victim constitutes a prohibited indirect communication under applicable ethics rules if the intended victim is represented by counsel.[25]

What are the parameters of notice versus warning? Those arguing for notice may have envisioned that a general statement as to heightened risk may suffice in lieu of a warning as to the detail of a plan. Any intended protection for the practitioner in providing notice as opposed to warning is illusory. Does notice versus warning really make a substantial difference in the case where a client voices a specific plan to seriously injure a spouse? Probably not. If a client discloses a specific plan, such as "I am going to kill my wife when she leaves for work on Friday," general notice of a heightened risk may not be appropriate. Unspecific notice to the intended target that she is at heightened risk does not provide her with the important details of the plan that are necessary to prevent her imminent death. Disclosure under a notice rule ("I believe that you are at increased risk of harm by my client.") as opposed to direct warning ("My client says he intends to kill you on Friday.") could literally make the difference in a victim's ability to take specific steps to protect herself. Indeed, one can only imagine the response of a jury in a wrongful death action where the attorney testifies that he or she had knowledge of a specific plan to kill, but failed to disclose the details to the intended victim. The exercise of parsing the difference in the standard of disclosure of notice versus warning is futile if a jury or ethics board will retroactively examine the adequacy of the notice.

Whether or not one gives notice or a direct warning, some level of disclosure of client confidence is presumed. Neither notice nor warning will be sufficient to prevent a review by an ethics board as to whether a confidence was breached and whether the disclosure was permitted under ethics rules. Review is almost a certainty. Clearer guidelines of approved mandatory notice would assist the practitioner in determining the nature and extent of appropriate disclosure. In the meantime, the best preparation and defense for the conflicted attorney might be to study the ethical opinions of the jurisdiction of his practice as well as

24. For a more complete discussion of the lawyer's duty to warn in cases involving child abuse *see* Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243 (1987).

25. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2003) (prohibiting violation of the Rules through the acts of another).

those jurisdictions with similar rules of disclosure. Jurisdictions vary in the standards employed, as addressed in the next section.

B. State Rules

Adoption of the ABA Model Rules is not mandatory. The Rules provide guidance only.[26] The Model Rules are not intended to provide a basis for civil liability, nor do they afford a shield from liability.[27] Individual states enact separate codes of professional conduct or responsibility. It is to these state codes that courts most often look when determining whether or not a lawyer has violated an ethical obligation.

With regard to Model Rule 1.6, the adoption of confidence disclosure rules by the states has fallen loosely into three categories. The first is the mandatory disclosure state. These states require disclosure when death or serious bodily injury is threatened. Essentially, mandatory disclosure states have adopted a form of Rule 1.6 that requires disclosure ("shall disclose") rather than the permissive language ("may disclose") that is found in the ABA model rule. Florida,[28] New Jersey,[29] and Tennessee[30] are considered "mandatory" states that require disclosure of client confidences when a third party may be seriously injured or death may result. States requiring notice relieve the lawyer of what can only be an agonizing process of determining whether or not to disclose information that the client is at risk of injuring or killing another.[31]

Most states address disclosure when serious financial or physical harm is threatened, as well as when the commission of a crime is threatened. A state may have inconsistent disclosure requirements within its Code of Professional Responsibility depending upon whether or not a crime is threatened. For example, while Tennessee's Code requires disclosure where there is risk of death or serious bodily harm, the Code uses permissive language on whether the lawyer may reveal information necessary to prevent the client or another from committing a crime.[32] Domestic violence involving physical injury is a criminal as well as civil offense and in all jurisdictions constitutes a crime under

26. MODEL RULES OF PROF'L CONDUCT, SCOPE ¶ 16 (2003).

27. *Id.* at ¶ 20.

28. FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b)(2) (2006).

29. N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1998).

30. TENN. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2004).

31. Client loyalty is fundamental to representation and one cannot minimize the difficulty of the attorney's dilemma in determining whether or not disclosure is appropriate.

32. *See supra* note 22.

assault, battery, stalking, or other statutes.[33] Those analyzing the disclosure obligation strictly under the criminal reference would be risking an ethics violation if the intended criminal behavior involved a serious threat of harm to a third party, the latter disclosure being mandatory in Tennessee. If a state has either mandatory disclosure of any criminal act or mandatory disclosure of threats of death or serious bodily harm, the practitioner is not left with a choice about disclosure when a third party is in danger of being seriously injured. The intended harm is most likely a crime under local statutes.

The second category of state ethical rules involves "permissive" disclosure. These states frequently pattern the language of Model Rule 1.6. Maine[34] and Minnesota[35] are among the states that have adopted the permissive stance of Model Rule 1.6. Although states that have adopted Rule 1.6 of the Model Code may believe that disclosure is best left to the discretion of the attorney,[36] those jurisdictions may have inadvertently exposed the lawyer to greater vulnerability to tort judgment when the lawyer decides to not disclose a client's threat and death or serious bodily harm occurs. Minnesota's Rules of Professional Conduct 1.6(b) lists circumstances under which disclosure of client confidences may be made. Section 1.6(b)(6) states the lawyer "may" disclose client confidences when "the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm."[37] The lawyer practicing in a state that permits, but does not require, disclosure of both threats of serious bodily harm and criminal offenses may be at the most risk for tort liability, which is explored in Part V. A decision not to disclose leaves one exposed to a civil action brought by a victim or victim's estate, even though local ethics regulations make clear that the choice of whether or not to disclose is

33. Conviction for criminal acts of assault and battery in a domestic context often carries more severe penalties.

34. *See* ME. CODE OF PROF'L RESPONSIBILITY R. 3.6(h)(4) (2006).

35. *See* MINN. RULES OF PROF'L CONDUCT R. 1.6(b) (2005) (listing circumstances under which disclosure of client confidences may be made; section b(6) states the lawyer "may" disclose client confidences when "the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm.").

36. The policy for permissive disclosure was well stated in *Purcell v. District Attorney*, 676 N.E.2d 436, 441 (Mass. 1997): "Unless the crime-fraud exception applies, the attorney-client privilege should apply to communications concerning possible future, as well as past, criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct."

37. Minnesota Rule 1.6(b)(4) reads: "A lawyer may reveal information relating to the representation of a client if . . . the lawyer reasonably believes the disclosure is necessary . . . to prevent the commission of a crime."

left to the practitioner. Similarly, disclosure could certainly invite suit by one's own client. Commentary to state rules may provide little or no guidance in the domestic violence context other than general references to criminal acts.[38]

The final category of state professional rules is best described as hybrid. Examples of hybrid rules are found in Rhode Island, Texas, and Georgia. Rhode Island, for example, has adopted the language of Model Rule 1.6 but has retained the reference to "imminence"[39] found in the earlier ABA Model Code of Professional Responsibility.[40] The language "but is not obligated to" in the Rhode Island Rules provides an additional layer of protection from an allegation of ethical breach to the attorney who decides against disclosure. The state ethics board may be sympathetic to non-disclosure, but that decision is unlikely to protect the lawyer who is defending a tort claim on behalf of the seriously injured victim. Liability in tort will be explored below.

Texas's Model Rules offer a different formulation of the hybrid type. For example, whether or not disclosure of a possible criminal act is mandatory or permissive in Texas depends upon the level of counsel's certainty that the client has a plan to commit the intended crime.[41] Note also that the emphasis in the Texas Rules is on acts that are criminal in nature.

In Georgia's Rule 1.6, the language of disclosure is permissive, allowing a lawyer to disclose criminal conduct of a client or third party that might result in harm.[42] In addition, the lawyer may also disclose a

38. Specific examples are generally not included in professional codes, model or otherwise.

39. R.I. RULES OF PROF'L CONDUCT R. 1.6(b) (2006) ("Confidentiality of Information: . . . (b) A lawyer may, ***but is not obligated to***, 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") (emphasis added). *See also generally* Robert I. Simon, The Myth of "Imminent" Violence in Psychiatry and the Law, 75 U. CIN. L. REV. 631 (2006) (article on the difficulties of determining imminence elsewhere in this volume).

40. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983) (stating that a lawyer may reveal confidential client information reasonably necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm").

41. *Compare* TX. RULES OF PROF'L CONDUCT R. 1.05(c) (2005) ("A lawyer may reveal confidential information . . . (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act," ***with*** Tx. D. R. Prof. Conduct 1.05(e) (2005) ("When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer ***shall*** reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act") (emphasis added).

42. GA. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001) ("A lawyer may reveal information covered by paragraph (a) [confidential information] which the lawyer reasonably believes necessary . . . to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law" and "to prevent serious injury or death not otherwise covered . . . above").

plan to cause serious injury or death otherwise not covered by the paragraph referencing criminal conduct. The rule itself seems to employ a lower standard of harm regarding a client's planned criminal conduct, even though the commentary references death or substantial bodily harm as being a reasonably expected outcome of an intended criminal act.[43] The distinction in the language of the rule (a possibly lower standard of "harm" for criminal acts) becomes particularly important in domestic violence cases where what may appear to be a minor crime in some jurisdictions (e.g., injury to a pet) may in fact be an indicator of high lethality.[44]

While Georgia is a "permissive" state for disclosure of threat of harm, additional and broader obligations are imposed upon the lawyer. Significantly, paragraph (b)(3) of the Georgia Rule 1.6 contains the following language: "Before using or disclosing information pursuant to Subsection (1), *if feasible*, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, *to warn the victim*."[45] Georgia has faced head-on the issue that so many other codes avoid: What specific steps shall a lawyer shall take when a serious threat of harm is made by the client toward a third party?

Guidance is provided within the language of the rule and the duty to warn has been written into the Georgia code. If the client has taken action, and refuses to warn the victim, the attorney may have a higher duty to warn the intended victim, even though permissive disclosure language is used. The duty to warn the victim is a burden easily shifted to the attorney should the client fail to agree to either cease the planned activity or to warn the intended target. Consider the following: A client discloses to the Georgia lawyer that he plans to purchase a gun. The client has previously indicated that he wished that he had killed his wife when the parties were still living together. Upon investigation, the attorney discovers that on the prior day the client applied for a gun permit. Because the statutory waiting period before purchase of a gun

43. *See* GA. RULES OF PROF'L CONDUCT R. 1.6 cmt. 11 (2001) ("[T]he lawyer may learn that a client intends prospective conduct that is criminal and likely to result in death or substantial bodily harm.").

44. Even without distinguishing standards of harm, killing a family pet could in and of itself be considered a non-verbal warning that the former intimate partner is at high risk of harm from the abuser client. This and other lethality indicators will be discussed further in the following section.

45. GA. RULES OF PROF'S CONDUCT R. 1.6(b)(3) (2001) (emphases added). Virginia follows a similar pattern regarding an attorney's duty to persuade a client not to act. *See* VA. RULES OF PROF'L CONDUCT R. 1.6(c) (2004) ("A lawyer shall promptly reveal: (1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned . . . .").

has not passed, the lawyer has sufficient time to inquire as to the client's intent and to attempt to dissuade the client from any plan to harm the former partner.

Under the Georgia rules, the duty to inquire was triggered, as was the duty to dissuade. In addition, the lawyer has an obligation to convince the client to warn the victim. This latter requirement is controversial. One assumes that the lawyer is obligated to find every reasonable avenue of disclosure short of the lawyer warning the intended victim. Clients who are planning harm to another are unlikely to warn the intended victim. If they do, it may be one in a series of threats received by the former intimate partner. It is likely that the warning will have much greater impact when delivered by a third party professional. The lawyer who relies upon the client to provide the warning does so at his or her own risk.

Assume the same lawyer receives a voicemail message from the client indicating that the client has purchased a gun. The attorney could appropriately determine that there is not sufficient time to attempt to dissuade the client and that the client will not warn the intended victim. The decision whether or not the attorney will warn the victim must take priority. Clearly, each case involving the threat of violence in the domestic abuse context is fact-specific and requires thoughtful analysis by the attorney as to whether or not disclosure of client confidence is required. It is likely, however, that as the Georgia Rules include an acknowledgement of the client's duty to warn an intended target, a post-injury jury will conclude that warning the intended target would have been the appropriate action for the lawyer in the face of the client's refusal to abandon the plan to harm. Once duty to warn language is introduced into a code, jury empathy may side with the harmed third party, should counsel determine not to exercise her judgment in favor of disclosure.

III. ATTORNEY-CLIENT COMMUNICATIONS: WHAT IS THE SCOPE OF PRIVILEGE?

A. Balancing Ethical Duty vs. Individual and Public Safety

Some state ethics requirements and the ABA Model Rules are on a collision course with a lawyer's imperative to prevent reasonably foreseeable harm to a third party. Rules that are not specific and mandatory may, in fact, leave the practitioner exposed to suits by clients or opposing parties. These competing forces must be balanced when assessing the reasonableness of a mandate for lawyers to breach client

confidentiality in order to protect a third party from harm. Georgia has stated its policy clearly. The commentary to its Rule 1.6 states: "In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. The public is better protected if full and open communication by the client is encouraged than if it is inhibited."[46] Georgia has introduced the discussion of the public as a stakeholder in the attorney-client relationship. In so doing, it has provided guidance and support to the practitioner who is faced with the difficult task of deciding between loyalty to client and protection of others.

A genuine public safety interest exists in violence prevention. There are many reasons for disclosing a plan to harm one victim, as it furthers the protection of others in addition to the intended target. Collaterals could be seriously injured if steps were not taken to warn the intended victims and to dissuade the perpetrator. For example, a correlation can exist between some workplace violence and domestic abuse. Victims often report being stalked and otherwise harassed by perpetrators while at work.[47] Some incidents of workplace violence are preceded by an incident of intimate partner abuse. In *Currie v. United States*, a discharged employee opened fire at his former workplace, killing one individual and wounding others.[48] There are two points of particular interest in this case. The first is that the treating psychiatrists agreed that while the former employee, Ralph Glenn, was threatening and angry, he did not meet the standard necessary for involuntary commitment.[49] This is important to remember as lawyers may be tempted to satisfy any *Tarasoff* duty by referring the client to a therapist. But the mental health provider may be in no better position to prevent harm. The lawyer will not avoid the obligation to disclose a client's threat by turning the matter over to a mental health professional.[50]

The second note of interest is that Glenn's distress was first evidenced when he was involved in a "dispute" over child support with his former wife.[51] Yet, it was workers in the place of the perpetrator's former employment who were the targets of his rampage.[52] Any correlation

46. GA. RULES OF PROF'L CONDUCT R. 1.6 cmt. 8 (2001).

47. *See* NEW YORK STATE DEP'T OF LABOR, REPORT TO THE NEW YORK STATE LEGISLATURE ON EMPLOYEES SEPARATED FROM EMPLOYMENT DUE TO DOMESTIC VIOLENCE 3 (1996) (reporting that 74 percent of victims are harassed at work by their abusers).

48. 836 F.2d 209, 211 (4th Cir. 1987)

49. *Id.* at 211–12.

50. Likewise, it is worth noting that there is no psychiatric testing that can determine with precision whether or not an individual will be violent. This topic is discussed elsewhere in this journal.

51. *Currie*, 836 F.2d at 211.

52. *Id.*

between domestic and workplace violence makes public safety a compelling consideration in the attorney's analysis of whether or not to disclose client threats to harm.[53] As one commentator noted, "[r]equiring attorneys to disclose confidences in order to avert life-threatening harm to others would merely continue an apparent trend of placing societal welfare and safety above the interest of confidentiality."[54] Furthermore, introducing the common sense foreseeability component of the lawyer's role may be at the heart of *Tarasoff*-like tort liability for lawyers in the domestic violence arena, a matter explored later.

B. Lawyer Competency for Assessing Dangerousness: Exacerbating the Tension Between Confidentiality and Risk of Harm

As part of competent representation of victims and perpetrators, lawyers are obligated to study domestic violence law and the dynamics of abusive relationships. Without an intimate knowledge of and sensitivity to the dynamics of violence in the intimate partner setting, the attorney risks both malpractice and violation of the ethical obligation to warn an intended victim. Competency in the field may trigger the obligation to assess third party lethality risk, to inquire as to the existence of a specific plan of harm, and to disclose client confidences in order to prevent serious harm. After studying lethality factors in domestic violence cases, the lawyer is better able to appreciate that warning signs of increased risk may be disclosed non-verbally. The actions of the perpetrator may speak more about the victim's risk than any words uttered. In addition, certain factors or time periods may indicate a higher risk for other abuse or for more severe incidents of abuse.[55]

Many high risk time periods for victims involve the timing of a decision to leave an abusive relationship. When the victim is perceived by the batterer to be weighing options for leaving or taking steps toward leaving, risk of serious harm may substantially increase. The early years following separation may pose a higher risk, as well. Pregnancy and the post-delivery year may also increase a woman's likelihood of harm by

53. The "zone" of individuals who could be potential victims is discussed in the *Tarasoff* line of cases is addressed in *Currie* at page 213.

54. Michael A. Backstrom, *Unveiling the Truth When it Matters Most: Implementing The* Tarasoff *Duty for California's Attorneys,* 73 S. CAL. L. REV. 139, 147 (1999)

55. For web-based information on lethality risks *see* Metropolitan Nashville Police Department, Domestic Violence Division, http://www.police.nashville.org/bureaus/investigative/domestic/default.htm.

the intimate partner.[56] Some other factors that may indicate increased risk may be: pet abuse, child abuse, willingness to leave evidence, strangulation, escalating levels of violence, access to weapons, and stalking.[57] Competent criminal and domestic violence attorneys understand the indicators of risk. More importantly, few of the danger factors noted above are communicated verbally. A client may articulate that he has had increased thoughts of killing his intimate partner since she became pregnant, but that is unlikely. Indeed, minimization and denial are hallmarks of the domestic violence perpetrator.[58]

Lawyers are competent to assess risk presented by their clients and often have extensive information regarding their clients' histories. Case investigations and discovery provide opportunities for the practitioner to learn information about their clients and the clients' behaviors that are unavailable to mental health providers. Common sense will guide the lawyer in assessing a client's risk to others.[59]

56. Not all pregnant women are at increased risk. Pregnancy can be a higher risk situation but it remains a minority of women who are at higher risk. That said, murder remains the greatest risk to pregnant women. Judith McFarlane et al., *Abuse During Pregnancy and Femicide: Urgent Implications for Women's Health*, 100 OBSTETRICS & GYNECOLOGY 27, 27 (2002) (stating that most studies report a prevalence of 3.9% to 8.3% of violence against pregnant women); Sandra L. Martin et al., *Physical Abuse of Women Before, During, and After Pregnancy*, 285 JAMA 1581, 1582 (2001) (finding that the best predictor of abuse during pregnancy is prior abuse); Vilma E. Cokkinides et al., *Physical Violence During Pregnancy: Maternal Complications and Birth Outcomes*, 93 OBSTETRICS & GYNECOLOGY 661 (1999) (reporting that physical violence during pregnancy is one of the leading causes of trauma during pregnancy); Julie A. Gazmararian et al., *Prevalence of Violence against Pregnant Women*, 275 JAMA 1915 (1996) (stating that a review of studies examining the prevalence of abuse against pregnant women found rates ranging from 0.9 percent to 20.1 percent); and Judith McFarlane et al., *Assessing for Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care*, 267 JAMA 3176 (1992) (reporting that among pregnant women who experienced violence, 60 percent reported multiple episodes).

57. The list is not exclusive. While the risk factors listed are commonly observed by domestic violence advocates, increased risk can be evidenced by factors that are peculiar to each case. While the risk factors listed are commonly observed by domestic violence advocates, increased risk can be evidenced by factors that are peculiar to each case. *See generally* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, 28 COLO. BAR J. 19 (1999) (noting the many valid reasons why victims may not be able to leave or remain away from a batterer).

58. Joan Zorza, *Batterer Manipulation and Retaliation: Denial and Complicity in the Family Courts*, *in* FEMINISTA 1, 4 (2001), *available at* http://www.feminista.com/archives/v4n7/zorza.html.

59. *See* Backstrom, *supra* note 54, at 159.

C. Factors to Consider in Determining Whether the Obligation to Disclose is Triggered

Information of client threat may be received in a variety of forms. The easy case is where the client verbally discloses the desire to kill the former partner and has a plan to do so. Some information, however, is received through non-verbal communication. The form of the communication is not relevant to the determination of whether the lawyer has a duty to disclose. Likewise, the form of the communication does not limit the attorney's duty to inquire or the duty to attempt to persuade the client to abandon the planned harm. Consider the following example: During the course of discovery, the opposing party states that prior to any significant beating, the opposing client would pace for several days. Assume that the abuser's lawyer has represented the client for over one year and for the first time notices during a meeting that the client cannot stop pacing. Assuming the attorney practices in a mandatory disclosure state, does the lawyer have an obligation to warn or provide notice? Obligation to disclose may not yet be triggered, but the duty to inquire has been.

The lawyer would want to know whether the client paces under any other circumstances. If this line of questioning was pursued with the opposing party at deposition, then the lawyer may already have sufficient information to assess risk to the former partner. The lawyer is obligated to address the issue with the client and make a good faith effort to dissuade him from any planned harm. Even if that conversation is not successful, the attorney, at a minimum, will leave the interview with information that will permit a reasoned decision as to whether a victim must be warned of possible harm. Particularly if the opposing client has been seriously injured in the past, the lawyer would have sufficient information to identify the opposing party as the intended target of serious physical harm. The obligation to disclose may be heightened if the lawyer knows that the opposing party is the only target of the client's violence or other risk factors are present, such as if the opposing party is recently involved in a new intimate relationship.

D. Determining the "Zone" of the Targets

There may be more than one individual who is entitled to notice or warning under *Tarasoff*. This issue has been explored regarding mental health providers.[60] A wider zone of potential victims is obvious when

60. *See* Currie v. United States, 836 F.2d 209 (4th Cir. 1987).

the threat is to harm a third party in the workplace setting. In the example where the former partner plans to kill his victim as she leaves for work, the only one entitled to notice may be the former intimate partner. But what if the client discloses a plan to go to the former partner's workplace and kill her there? In those circumstances it is foreseeable that individuals in addition to the former partner may be entitled to warning. This is easily accomplished through notice to the employer, who may, in fact, be in the best position to prevent the violence, particularly in larger companies with security departments and monitoring equipment.

Often ignored individuals in the zone of endangered individuals are the children of the former intimate partner. Children of a battered mother are much more likely to be abused than other children.[61] While courts may not always recognize the use of the children as tools of continuing the abuse of the mother, family law practitioners experience this pattern frequently. A previously uninvolved parent may suddenly demand extensive parenting or visitation time with the children upon separation. Often the children are then subjected to the perpetrator's abusive behavior, even if the children have not been previously harmed.[62] Threats and abuse involving children must be taken seriously. The attorney receiving the information could make disclosure to a variety of sources. The other parent, Child Protective Services (CPS),[63] or both are likely third parties to receive a warning or notice. There may be some additional comfort in reporting to CPS as the name of the reporter generally is not public information. In other cases, the zone of individuals entitled to notice may include roommates, new intimate partners, coworkers, shelter staff, opposing counsel or judges, depending on where the perpetrator plans on carrying out the intended harm. The lawyer must take responsibility to assess the adequacy of the warning as well as the zone of individuals entitled to notice.

61. *See, e.g.*, Bowker, *supra* note 20 (reporting that 70 percent of wife batterers also abuse their children).

62. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (three children killed after being taken by their father beyond the scope of court of court ordered visitation; there had been no prior threats to harm the children).

63. Reports to CPS must include the name of the person posing the threat to the child. Failure to disclose the name would provide inadequate notice or warning. In addition, failure to name the abuser could lead to CPS investigating the other parent, which would further victimize the children and the non-client parent.

E. The Scope of Disclosure

Once an attorney determines that notice is required or warranted, she must determine how much information needs to be disclosed. Client confidences are to be disclosed in the narrowest form possible to accomplish the notice.[64] Once the intended victim has the necessary information it is not within the lawyer's prerogative to make additional releases of information. For example, should the lawyer indicate to the intended target that the former partner intended to harm the victim as she left home on Friday, there is no reason why any additional information need be provided. Indeed, to do so could be a violation of applicable rules on client confidentiality. In the described scenario, additional comments made by the client that are not relevant to adequacy of the warning are to be protected. Disclosure does not destroy attorney-client privilege.

Of interest is the case of *Newman v. State*[65] where a client disclosed to her lawyer that she planned to murder the father of her children with whom she was litigating custody issues. The client made the statement to the lawyer in the presence of a third party who had been invited to the client-lawyer conference.[66] The attorney disclosed the client's plan to commit murder.[67] The lawyer was then called as a witness at the client's trial on criminal charges.[68] The Appeals Court went to great, if not questionable, lengths in determining that privilege still existed between the client and the lawyer, despite the presence of a third party when the client discussed her plan.[69] The court found that the attorney's disclosure of the client statement was within his ethical duties under the Maryland Rules of Professional Responsibility.[70] Furthermore, the court ruled that because attorney-client privilege was not destroyed by the

64. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (proposed Mar. 23, 1999) ("Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."). *See also* GA. RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2001) ("a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.").

65. 863 A.2d 321 (Md. 2004).

66. *Id.* at 324.

67. *Id.*

68. *Id.*

69. *Id.* at 333.

70. *Id.* at 335.

disclosure, the attorney was improperly called as a witness at the client's criminal trial.[71]

Once disclosure is made, the attorney does not have carte blanche to discuss all of the client confidences. The lawyer's obligation is to provide adequate warning while disclosing only that information necessary to prevent the intended harm. The outcome as to whether or not an attorney may be subpoenaed to testify at the client's trial on the proposed or actual criminal act would likely reach the opposite conclusion from *Newman* if the client consulted with counsel in furtherance of the crime or the attorney participated in planning the crime.[72] Although the attorney-client relationship is likely to be terminated at or shortly after the disclosure, privilege is not destroyed.[73]

IV. IMPLICATIONS OF DISCLOSURE

A. Cessation of Attorney-Client Relationship

One can imagine a scenario where the attorney-client relationship might not terminate upon the attorney's disclosure of a client confidence. For example, during a conversation where the attorney attempts to dissuade the abuser from carrying out a stated threat, the client may, in fact, permit the attorney to inform the target that the client is experiencing homicidal ideation. Issues of client competency aside, if the client agrees to some form of disclosure or warning, the attorney is relieved of any concern of unauthorized or unwarranted disclosure. This is particularly so if the client has assented in writing to the disclosure. Even in these narrow and unusual circumstances, the attorney might consider terminating the professional relationship. While clients are often grateful when an attorney has given advice that prevents the client from engaging in illegal or inappropriate behavior, one must assume that an element of professional trust is diminished once a confidence is breached. The client might agree, in writing, to terminate the professional relationship. Absent agreement, the attorney might consider formal withdrawal, even where contested, should the matter be in litigation.

71. *Id.* at 340.

72. Purcell v. District Attorney, 676 N.E.2d 436 (Mass. 1997).

73. *Newman*, 863 A.2d at 340. *See also Purcell*, 676 N.E.2d at 440 ("We must be cautious in permitting the use of client communications that a lawyer has revealed only because of a threat to others. Lawyers will be reluctant to come forward if they know that the information that they disclose may lead to adverse consequences to their clients.").

B. Adverse Impact on Client's Case

Disclosure of the threat of harm or the risk of substantial harm may require not only withdrawal by the attorney for the batterer, but recusal by the judge who may have been informed of the warning. Although withdrawal may be done in such a way that the court is never informed of the reason (unless the judge was the intended target) the likelihood is that the attorney may be required to make an in camera disclosure of the reason for withdrawal, thus potentially prejudicing the court before whom the case is pending. Counsel should first attempt to withdraw disclosing the narrowest of information so that the client is not prejudiced by any disclosure. Depending upon the closeness of a trial date, the court might resist withdrawal. In these circumstances, in camera disclosure may be necessary. Successor counsel will need to take all appropriate measures to protect the client's interests, including a possible motion to recuse the judge who was informed of the reasons for withdrawal from hearing trial of the underlying matter.

C. Potential Danger to the Attorney

The attorney who discloses client confidences in the domestic violence arena must assess his own personal risk. If the client is intent on killing the former intimate partner, the attorney must consider the timing of his notice to the client of the intended disclosure of confidential information. For example, is it safer for the lawyer to make the disclosure before notifying the client that disclosure is required or warranted? If the client is intent upon carrying out the threat, notice as to the attorney's intent to disclose could accelerate the client's plan. Disclosure might also place the attorney in danger if the client perceives the attorney as an impediment to carrying out the plan to harm the third party. While the attorney may consider informing the client of the attorney's obligation to disclose in an attempt to convince the client to abandon the plan, the attorney must carefully consider his or her own safety risks in doing so, as well as the increased risk to the intended victim.

Although concern about the lawyer's personal safety is not a defense to non-disclosure, the attorney might consider his own safety in determining the timing of disclosure and the manner in which notice is made. For example, the attorney might contemplate disclosure at a time when he knows the client to be at work, allowing the target (as well as the attorney) to have adequate time to find a safe location. If the attorney anticipates his client's arrest following notice, disclosing at a time when the police can locate the client easily will provide additional

time for the attorney and the intended victim to find a location not known to the client or provide time to arrange for adequate security.

D. Safety Planning

Domestic violence survivors are skilled safety planners, in part because often they have survived years of abusive behavior. Attorneys who represent clients in cases involving domestic violence are wise to conduct their own safety planning. This is particularly true if the attorney is about to take an action that the client perceives as interfering with a plan to harm the survivor. A safety assessment of the attorney's workplace and home might be in order. If unsure how to plan for safety, there is literature available and local domestic violence advocates are often available and willing to help with the process.[74]

E. Unexpected Consequences

In warning potential victims, the batterer's attorney is likely helping her client avoid being charged with serious criminal offenses. The attorney could very well be saving the client from years of incarceration and from possible death. "Suicide by cop" and self-inflicted fatal wounds are not unheard of in domestic violence cases, particularly in the case of the family annihilator. Also, if a client is disclosing to counsel an intention to harm another, one motivation for disclosure may be an unstated request for intervention. Disclosure may be consistent not only with ethical rules, but with the client's best legal and personal interests.

Unfortunately not all of the consequences might be so rewarding. Violation of attorney client privilege is generally not well received by clients or colleagues.[75] While the attorney may be well within his or her ethical obligations, an inquiry or lawsuits may follow. Disclosure may invite lawsuits by the client and non-disclosure may invite a lawsuit from the victim or the victim's estate. Whether or not to disclose a client confidence is a very difficult decision for any practitioner. At present, there is no safe haven for the attorney practicing in the domestic

74. *See, e.g.*, ABA, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE (Margaret B. Drew et al. eds., 2d ed. 2004). In particular see the chapters on Safety Planning and Pro Bono Service, which address safety planning for the lawyer, as well as the client. The National Domestic Violence Hotline, 1-800-799-SAFE, provides 24-hour safety planning as well as information on resources throughout the country.

75. We cannot discount the practical considerations that an attorney struggling with disclosure likely considers. Disclosure and any subsequent lawsuit by a client cannot be discounted considering the impact that such negative publicity will have on the attorney's business. Client loyalty and attorney-client privilege are hallmarks of the attorney's trade.

violence arena where the issue of disclosure of client threats is concerned.

If states wish to encourage lawyer disclosure in the interests of public safety, then they should consider adoption of statutes to protect attorneys who disclose a client's plan to cause death or serious bodily harm.[76] Statutory protection might be considered a way of encouraging disclosure in the interest of public safety. Ohio provides statutory protection from tort liability should a mental health provider take appropriate action to warn an identifiable victim of a patient's intent to harm.[77] Since comparable attorney protection does not exist, attorneys with information that a client might cause another serious harm expose themselves to possible tort liability whether or not they warn of the danger posed by the client. If we want attorneys to err on the side of protecting victims from serious injury, then lawyers should be shielded from liability resulting from good faith disclosure of client confidences when the notice is intended to prevent threatened serious harm. Attorneys who decide not to disclose such threats would remain vulnerable to suits from injured third parties. Such decisions would continue to be made at the lawyer's peril.

V. IMPOSING TORT DUTY ON LAWYERS TO BEHAVE ETHICALLY

Although a tension exists between breaching client confidentiality and preventing harm, lawyers should be among the professionals required to warn identifiable targets in domestic violence cases. Beyond professional and state rules, we argue that doctrinal and normative notions of tort should be utilized to hold lawyers liable if they fail to take pre-emptive actions. Strong legal and policy arguments weigh in favor of tort liability attaching when a lawyer neglects to screen for and attempt to dissuade dangerous clients, and then, to warn a third party who has been threatened. These proposals further the public policy of reducing the incidence of domestic violence crimes and are punctuated by arguments of fundamental fairness.

76. Of course, any such protection for attorneys must not be limited to cases where clients make verbal disclosure of threats to cause serious harm. As discussed, in domestic violence matters patterns of behavior or other non-verbal information could indicate the existence of a serious threat. The lawyer who gives warning to a third party, or otherwise puts the victim on notice, must be just as protected when the "information" upon which disclosure is based is communicated non-verbally.

77. OHIO REV. CODE ANN. § 2305.51(C)(4) (West 2006)

A. Motivating Lawyers Beyond Ethical Mandates

In a study of eight hundred New Jersey lawyers, Professor Leslie Levin asked about their decisions to warn third parties regarding potential client harm.[78] Although New Jersey is one of the few states mandating disclosure,[79] less than half of the attorneys warned victims even when they believed it was necessary to prevent death or serious physical harm.[80] One-third of the lawyers reported not knowing whether their clients carried out the threats, and 12% said that their clients followed through with the threatened harm.[81] These findings indicate that attorneys overwhelmingly adhere to confidentiality, even in the face of a state's mandatory duty to warn as a means of protecting the public. Consequently, in numerous cases a lawyer could have prevented his client from causing unlawful harm, but he refused to warn the eventual victim[82]—with Rule 1.6 supporting this irrational and dangerous result.[83]

Strong empirical and experiential evidence underscores the argument that clients' threatening to harm others is not simply a theoretical problem.[84] In Professor Levin's study, sixty-seven lawyers acknowledged that they had recently dealt with a client whom they reasonably believed intended to substantially harm or kill a specific third party.[85] Close to half of these attorneys indicated they dealt with this issue more than once,[86] and almost 20% said the threatened act was homicide.[87] Importantly, 58% of the lawyers reported the intended acts of assault and battery, arson, kidnapping, and terrorism—specifically identifying domestic violence as the context in some cases.[88]

The delicate balance between preserving attorney-client confidentiality and protecting victims has been aptly handled within Ohio's statutory scheme for mental health providers and could readily be applied to the bar. By providing immunity for mental health practitioners who appropriately warn a client's potential victim, they

78. Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81(1994).

79. *See* N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (1985) (stating that an attorney must warn victims when necessary to avert fraudulent or criminal conduct likely to cause serious harm).

80. Levin, *supra* note 78, at 128.

81. *Id.*

82. *Id.* at 128.

83. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2001).

84. *See* Levin, *supra* note 78.

85. *Id.* at 112.

86. *Id.* (citing Table 6 at 47.8%).

87. *Id.* (citing Table 7 at 19.4%).

88. *Id.*

have removed at least one large barrier to compliance.[89] Even more promising are the mandatory disclosure statutes of Florida,[90] New Jersey,[91] and Tennessee[92] which obviate the need for lawyer's difficult judgment calls regarding notice to potential victims.

B. Batterers' High Recidivism Rates Make Further Harm Forseeable

As forseeability is a foundational precept in tort law, it is necessary to situate these mandatory duties squarely within its realm. One factor that distinguishes domestic violence cases from many others is the propensity of its offenders to recidivate absent compelling motivation to abstain.[93] This fact triggers the negligence standard that lawyers must act when they know or reasonably should know of their client's likely future abusive conduct.[94] Given the current practice of massive under-reporting, under both permissive and mandatory regimes, it is worth noting that voluntary ignorance will not absolve lawyers of liability.

A Maryland study found that approximately 25.5% of domestic violence offenders committed a new crime within eighteen months of their initial arrest, although the recidivism rate dropped to 23% if he was successfully prosecuted.[95] The recidivism analysis also looked at other factors (i.e. race, gender, employment, prior arrest for domestic violence, number of charges) having a statistical impact on the likelihood of re-offense rates. Holding all other elements constant, the study concluded that an additional prior domestic violence arrest increased the odds of recidivism by 46%.[96] Importantly, alternative

89. *See supra* note 43 and accompanying text.

90. *See supra* note 28 and accompanying text.

91. *See supra* note 29 and accompanying text.

92. *See supra* note 30 and accompanying text.

93. Although early on mental health professionals thought that most batterers had poor impulse control, more recent data indicate that, in fact, the vast majority of domestic violence perpetrators *choose* to be violent with their partners, or children, or both. This is widely viewed as good news, since it assumes that batterers can also choose to be non-violent when the stakes are high enough. *See, e.g.*, EDWARD W. GONDOLF, BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES, AND RECOMMENDATIONS 199 (2002); PAUL KIVEL, UNLEARNING VIOLENCE: A BREAKTHROUGH BOOK FOR VIOLENT MEN AND ALL THOSE WHO LOVE THEM 100 (1992).

94. *See, e.g.*, Stern v. Thompson & Coates, Ltd., 517 N.W.2d 658, 666 (Wis. 1994) (explaining that "[t]he standard is whether the attorney knew or should have known that the position taken was frivolous as determined by what a *reasonable attorney* would have known or should have known under the same or similar circumstances.").

95. Christopher M. Murphy, et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. FAM. VIOLENCE 263 (1998) (these data reflect recidivism in addition to a new assault, including violation of a protective order, stalking, malicious destruction of property, disturbing the peace, and telephone harassment).

96. Angela Gover, et al., *The Lexington County Domestic Violence Court: A Partnership and*

measures of recidivism—such as victim interviews—yielded higher rates of recidivism. For example, in one study on the effect of court-ordered counseling on batterers, the average recidivism rate gathered from victim interviews was 36%.[97]

Those who facilitate batterers' intervention programs are clear that they cannot promise the violence will cease. Such programs are viewed as a mechanism to assist in the supervision of batterers,[98] but they cannot be expected to accomplish cessation of abuse alone. Whether it is wealthy sports stars or relative unknowns abusing intimate partners, it takes collective will to hold them accountable with the intention of stopping further violence.[99] Lawyers with knowledge of potential harm should be part of the safety net for family violence victims and their children, at least in part because of the high likelihood of batterer recidivism.

The *Tarasoff* case offers guidance in determining forseeability of harm to the threatened third party. Generally, a defendant owes a duty of care to those who are forseeably harmed by his behavior. Applying this concept to *Tarasoff* means determining whether the psychiatrist should have had a duty to warn Tatiana Tarasoff, the victim, based on their reasonably believing that Podar, their patient, would carry out his threat to kill her.[100] The *Tarasoff* court did not expect the defendant-therapist to perfectly predict whether the patient would carry out his threat, but need only employ "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of that professional specialty under similar circumstances."[101] In conferring a duty to warn on lawyers, the expectation is similarly not that they must flawlessly predict the likelihood of a client carrying out his threats, but that the lawyer will have a minimal level of proficiency in domestic violence dynamics or criminal behavior to make a reasonable assessment. Indeed, it is unethical for an attorney to handle matters about which he lacks basic knowledge. Any lawyer representing an accused or convicted batterer should possess at least a rudimentary

Evaluation, Presented at the South Carolina Victim Assistance Network Board Meeting (Feb. 14, 2003).

97. Murphy, *supra* note 95, at 263–83.

98. Tom Perrotta, *Many in Domestic Violence Community Question Batterer Intervention Programs*, N.Y. L. J., Feb. 23, 2006, at 1 ("Mr. Bunch [the Senior Director of the Domestic Violence Accountability Program at Safe Horizon] does not promise to reduce recidivism. At best, he said, the program is a tool that helps the court to better monitor its defendants.").

99. *See, e.g.*, Gary Shelton, *Don't Let Abusers Off Hook*, ST. PETERSBURG TIMES, July 25, 2002, at 1C (arguing for community members and professionals to assist victims in achieving ongoing safety).

100. See, John M. Burman, *Disclosing Privileged Communications: A Lawyer's Duty to Warn*, WYO. LAW. 17, 18 (1996) (analogizing the lawyer and therapist's duty to warn).

101. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976).

understanding of a typical batterer's abuse of power and control, including high rates of retaliation against the victim for leaving, taking legal action, disclosing the abuse, filing for custody or child support, or asserting her rights in almost any manner.[102]

The *Tarasoff* court also considered the detrimental impact of a therapist's breaching the psychologist-patient privilege and the chance of erroneous warnings, as against the opportunity to prevent harm to the victim. Saving a victim's life, the court ruled, must take precedence when the harm is foreseeable.[103] This social policy rationale must also be applied in deciding that lawyers, too, should be required to err on the side of preserving victim safety in the context of foreseeable injury to victims. Although concerns about client confidentiality and mistaken assessments of victim danger are valid and must be factored into the lawyer's decision to warn, they cannot be used to obfuscate the critical issue of saving victims' lives when possible.

C. Tort Policy Rationales Militate for Pre-Emptive Actions

At least three primary goals of tort are best served by holding lawyers responsible if they fail to screen and attempt to dissuade batterers, as well as warn potential domestic violence victims. Tort doctrine is premised on the notion of a person's right to obtain compensation from those who have caused her injury.[104] Intrinsic to tort law is the Aristotelian premise of corrective justice.[105] This concept of restoration, or making the victim whole, can be distinguished from distributive justice as it does not seek to discern the character of the tortfeasor, but rather to assess the harm.[106] It is then the judge's role to "restore the equilibrium . . . through compensation of one sort or another . . . to bring the victim to the condition he would have been in, or its equivalent, had

102. *See* David Adams, *Treatment Programs for Batterers*, 5 CLINICS FAM. PRAC. 159 (2003).

103. *Tarasoff*, 551 P.2d at 347.

104. DAVID ROBERTSON, ET AL., CASES AND MATERIALS ON TORTS 81 (3d ed. 2003) (noting "because he that is damaged ought to be recompensed" citing *The Case of the Thorns*, Y.B. 6 Ed. 4, 7a, p. 18 (1466)).

105. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS (1992); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Ernest Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) (drawing on Aristotle, Hegel and Kant to formulate a formalist notion of corrective justice based on the principles of interpersonal rights and the duties owed one another).

106. Ellen Frankel Paul, *Set-Asides, Reparations, and Compensatory Justice*, *in* NOMOS XXXIII: COMPENSATORY JUSTICE 97, 100 (John W. Chapman ed., 1991) (noting that "it treats the parties as equals and asks only whether one has done and the other has suffered damage.").

the injurious event never occurred."[107] The tort system is thus designed to realize justice for the parties by shifting the burden of the harm from the victim to the tortfeasor,[108] here to include both the batterer and his attorney who fails to warn.

A further subsuming presumption under the rubric of corrective justice is that of the wrongdoer paying for the loss, not the victim.[109] This nonconsequentialist and deontological theory is rooted in the notion of "just desserts"—that is, a moral judgment is made that justifies holding the tortfeasor responsible for the harm he causes.[110] This end result of loss-shifting is both necessary and intentional to prevent the victim from unfairly shouldering the harm caused by conduct deemed unacceptable.[111] Current permissive notice guidelines seem to mean that a lawyer only has to explain if he chooses to warn a threatened third party—an illogical and dangerous regime that is inconsistent with the basic principles of corrective justice.

A second goal of American tort law is optimal deterrence, that is, seeking to prevent current and potential tortfeasors from engaging in behavior deemed excessively risky.[112] There can be little doubt but that a lawyer gambling on whether a batterer will carry out his threats constitutes conduct too risky to avoid imposition of legal controls. Although the non-tort sanction of reprimand by a bar association may initially sound appealing, such steps have proved too minimal to be effective in many contexts.[113] Imposing tort liability on lawyers who fail to adequately inquire, attempt to deter, and warn identifiable victims should give all lawyers clear guidance when deciding what course of

107. *Id.*

108. *See,* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 570 (2003) (stating that a sufficient causal connection must be established between the wronged party and the tortfeasor's conduct).

109. *See, e.g.*, David Gruning, *Pure Economic Loss in American Tort Law: An Unstable Consensus*, 54 AM. J. COMP. L. 187 (2006) (noting that recovery for the physically harmed plaintiff should not be problematic).

110. *See, e.g.*, Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 478 (1997).

111. *See, e.g.*, Jules L. Coleman, *Second Thoughts and Other First Impressions, in* ANALYZING LAW 257, 302 (Brian Bix ed., 1998) (arguing that tort law effectively redistributes losses to the tortfeasors as is just).

112. *See, e.g.*, Kenneth S. Abraham, THE FORMS AND FUNCTIONS OF TORT LAW 14–20 (2d ed. 2002) (identifying deterrence, along with corrective justice and compensation, as the interrelated goals that U.S. tort law seeks to accomplish).

113. *See, e.g.*, T. Leigh Anenson, *Creating Conflicts of Interest: Litigation As Interference With The Attorney-Client Relationship*, 43 AM. BUS. L.J. 173, 218 (2006) (stating, "[m]oreover, while filing a complaint with the local bar association may result in reprimand or sanctions against the attorney who initiated the interference, it would not serve the purposes of compensation and deterrence that underlie tort law.").

action is required in dealing with domestic violence cases. As such, bringing the prospect of tort liability to the table should encourage lawyers to engage in the socially responsible behavior of preventing further harm to abuse victims.

A third tenet of tort law is the notion of compensation, based on the belief that the victim deserves to receive monetary reparation for distress resulting from the defendant's negligent or intentionally harmful behavior.[114] Case law[115] and scholarship[116] affirm the belief that victims deserve recompense for their proverbial pain and suffering. Additionally, every state administers some form of a victim's compensation program to ensure that at least those costs directly attributable to the crime are reimbursed.[117] It is thus apparent that public policy, driven by evolving social norms criminalizing domestic violence, also supports myriad means of giving back to victims some measure of justice.

D. Conscious and Unconscious Race Bias

The pervasiveness of racism within America today, albeit sometimes unconscious,[118] may adversely impact the attorney-client relationship absent a concerted effort to understand its influence in each case.[119] For a white lawyer trying to decide whether a client of color truly presents a

114. *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 7–11 (4th ed. 1971) (stating that the key purposes of Amercian tort law are victim compensation and encouraging people to behave more conscientiously).

115. *See, e.g.*, *Chevron Chemical Co. v. Deloitte & Touche*, 483 N.W.2d 314 (Wis. Ct. App. 1992); *Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So. 2d 315 (Miss. 1987); *Bradford Sec. Processing Servs., Inc. v. Plaza Bank & Trust*, 653 P.2d 188 (Okla. 1982). In each case, the court noted its reliance on the tort premises of compensation and deterrence.

116. *See, e.g.*, Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 340 (2004) (writing that a key reason for tort litigation is the provision of compensation, indemnity, or restitution).

117. For example, the Texas Attorney General's Office web site states, "Crime doesn't pay, but in Texas, criminals do. Texas courts collect court costs from convicted offenders for the Crime Victims' Compensation Fund. If you are a victim of violent crime, you may be eligible for benefits." Texas Attorney General, https://www.oag.state.tx.us/victims/cvc.shtml. *See also* Ohio Attorney General – Victim Services, http://www.ag.state.oh.us/victim/index.asp ("The Crime Victims Compensation Unit administers awards of compensation in accordance with Ohio's Crime Victims Compensation Law, a law that provides payment to eligible victims of violent crime for their unreimbursed economic losses.").

118. *See, e.g.*, Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN'S L. REV. 899, 906 (2005) (arguing that "in the wake of the civil rights movement, old-fashioned animus is no longer the main obstacle to racial equality. Instead racism persists through assumptions and attitudes that are often hidden from individual awareness. . . .").

119. *See, e.g.*, Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 231 (2002) (noting that racial differences can impair communication between a lawyer and client).

danger to a victim, race may play an unwitting role either in seeing the batterer as overly dangerous or attributing the threat to his race or culture.[120] Denial, fear, and ignorance—individually or in tandem—conspire to prevent even a well-intentioned majority attorney from fully examining her race bias.[121] Thus, race can further be used as an unintentional proxy for reasonable discerning of potential harm.

Given that people of color often experience the legal system quite differently from whites, it is likely they will have lesser access to a spectrum of remedies without concerted effort to prioritize cultural competence. Little empirical data exists on the distinctions underscoring patterns of resistance and causes of violence against women of color,[122] leading many within the court system to base their responses on stereotypes and misconceptions. One study found that African American females are 1.23 times more likely to be the victims of lesser violence, but more than 50% as likely to suffer serious violence as white females.[123] Although the 2002 National Violence Against Women Survey found comparable rates of nonfatal domestic violence against black and white women, they reported that black women were more likely to be murdered by an intimate partner than white women.[124] Even in the face of such danger, women of color may, for many valid reasons, be reluctant to seek assistance from community agencies, including the courts.[125] Thus, it is possible that a battered woman of color would be

120. *Id.* (stating that "[r]ace insidiously infects individual and organizational decision-making.") (citing David Berreby, *How, but Not Why, the Brain Distinguishes Race*, N.Y. TIMES, Sept. 5, 2000, at F3; Anne C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415 (2000); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Lawrence III, *supra* note 118)..

121. Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027 (1988) (asserting that racism is ignored within criminal procedure decisions because of fear, ignorance, and denial).

122. Shondrah Tarrezz Nash, *Through Black Eyes, African American Women's Constructions of Their Experiences With Intimate Male Partner Violence*, 11 VIOLENCE AGAINST WOMEN 1420, 1420 (2005) (noting that, "[d]espite the growth . . . of research on the frequencies, patterns, and causes of family violence, studies about violence within families of color . . . remain limited.").

123. *Id.* at 1421 (citing R.L. Hampton & Richard J. Gelles, *Violence Toward Black Women in a Nationally Representative Sample of Black Families*, 25 J. COMP. FAM. STUD. 105 (1994)).

124. Nash, *supra* note 122, at 1421 (citing R.K. Lee et al., *Intimate Partner Violence and Women of Color: a Call for Innovations*, 92 Am. J. Pub. Health 530 (2002)).

125. Lee et al., *supra* note 124, at 530. *See also* Linda A. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L.REV. 1003, 1020 (1995); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN L. REV. 1241, 1257 (1991) (Professors Ammons and Crenshaw note that racial bias within the legal system deters many battered women of color from utilizing its resources.).

even more reliant on warnings from her batterer's lawyer if threatened harm is imminent.

Additionally, changes in U.S. immigration laws and patterns of re-settlement have substantially impacted the numbers of those foreign born interacting with the legal system. For instance, upwards of 60% of Asian Americans were not born in America, a rate ten times that of the U.S. population.[126] Thus, in some communities, many of the victims and offenders may not be familiar with the American justice system and are understandably suspicious of any governmental involvement in family matters.[127] Compounded by the backlash against immigrants and general attitude of intolerance toward "difference," efforts to improve interventions with families of color may be sabotaged by local bigotry.[128] As a result, immigrants and people of color involved in domestic violence cases may be particularly open to suggestions from lawyers whether focused on the batterer's planned abuse or the victim's safety. As officers of the court lawyers should welcome the opportunity to ameliorate the legal system's inability to better protect abuse victims of color, and be held liable for their failure to do so.

VI. ARGUMENTS FOR MANDATORY DUTY TO INITIATE INQUIRY ABOUT PLANNED HARM

A. Screening Reflects Lawyer's Duty to Know of Danger

A lawyer's duty to initiate questioning about planned abuse is triggered by a client's verbal statements and individualized actions from which a reasonable lawyer should discern a third party may be in danger.[129] The standard of reasonableness here presumes basic knowledge of domestic violence dynamics and typical verbal and non-verbal behaviors of batterers indicating potential danger, without which counsel should not be handling such cases.[130] Unless batterers planning further violence against their victims can be identified, the opportunity

126. Karin Wang, *Battered Asian American Women: Community Responses From the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151 (1996).

127. *See* Family Violence Prevention Fund, Programs: Immigrant Women, http://endabuse.org/programs (last visited Aug. 26, 2006).

128. *See, e.g.*, Charlotte Pierce-Baker, SURVIVING THE SILENCE: BLACK WOMEN'S STORIES OF RAPE (1998).

129. *See supra* Parts II, III, and IV for full discussion of assessing dangerousness.

130. *See supra* Part III.D. Factors to Consider in Determining Whether the Obligation to Disclose is Triggered (discussing specific batterer behaviors that will likely prompt the duty to warn, including verbal and non-verbal examples).

to prevent the injuries and death may be lost.[131]

In *Higgins v. Salt Lake County*, the Utah Supreme Court agreed with plaintiff's contention that had the defendant-therapist been appropriately carrying out his professional duties, the murderous patient would have disclosed his target, Shaundra.[132] Here plaintiff further argues persuasively that defendant's negligence cannot shield him from being held to the correct standard of care.[133] Permitting avoidance of responsibility to behave reasonably could motivate professionals to evade thorough questioning that might expose a client's threats and necessitate warning the intended victim.[134] The court emphasizes that it finds "a special relationship and consequent duty when a defendant knew of the likely danger to an individual or distinct group of individuals or when a defendant should have known of such danger."[135]

B. Physician's Practice

Given the frequency with which abuse victims seek healthcare treatment,[136] the medical profession has included screening for intimate partner abuse within the rubric of its standard of care.[137] The premise is

131. *See, e.g.*, EVAN STARK ET AL., NATIONAL CLEARINGHOUSE ON DOMESTIC VIOLENCE, WIFE ABUSE IN THE MEDICAL SETTING: AN INTRODUCTION FOR HEALTH PERSONNEL (1981).

132. 855 P.2d 231, 240 (1993) (ruling that "[i]n the context of the present case, if the steps taken by defendants were not reasonable in light of Trujillo's symptoms and if reasonable action would have revealed that Trujillo was likely to inflict grievous bodily harm on Shaundra, then a special relationship would arise. Higgins's factual allegation that proper examination and diagnosis would have disclosed that Trujillo was brooding over Shaundra and had targeted her for an attack presents a sufficient claim that a duty existed.").

133. *Id.* at 239.

134. *Id.*

135. *Id.* at 240.

136. *See, e.g., Domestic Violence: A Practical Approach for Clinicians,* San Francisco Medical Society: Current News, http://www.sfms.org/brochure.html [hereinafter San Francisco Medical Society] (reporting that abuse victims frequently seek treatment in emergency and primary care settings, ranging from obstetrics and allergy, to psychiatric and orthopedic care).

137. *See* American Nurses Association, *Position Statement on Physical Violence Against Women* (1994) *available at* http://www.nursingworld.org/readroom/position/social/viowomen.pdf;, American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996); *The Battered Woman*, 1989 ACOG BULLETIN 124 (American College of Obstetricians & Gynecologists, Washington, D.C.); *see also,* AMERICAN MEDICAL ASSOCIATION COUNCIL ON SCIENTIFIC AFFAIRS, *Policy H-515.965*, Dec. 2000, *available at* http://www.ama-assn.org/ama/pub/category/13577.html (stating that medical "curricula should include coverage of the diagnosis, treatment, and reporting of child maltreatment, intimate partner violence, and elder abuse and provide training on interviewing techniques, risk assessment, safety planning, and procedures for linking with resources to assist victims. The AMA supports the inclusion of questions on family violence issues on licensure and certification tests. . ." and the "AMA encourages physicians to: (a) Routinely inquire about the family violence histories of their patients as this knowledge is essential for effective diagnosis and care"); and Linda R. Chambliss, *Domestic*

based on findings that while many battered patients are too ashamed or afraid to self-disclose intentional harm to their physicians, directly asking a patient about abuse prompts some victims who might not otherwise do so to report the abuse.[138] With a bit of heightened awareness, doctors have found their screening and even minimal guidance to be quite effective in assisting battered patients.[139] A number of doctors have now expanded victim screening to include that of patients whom they suspect of being batterers.[140]

A solid case can be made that the standard of care expected of lawyers should include a requirement that they screen clients for abuse once presented with indications of possible harm to a third party. Physicians were motivated, in part, by the knowledge that those subjected to one type of victimization are likely targets of other forms, often perpetrated by the same offenders.[141] As doctors have found that initiating inquiry about abuse dramatically increases the likelihood of detecting endangered patients,[142] lawyers, too, could find that by asking a batterer client about his plans, serious harm can be averted.

C. Screening Is Not Overly Burdensome

In evaluating the degree of burden imposed, the usefulness of the information gleaned from screening must be emphasized. Medical professionals report that screening has improved treatment for AIDS, breast cancer, cardiovascular disease, smoking cessation, and, more

Violence: A Public Health Crisis, 40 CLINICAL OBSTETRICS & GYNECOLOGY 630, 633 (1997) (stating that both the American Medical Association and the American College of Obstetricians and Gynecologists strongly encourage screening all patients for violence).

138. Richard F. Jones, III, *Domestic Violence: Let Our Voices Be Heard*, 81 OBSTETRICS & GYNECOLOGY 1, 2 (1993) (reporting that during decades of ob-gyn practice, domestic violence victims rarely disclosed until Dr. Jones began routinely screening—that is, asking every patient if they had been hit or threatened at home—then victimization reports exponentially increased from an average of 4–5 per year, to 2–3 per week).

139. *See* San Francisco Medical Society, *supra* note 136.

140. *See* Elaine Alpert et al., *Interpersonal Violence and the Education of Physicians*, 72 ACAD. MED. 41, 42 (1997).

141. *See, e.g.*, Victoria M. Follette et al., *Cumulative Trauma: The Impact of Child Sexual Abuse, Adult Sexual Assault, and Spouse Abuse*, 9 J. TRAUMATIC STRESS 25, 25 (1996) (stating that data indicate a high co-incidence of various forms of abuse); *see also* Heidi S. Resnick et al., *Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of Women*, 61 J. CONSULTING & CLINICAL PSYCHOL. 984 (1993).

142. *See, e.g.*, Julie Tasso, *Screening for Domestic Abuse is Critical for MDs*, 39 MED. TRIB.: INTERNIST & CARDIOLOGIST ED. 16, 17 (1998) (reporting an interview with Dr. Peggy Goodman, an emergency medicine professor at East Carolina School of Medicine in Greenville, N.C., who states that asking three simple screening questions to identify abuse victims is quite effective).

recently, domestic violence.[143] Given that a batterer may not offer information about his intent to harm a partner absent direct questioning, sound social policy dictates that the attorney must routinely initiate inquiry about the batterer's intentions. It would be ludicrous to suggest that the few minutes required to screen and, if necessary, warn the victim, are overly burdensome given that severe harm or homicide may be prevented.

Furthermore, because in domestic violence cases the batterer most often threatens his current or former intimate partner,[144] it is not difficult for the lawyer to know whom he must warn. Should counsel be confused about the identity or location of the intimate partner, he can contact law enforcement authorities for assistance. Just as medical providers have taken on the task of learning objective indicia to discern which delivering mothers to screen for substance abuse,[145] so too, lawyers should not find the task of questioning a batterer and warning a victim to be too onerous.

D. Victims' Cognizance of Danger

Since abuse victims may have poor self-esteem or be ashamed to report the abuse, a lawyer's inquiry of the batterer can convey societal concern and availability of life-saving resources. Some may suggest that battered women should already know that they are in danger, particularly if they have obtained a protective order. However, battered women are not a monolithic group; their cases represent a spectrum of danger, with each victim's cognizance, resources and realistic options varying. Even if an abuse victim is acutely aware of the danger her batterer poses, it is quite unrealistic to expect that she remain on high alert at every moment of her life. Most survivors must work, outside the home, inside the home, or both; care for children; shop for groceries and other essentials; travel; and, generally, carry on with their lives. Even as battered women apply safety planning to evade their abusers, they are

143. *See* Family Violence Prevention Fund, *Preventing Domestic Violence: Clinical Guidelines on Routine Screening* 1 (1999), *available at* http://endabuse.org/programs/healthcare/files/screpol.pdf (noting that "[s]creening for domestic violence provides a critical opportunity for disclosure of domestic violence and provides a woman and her health care provider the chance to develop a plan to protect her safety and improve her health. Recent experience with AIDS, smoking cessation and improved outcomes in breast cancer and cardiovascular disease support the efficacy of early identification and intervention.").

144. *See generally* Adams, *supra* note 102.

145. *See* Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 Stan. L. Rev. 745, 784–85 (1990) (giving as examples the presence of needle tracks and conduct of the mother).

virtual sitting ducks absent extrasensory perception, personal body guards, home security systems wired to a responsive police department, and substantial financial resources.[146] And this assumes an abuse victim is fully aware of the on-going danger her batterer poses, when empirical studies document the very trauma caused by domestic violence can trigger various levels of denial necessary to cope.[147]

VII. DUTY TO ATTEMPT TO DISSUADE BATTERER-CLIENT FROM CARRYING OUT THREATENED HARM

Screening clients means little if a lawyer is not then obligated to act on knowledge of intended harm by counseling his client to refrain from committing the unlawful acts. In advising mediators regarding their duties vis a vis violent litigants, Professor Joseph Stulberg offers a scenario in which a disgruntled participant threatens to harm another if she dislikes the outcome.[148] Professor Stulberg states that no mediator condones threats and most would try to dissuade the threatening party from carrying out the crime.[149] Although this would appear to be a common sense approach, Professor Levin's study of eight hundred lawyers indicates that many need to have their ethical and legal obligations codified if compliance is expected.[150]

A. Lawyer As Batterer's Confidant

When the attorney is the only person to whom the client discloses his intent to harm a third party, the duty to dissuade becomes most logical and urgent. Since a lawyer cannot be certain if she is the sole person in possession of this knowledge, public interest dictates that she assume this to be the case and act accordingly. In order to ethically represent a client, an attorney must get the full story and attempt to understand her client's mindset. Professor Levin found that close to 60% of lawyers believed their clients who disclosed plans to harm a third party, in part because the information was revealed directly—obviating the likelihood of confusion or misunderstanding.[151]

146. *See generally* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, 28 COLO. BAR J. 19 (1999) (noting the many valid reasons why victims may not be able to leave or remain away from a batterer).

147. *See generally* JUDITH HERMAN, TRAUMA AND RECOVERY (1992).

148. *See* Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. DISP. RESOL. 85, 88 (1986).

149. *Id.*

150. *See* Levin, *supra* note 78 and accompanying text for full discussion of study.

151. *Id.*

Importantly, when batterers admit their crimes to authorities, they most often minimize the frequency, severity, and scope of abuse.[152] A sizeable number of male convicted felons willingly reported sexual, physical and psychological abuse to researchers, but the vast majority had not disclosed their offenses to anyone within the courts.[153] Because one of the most common post-separation offenses committed against abuse victims is witness tampering or intimidation, counsel representing a batterer should screen for it and advise her client that such conduct is illegal in every state.[154] In most jurisdictions, obstruction conduct constitutes a felony crime in recognition of its likely success: many witnesses and victims decline to pursue legal claims because they fear the offender's retaliation.[155] Whether counsel is representing the victim or batterer, he should use the terminology, definitions, and intent evidenced in witness tampering statutes to explain options in criminal and tort claims.[156] Counsel will also want to advise her client that offering any financial inducement also constitutes obstruction of justice[157] as the sophisticated batterer may proffer cash, jewelry, or other goods of value rather than threaten further violence. Even statutes that do not specifically provide for such bribes have general language that covers seemingly innocuous offers that serve the same function as threats or violence.[158]

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152. Walter S. DeKeseredy & Martin D. Schwartz, Nat'l Res. Ctr. on Domestic Violence, *Measuring the Extent of Woman Abuse in Intimate Heterosexual Relationships: A Critique of the Conflict Tactics Scales*, (1998), *available at* http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_ctscrit.pdf (finding that the most common screening questions are limited in scope, allowing offenders to skew reporting).

153. Sarah L. Cook, *Self-Reports of Sexual, Physical, and Nonphysical Abuse Perpetration*, 8 VIOLENCE AGAINST WOMEN 541, 562 (2002) (reporting that a great many incarcerated men revealed a range of abusive conduct to researchers, which they failed to disclose to anyone within the legal system).

154. *See, e.g.*, ALASKA STAT. § 11.56.540 (2005) (tampering with a witness in the first degree); FLA. STAT. ANN. § 914.22 (West 2004) (tampering with a witness, victim, or informant); MASS. GEN. LAWS ANN. ch. 268, § 13B (West 2004) (intimidation of witnesses, jurors and persons furnishing information in connection with criminal proceedings); N.Y. PENAL LAW § 215.10 (McKinney 2004) (tampering with a witness in the fourth degree); TEX. PENAL CODE ANN. § 36.06 (Vernon 2004) (obstruction or retaliation).

155. *See, e.g.*, ALASKA STAT. § 11.56.540 (2005) (tampering with a witness in the first degree is a class C felony); FLA. STAT. ANN. § 914.22 (tampering with a witness, victim, or informant constitutes a third degree felony); TEX. PENAL CODE ANN. § 36.06 (Vernon 2004) (obstruction or retaliation is a third degree felony).

156. *See* Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945 (2004).

157. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 268, § 13B (West 2004) (stating that "[w]hoever, directly or indirectly, willfully endeavors by means of a gift, offer or promise of anything of value . . . to influence, impede, obstruct, delay or otherwise interfere with any witness . . . shall be punished . . . .").

158. *See, e.g.*, ALASKA STAT. § 11.56.540(a) (2005) ("A person commits the crime of tampering with a witness in the first degree if the person knowingly induces or attempts to induce a witness to (1)

Importantly, some jurisdictions do not limit their witness protections to criminal cases. Florida's statute provides that a person cannot use physical force, threats, or offer of financial gain to convince a witness to decline participation in an official investigation or proceeding.[159] New York offers similar protection by referencing "an action or proceeding,"[160] and Alaska cites "an official proceeding; or . . . judicial proceeding to which the witness has been summoned."[161] By not limiting their purview to criminal cases, Alaska, Florida, and New York have given family and civil law attorneys representing victims another vehicle through which they can hold batterers responsible for the true scope of their abuse. Counsel for batterers should warn their clients of the court's applicable law in their jurisdiction. Witness tampering is arguably the single most frequent offense committed against domestic violence victims, yet the least prosecuted in spite of its deleterious impact on the victim's ability to seek safety and legal remedies.

B. Lawyer May Be Only Person Able to Dissuade Batterer

Lawyers representing batterers wield much influence in their clients' attitudes toward the abuse, as well as how they view counseling and intervention programs.[162] Just as counsel would say to a recidivist drunk driver client, so too a batterer should be told, "You can't keep doing this. You have to choose to stop or you may ruin your life." Some defense attorneys now condition their representation on the batterer making diligent efforts to successfully complete a certified batterer's intervention program, as this appears to be most helpful to the client.[163] This tactic is problematic for public defenders who cannot condition their representation on the batterer's completion of a counseling program. However, appointed counsel can, if properly knowledgeable about the dynamics of domestic violence relationships, at least attempt to persuade their clients to consider the many benefits of batterer's intervention programs.[164]

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testify falsely, offer misleading testimony, or unlawfully withhold testimony in an official proceeding . . . .").

159. FLA. STAT. ANN. § 914.22(1)(a) (West 2004).

160. N.Y. PENAL LAW § 215.10 (McKinney 2004).

161. ALASKA STAT. § 11.56.540(1) and (2) (2005).

162. Lee S. Rosen, *Zealous and Ethical Representation of Batterers, in* THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK 2-25-2-28 (Deborah M. Goelman,Fredrica L. Lehrman & Roberta L. Valente eds., 1996).

163. *Id.*

164. For a discussion on the efficacy and differences among batterer's intervention programs, particularly as distinguished from anger management classes, *see generally* Edward W. Gondolf et al.,

The Model Rules of Professional Conduct specify that "(c)ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."[165] Yet, the Texas Gender Bias Task Force Report documents that one reason domestic violence cases are improperly handled at all levels of the judicial system is attorneys' lack of knowledge regarding the issue.[166] It is the authors' collective experience that this problem of attorney ignorance about domestic violence continues to be highly problematic in all states and results in offenders as well as victims not receiving effective assistance of counsel.[167] Were lawyers properly trained, they could explain to their batterer-clients that at least one positive outcome is that those who successfully complete batterer intervention programs are far less likely to re-assault than those who drop out, even when background factors were controlled.[168] Importantly, the highest number of recidivist assaults occurred within three months of the batterer starting a program, with almost half (44%) of the men doing so.[169] Crucial for both lawyer and batterer to know is that new assaults fell from 14% at the three-month follow up to 3% at the nine-month follow up.[170] Hopefully, attorneys will take seriously their title of counselor-at-law and apprise their batterer clients of the short- and long-term benefits of attempting to change their unlawful conduct and, possibly, avoid incarceration in the process. Dr. Ed Gondolf notes that "a small portion of men . . . are unresponsive to the intervention and continue to be severely abusive." [171] This is precisely the information that counsel needs to place her on heightened alert that this client may be particularly dangerous.

Attorneys do report that often their admonitions and advice are heeded by clients, in particular, abusers who care what others think of

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Do Batterer Programs Work?: A 15 Month Follow-Up of Multi-Site Evaluation, 3 DOMESTIC VIOLENCE REPORT 65 (1998). *See also* Adams, *supra* note 102.

165. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5.

166. *See* STATE BAR OF TEXAS, DEP'T OF RESEARCH & ANALYSIS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 76–78 (1994).

167. *See* Authors' Experience, *supra* note 14 (noting that the authors have worked in the field of domestic violence in the states of Colorado, Massachusetts, New Hampshire, New York, Ohio, Texas, Vermont, and Washington. However, they have provided trainings to lawyers, judges and other legal professionals in all fifty states.)

168. Gondolf et al., *supra* note 164 (reporting in his study that the "program effect" for program completers is that they are significantly less likely to re-offend than dropouts).

169. *Id.* at 66.

170. *Id.*

171. *Id.*

them; they are what experts term "externally motivated."[172] Since most batterers are not out of control, but rather, choosing to be abusive, it is now understood that they use anger to manipulate and control their partners and children. As Paul Kivel, the co-founder of the Oakland Men's Project, says, "Anger is not the problem."[173] This insight should also alleviate some concerns voiced by defense attorneys who fear for their own safety when dealing with domestic violence offenders, and, in particular, if they were asked to talk batterers out of committing additional crimes. Batterers' experts report that probably less than 5% of batterers are "out of control" and that by listening to perpetrators *and* examining their behavior, counselors have learned that the violent behavior is most often deliberate.[174] Certainly, all attorneys should take precautions if clients indicate troubling signs of aberrant behavior, but this cannot relieve them of taking minimal steps to reduce the likelihood of foreseeable harm to third parties.

VIII. ARGUMENTS FOR A MANDATORY DUTY TO WARN WITHIN THE TORT FRAMEWORK

A. Results-Based Policy

Professor Levin's research revealed a typical and problematic truth: that some lawyers listed apprehension about possible criminal prosecution, civil liability, and reputation as the factors compelling their warning third party victims of threatened harm.[175] Although it is heartening that a number of attorneys indicated fear for the victim's safety compelled their warnings and that they would have done so even absent a rule,[176] their colleagues' noncompliance does not bode well for imperiled victims. Because even a mandatory disclosure rule does not engender the desired behavior of lawyers warning endangered third parties, it is necessary to promulgate a duty in tort to do so.

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172. *See Developments in the Law – Legal Responses to Domestic Violence: IV. Making State Institutions More Responsive*, 106 HARV. L. REV. 1551, 1557 (1993) (arguing that the criminal justice system "must provide the batterer with the necessary external motivation to modify his behavior.").

173. KIVEL, *supra* note 93, at 100; *see also, supra* note 26 and accompanying text.

174. LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 113 (Putnam's Sons 2002).

175. Levin, *supra* note 78, at 132.

176. *Id.* One attorney responded, "[t]here didn't have to be any rule. I just know there wouldn't be any question about what I would do."

B. Duties of Other Professionals

Many professionals enjoy the benefits of privileged communications with their patients and clients,[177] although the concept is no longer considered inviolate.[178] The *Tarasoff* court clarified that, in spite of assumed confidentiality, mental health professionals are mandated to warn an identifiable victim when they have a reasonable basis for believing their patient will harm a third party.[179] As part of the growing trend of holding professionals responsible for notifying specific persons of potential harm, courts have found that pharmacists have a duty to warn customers of potentially harmful drug interactions.[180] In *Dooley v. Everett*, a Tennessee appellate court found that the pharmacist's recognized standard of care embraces an obligation to warn patients of possible negative consequences of drug combinations.[181] The court explained as rationale that acting on this duty deters harm to customers.[182] Scholarly discourse has also advanced the proposition that courts should expand their notions of pharmacist accountability to include a duty to warn.[183]

As early as 1986, legal scholars argued the reasonableness of mandating mediators to warn when they know or should know that a victim could be harmed.[184] Professor Arthur Chaykin suggests that

177. *See, e.g.*, TEX. R. EVID. 509. Physician-Patient Privilege, specifying that there is limited privilege in criminal proceedings, *id.* at 509(b), but that communications may not be disclosed in civil proceedings. *Id.* at 509(d)(1).

178. *See, e.g.*, Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853 (1998) (contesting the idea that confidentiality is a key aspect of the lawyer-client privilege).

179. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

180. Note this change from earlier courts finding that pharmacists had no duty to warn patients as long as adequate notice of a drug's potential dangers had been provided to the physician. *See, e.g.*, Carmichael v. Reitz, 95 Cal. Rptr. 381 (Cal. Ct. App. 1971); Parke, Davis & Co. v. Mayes, 183 S.E.2d 410 (Ga. Ct. App. 1971).

181. 805 S.W.2d 380, 386 (Tenn. Ct. App. 1990) (after ingesting a contraindicated combination of drugs, a child had cerebral seizures; parents sued the pharmacy, arguing that the pharmacist had a duty to warn them of toxic drug interaction).

182. *Id.* at 384 (stating that "Revco owes a duty to its customer to refrain from negligently doing or failing to do an act which would injure its customer.").

183. *See, e.g.*, R. Paul Asbury, Comment, *Pharmacist Liability: The Doors of Litigation Are Opening*, 40 SANTA CLARA L. REV. 907 (2000) (arguing that courts should no longer recognize liability limitations previously granted pharmacists); Edward Casmere, Comment, *Rx for Liability: Advocating the Elimination of the Pharmacist's No Duty to Warn Rule*, 33 J. MARSHALL L. REV. 425 (2000) (advising that absent a duty to warn, pharmacists will not be regarded as professionals); *See generally* Martha K. Wivell & Gary L. Wilson, *Prescription for Harm: Pharmacist Liability*, 30 TRIAL 36 (1994); W.J. Cremer & T.R. Pender, *Pharmicist Liability: A Duty to Warn?*, 17 PRODUCT LIABILITY INT'L 1, 2 (1995); RICHARD R. ABOOD & DAVID B. BRUSHWOOD, PHARMACY PRACTICE AND THE LAW (1997).

184. See, e.g., Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile*

failing to warn an endangered person creates improper mediator bias and increases the likelihood of an impractical agreement.[185] He also notes that the threatening party may be requesting help and "it would be unfortunate to refuse help under the guise of some vague notion of confidentiality."[186]

Professor Virgil Wiebe is clear that when a client threatens to harm a third party, the social worker's duty to warn supercedes client loyalty or confidentiality.[187] Wiebe further asserts that the obligation to warn also includes notice to other relevant actors, such as law enforcement officials.[188] Interestingly, however, in 2002, when Massachusetts revised its law addressing confidentiality between a social worker and her client, legislators specified that disclosure of otherwise privileged information was permissible if a client threatens to inflict serious harm on a "reasonably identified victim," or the social worker knows he has a history of violent conduct.[189] The social worker is not obligated to take actions that place her in danger,[190] reflecting a concern voiced by some defense attorneys.[191] It is unclear, however, why the safety of the professional should trump that of the intended victim, and difficult to imagine how one would compare the relative dangers in making a necessarily fast decision whether to warn.

Similar to the lawyer-client privilege, that between clergy and penitent was thought to be inviolate as a widely accepted American social and legal norm.[192] However, revelations of widespread

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Environment for Model Legilsation, 2 OHIO ST. J. DISP. RESOL. 47, 76 (1986) (stating that "it is reasonable to require a duty to warn where the mediator knows or should know that an innocent victim will be injured.").

185. *Id.* at 75.

186. *Id.*

187. Virgil Wiebe, *Washing Your Feet in the Blood of the Wicked: Seeking Justice and Contending With Vengeance in an Interprofessional Setting*, 1 UNIV. ST. THOMAS L.J. 182 (2003).

188. *Id.*

189. Paul E. Nemser, *Evidentiary Issues, in* MASSACHUSETTS DISCOVERY PRACTICE, VOL.II, § 16.16.2 (M.C.L.E., 2002) (citing MASS. GEN. LAWS ANN. ch. 112, § 135A(c)(2) (West 2004) (stating that the social worker must reasonably belief that there is a "clear and present danger" that the client will try to harm the third party)).

190. *Id.* (citing MASS GEN. LAWS ANN. ch. 112 § 135B(a)).

191. Telephone Interview with defense attorney who asked to remain anonymous (Mar. 20, 2006). *See also* Levin, *supra* note 78.

192. Every state and the District of Columbia have codified some version of the clergy-penitent privilege. *See* MCCORMICK ON EVIDENCE § 76.2 (John William Strong ed., 4th ed. 1992). The privilege generally protects from disclosure any confidential communication in the realm of spiritual advice or confession. *See* Jane E. Mayes, *Striking Down the Clergyman-Communicant Privilege Statutes: Let Free Exercise of Religion Govern*, 62 IND. L.J. 397, 400 (1987). *See generally* FED. R. EVID. 506 (Proposed 1973).

pedophilia within the Catholic Church[193] have caused many to again question the scope of this privilege.[194] Thirty-two states include clergy among their mandatory reporters of child abuse, while fourteen states require reporting by "any person" suspecting child abuse.[195] Many state legislatures have considered amending their child abuse reporting laws to either expressly include clergy as mandatory reporters or otherwise curtail the clergy-penitent privilege when public welfare is compromised.[196] Beyond whether they must report current or threatened child abuse, there is also an increased call for clergy to prevent a broad array of harmful conduct, including domestic violence.[197]

In line with legal mandates to notify intended victims of threatened violence, courts are increasingly imposing the duty to warn on a various professionals in contact with HIV and AIDS patients. In 1995, a California appellate court held that physicians have a duty to warn intimate partners of an AIDS patient's status.[198] The court explained that although a professional has a special relationship with a patient or client, the duty to warn a third party takes precedence, "even if the third person is both unknown and unidentifiable."[199] Given this line of reasoning, it is neither overly burdensome nor unreasonable to insist that lawyers warn an identifiable, known third party whom a client has threatened.

Hospitals, too, have been swept into the duty to warn maelstrom in the context of HIV cases. A Texas appellate court found that the

193. Elizabeth Mehren, *Scandal Shaking Catholicism to Core*, L.A. TIMES, Mar. 13, 2002, at A12. (stating that the current crisis began after disclosures that after Catholic Priest Reverend John Geoghan was accused of molesting more than one hundred children, he was transferred to several parishes although top church officials knew or should have known about his pedophilia). *See also* Angie Cannon, et al., *Catholics in Crisis*, U.S. NEWS & WORLD REPORT, Apr. 1, 2002, at 51 (reporting on the responses of the Catholic Church to the pedophilia scandal).

194. *See, e.g.*, Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627 (2003).

195. *See* DEL. CODE ANN. tit. 16, § 903 (Supp. 2000); FLA. STAT. ANN. § 39.201 (West Supp. 2002); IDAHO CODE ANN. § 16-1619 (Michie 2001); IND. CODE ANN. § 31-33-5-1 (Michie 1997); KY. REV. STAT. ANN. § 620.030 (Michie 1999); MD. CODE ANN., FAM. LAW § 5-705 (1999); NEB. REV. STAT. § 28-711 (1995); N.J. STAT. ANN. § 9:6-8:10 (West 1993); N.M. STAT. ANN. § 32A-4-3 (Michie 1999); N.C. GEN. STAT. § 7b-301 (2002); OKLA. STAT. ANN. tit. 10, § 7103 (West Supp. 2002); R.I. GEN. LAWS § 40-11-3 (Supp. 2001); TENN. CODE ANN. § 37-1-403 (2001); WYO. STAT. ANN. § 14-3-205 (Michie 2001).

196. In 2002, the Massachusetts legislature added clergy to the list of those professionals who are mandated to report suspected child abuse. *See* MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2002).

197. Cassidy, *supra* note 194, at 1722 (Professor Cassidy ultimately argues that "[c]lergy confidentiality is valued too highly and guarded too zealously when it conflicts with paramount social values, such as the right of an innocent third party to be free from serious bodily harm.").

198. Reisner v. Regents of the Univ. of Cal, 37 Cal. Rptr. 2d 518 (Cal. Ct. App. 1995).

199. *Id.* at 1195.

hospital had a duty to warn its staff when they were treating an AIDS patient.[200] West Virginia courts, too, have affirmed the duty of hospitals to warn employees when dealing with AIDS patients. In *Johnson v. West Virginia University Hospital*, the court ruled (1) that the hospital had a duty to notify a security guard that he was subduing an AIDS patient, [201] and (2) that the officer could recover for emotional distress brought on by his exposure to AIDS.[202]

Lawyers ought to be persuaded to join the many other professionals who are now required to at least warn an identifiable victim. That mental health and medical professionals, pharmacists, social workers, clergy, and mediators must provide notice of likely harm means attorneys expect some special dispensation. The issue can no longer be couched in terms of the sacrosanct expectation of lawyer-client confidentiality since most of the above professionals must work within the same constraint, and all are expected, per *Tarasoff* and its progeny, to prioritize victim safety over confidentiality.

C. A Lawyer's Mandate to Warn of Client's Threats Against a Judge Should Extend to Abuse Victims

In *State v. Hansen*, Washington's Supreme Court ruled that both direct and indirect threats against a judge are actionable, and that although the client's threatening statements were made to a lawyer, they were not protected within the rubric of the attorney-client privilege.[203] Washington law prohibits direct and indirect intimidation of a judge "because of a ruling or decision . . . in any official proceeding."[204] Similarly, every state prohibits intimidation of a crime witness or victim, as well as threats of physical harm against a current or former intimate partner.[205] The *Hansen* court said, "We determine that the legislative intent behind RCW 9A.72.160(1) is to protect judges from the threat of

200. Casarez v. NME Hosps., Inc., 883 S.W.2d 360, 364 (Tex. Ct. App. 1994) (nurse contracted HIV after assisting a patient with AIDS; the hospital knew this was an AIDS patient but failed to notify the nurse).

201. Johnson v. W. Va. Univ. Hosps., Inc., 413 S.E.2d 889 (W. Va. 1991), *abrogated in part on other grounds by* Helderth v. Marrs, 425 S.E.2d 157, 160–61 (W.Va. 1991)).

202. *Id.* at 889.

203. State v. Hansen, 862 P.2d 117 (Wash. 1993).

204. WASH. REV. CODE 9A.72.160(1) (2006).

205. *See, e.g.*, ALASKA STAT. § 11.56.540 (2006) (tampering with a witness in the first degree); FLA. STAT. ANN. § 914.22 (2006) (tampering with a witness, victim, or informant); MASS. GEN. LAWS ch. 268, § 13B (2006) (intimidation of witnesses or jurors; penalties; "criminal investigator" defined); TEX. PENAL CODE § 36.06 (Vernon 2004) (obstruction or retaliation). *See also* Thomas R. Trenkner, Annotation, *Validity, Construction, and Application of State Statutes Imposing Criminal Penalties for Influencing, Intimidating, or Tampering with Witness*, 8 A.L.R.4th 769 (2004).

harm due by retaliatory acts because of past official actions by a judge."[206] Importantly, the precise intent of witness intimidation laws is also to prevent a defendant from retaliating against a witness who has or is planning to testify against him.[207] And, as discussed previously, a key purpose of statutes prohibiting domestic violence is abuse *prevention*.[208]

Given the striking similarities in language, purpose, and legislative intent among these laws, it is logical that they all be implemented with great emphasis on protecting the intended victims, not the perpetrators. The *Hansen* court provides a clarifying standard: "[T]hat attorneys, as officers of the court, have a duty to warn of true threats to harm members of the judiciary communicated to them by clients or third parties."[209] We posit that being officers of the court confers a greater duty than merely reporting threats made against the judiciary, but rather, to any identifiable party—in particular a domestic violence victim.[210]

D. Trends in Products Liability Doctrine Extending Duty to Warn

It is well settled that the duty to warn within products liability doctrine extends beyond the manufacturers to all persons within the distributive chain.[211] Suppliers, wholesalers, distributors, and retailers are among those who may be held liable for harm caused by defective products.[212] The policy rationale for imposition of liability on these parties rests with their power to influence the manufacturer to augment product safety[213] and their being in the best position to eliminate future danger.[214] Similarly, because lawyers whose batterer-clients reveal intentions to harm a specified victim are uniquely situated to warn that victim, the duty to warn should extend to counsel.

One reason that duty to warn cases have burgeoned is a general acknowledgment that most potentially dangerous products can be made

206. *Hansen*, 862 P.2d at 120.

207. *Id.*

208. *See, e.g.*, MASS. GEN. LAWS. ANN. ch. 209A, §§ 1–10 (West 1991) (Referred to as the "Abuse Prevention" Law).

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

210. Some might argue that domestic violence victims, unlike judges, often already know that their abusers pose an ongoing threat, *but see supra* Section VI.D., "Victim's Cognizance of Danger," explaining that some victims are unaware of new threats, others may be in denial, and a large number lack the resources to protect themselves from the batterer absent specific safety planning.

211. *See, e.g.*, Foremost-McKesson Corp. v. Allied Chem. Co., 680 P.2d 818, 822 (Ariz. Ct. App. 1983). *See also* Riordan v. Int'l Armament Corp., 477 N.E.2d 1293, 1296 (Ill. Ct. App. 1985).

212. *See, e.g.*, Hammond v. North American Asbestos Corp., 454 N.E.2d 210, 216 (Ill. 1983).

213. *Id.*

214. Bickram v. Case I.H., 712 F. Supp. 18, 22 (E.D.N.Y. 1989).

less so with effectual warnings to users.[215] As a result, fear of lawyer imprecision in predicting product hazards cannot be an impediment to executing the *Tarasoff* duty. In spite of rare mistakes, attorneys will be able to reasonably predict danger based on current professional standards and common sense.[216] By utilizing the reasonableness standard, in-house counsel can ably assess if a client plans to sell a dangerous product. Importantly, just this standard has been applied to those manufacturing and selling goods under the Consumer Product Safety Act (the CPSA).[217] The Consumer Product Safety Commission (CPSC) mandates reporting when there is a reasonable belief that consumers could be harmed by the product being sold.[218] It will thus be the rare case in which a client will be too vague for counsel to accurately assess risk of harm, whether by dangerous products or a violent abuser.[219]

E. Shielding Batterers from Accountability is Unethical: A Lawyer's Silence Constitutes Collusion

A lawyer's silence constitutes collusion with the batterer and likely malpractice for it reflects an unethical position that is no longer acceptable.[220] Most lawyers and members of the public express outrage when yet another battered woman is murdered, but that disdain appears short-lived. In reference to intimate partner abuse, Professor Kristian

215. M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 11 J. PROD. LIAB. 103, 104 (1988); *see also* Mark R. Lehto & James M. Miller, *The Effectiveness of Warning Labels*, 11 J. PROD. LIAB. 225, 225 (1988) ("During the last twenty years the duty to warn has been heavily emphasized in litigation regarding products liability."); James B. Cohoon, *Defeating Proximate Causation in Failure-to-Warn Cases*, 28 FOR THE DEFENSE 25, 25 (1986) ("Today, many products liability suits have as a primary theory of recovery an allegation that the plaintiff was injured because there was an insufficient or inadequate warning . . . .").

216. *See* Backstrom, *supra* note 54.

217. 15 U.S.C. §§ 2051–2085 (1994). The disclosure requirements of the CPSA include: "Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product . . . (3) creates unreasonable risk of serious injury or death, shall immediately inform the Commission of such failure to comply, of such defect, or of such risk . . . ." 15 U.S.C. § 2064(b) (as cited in Backstrom, *supra* note 54, at 160 n.108).

218. 15 U.S.C. § 2064(b). Note that the CPSC makes the final decision regarding product safety for the marketplace. 15 U.S.C. § 2064(c).

219. *See* Shelly Stucky Watson, *Keeping Secrets that Harm Others: Medical Standards Illuminate Lawyer's Dilemma*, 71 NEB. L. REV. 1123, 1131 (1992) (noting that "it is the exceptional case where the intent to harm a third party is not clear. In unclear cases it is unlikely that a duty to warn would arise for either a psychotherapist or a lawyer.").

220. The Model Rules of Professional Conduct mandate that attorneys "provide competent representation to a client" which "requires the legal knowledge, skills, thoroughness and preparation necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

Miccio asserts,

> [I]t is more than cultural amnesia that facilitates violence. It is a failure of will. . .. However, the perpetuation of such violence requires more than the act of an individual male. It requires state condonation of such violence . . . . Although we speak of accountability, we have neither the collective will nor the inclination to hold our selves or the architects of such violence accountable.[221]

As lawyers we are facilitators of a legal system premised on a duty to do justice and engage in ethical practice.[222] It is difficult to imagine how that foundation can be squared with maintaining silence while in possession of information that can save a victim's life. Attorney inaction may reflect troublesome minimization and denial about the potential danger to victims, but ignorance about the issue demands remedial education[223]—it in no way relieves the lawyer of responsibility to avoid complicity in a pending crime.

F. Plaintiff's Burden of Proof Protects Lawyers

The essential elements of a negligence action—duty, breach, cause in fact, legal cause, and harm[224]—militate against any notion that lawyers will too readily be found liable for failing to properly intervene. In *Roberts v. Healey*, a divorce lawyer was sued for not obtaining a protective order against a battered client's estranged husband, who then killed the client's two small children and wounded her mother.[225] Although the court let stand the mother's Deceptive Trade Practices claim, it found that there was insufficient nexus between Attorney Healey's failure to obtain a protective order and the husband's murder of their daughters.[226] Given the egregious facts of the *Healey* case—an attorney ignoring his battered client's repeated requests that he obtain a protective order—it should be of comfort to lawyers that at each stage of

221. G. Kristian Miccio, *Male Violence – State Silence: These and Other Tragedies of the 20th Century*, 5 J. GENDER RACE & JUST. 339, 340 (2002).

222. *See generally* MODEL RULES OF PROF'L CONDUCT (2004).

223. *See* Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 739 (1999) (explaining that batterer's treatment experts insist lawyers understand that most batterers do not have a problem with poor impulse control or anger, but rather that they choose to be violent and engage in what Dr. David Adams calls, "a planned pattern of coercive control.").

224. ROBERTSON ET AL., *supra* note 104, at 76.

225. Roberts v. Healey, 991 S.W.2d 873, 877 (Tex. Ct. App. 1999).

226. *Id.* at 879 (finding that the attorney's "failure to obtain a protective order [was] too attenuated from [the husband's] criminal conduct to constitute a legal cause of injury to Karin, her mother, and her children.").

the appeals process, the courts vigorously affirmed proximate cause requirements.

G. Potential Torts

One option is charging a lawyer with negligent failure to warn if she does not alert a third party to impending harm.[227] A customary negligence claim requires that five elements be met: first, a duty owed by defendant to plaintiff; second, breach of that duty; third, cause in fact—that is, but for the defendant's inaction, harm would not have been visited upon the plaintiff; fourth, legal cause—that is, reasonable foreseeability that defendant's inaction would result in harm to the plaintiff; and fifth, actual harm.[228] A traditional tenet of tort law presumes that there is no duty to protect a third party from harm absent a special relationship.[229] Scholars have previously argued that the inherent dangers of child abuse should confer a duty in tort for lawyers to forgo confidentiality in favor of warning an imperiled third party.[230] Given the similar and likely harms, the inclusion of domestic violence within the rubric of protected victims is easily justified.[231]

IX. CONCLUSION

Not withstanding the social utility of maintaining confidential client relationships, it must be recognized that there is greater public benefit from providing immediate assistance to prevent harm to a third party, particularly a readily identifiable abuse victim. Lawyers ranging from in-house counsel for large manufacturing companies and corporate litigators to criminal and family law practitioners are uniquely positioned to determine their clients' plans due to the interview and investigation process inherent in representation.[232] As our doctrinal,

227. Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability when a Lawyer Fails to Warn a Third of a Client's Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 495 (2000) (discussing application of the negligent failure to warn in tort cases).

228. ROBERTSON ET AL., *supra* note 104, at 76.

229. RESTATEMENT (SECOND) OF TORTS § 315 (1965) (specifying that existence of a special relationship can impose a duty for the defendant to control the third party's conduct, or it can accord the third party the right to be protected).

230. *See, e.g.*, Marc L. Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of A Client's Intended Violent Assault*, 21 TORT TRIAL & INS. PRAC. L.J. 355, 372 (1986) (writing that child abuse would constitute the kind of circumstance in which an attorney would have a duty in tort to initiate action to protect a threatened child).

231. *See, e.g.*, Buel, *supra* note 156, at 956 (noting that domestic violence "is characterized by intentional harms to persons and their property . . . .").

232. *See* Backstrom, *supra* note 54.

normative, and policy arguments indicate, it is inexcusable to permit continuing legal impunity for lawyers who fail to screen and attempt to dissuade potentially violent clients, and to warn the intended victims. Should jurisdictions wish to encourage client disclosures in the interests of individual and public safety, consideration must be given to statutory tort immunity for those lawyers who make good faith disclosures in the interests of preventing serious harm, including criminal acts. Given the astonishing levels of dangerous, criminal, recidivist behavior by domestic violence offenders, lawyers must take their place among the many professionals required to provide warning to their anticipated victims.