

ARTICLES

Revisiting Ethics in Domestic Abuse Cases

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ABSTRACT

Ethical dilemmas in domestic abuse cases often go unrecognized at worst and unacknowledged at best. Both civil and criminal lawyers frequently fail to recognize the special ethical problems of intimate partner abuse, specifically those that place a survivor at an increased risk of harm.

This article explores ethical dilemmas and violations of lawyer professional responsibilities from both criminal and civil perspectives. The overriding focus of this article will not be so much on criminal cases involving domestic abuse, but rather on the intersection of criminal law and criminal lawyering with civil practice. Among other issues, this article reviews the nature of zealous advocacy and the elements of competency under the rules of professional conduct.

Others have ably written on ethical representation in domestic abuse cases, sounding the alarm of ethical hazards. Those authors have made valuable contributions to the discourse, and many are cited herein. This article seeks to supplement those writings by blending both practical and scholarly perspectives on what happens when criminal law and practices in abuse cases influence family law matters and intimate partner abuse discourse. A primary focus of the ethics discussion is the disruption of family law goals when abusive partners are represented by lawyers who use criminal style tactics in family court matters. When parties' use criminal strategies—which have often-contradictory goals—in family law matters, such approaches can harm opportunities for settlement as parties become more polarized. This inability to reconcile goals can be both financially and emotionally costly for both parties, as well as dangerous for the

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party who has been harmed. In addition, practitioners may be exposing themselves to ethics complaints and malpractice claims.

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INTRODUCTION

“Professional responsibility takes on new meaning when domestic violence (DV) is involved.”

Julie Saffren, Ethical Issues in Domestic Violence Cases¹

Not until the 1970s was domestic violence² brought to the attention of our courts in a significant way. Over forty years have passed since courts in this country began hearing voluminous cases regarding the abuse of women and other intimate partners. Protection orders evolved to protect individuals who did not identify as wives; jurisdictions expanded domestic abuse statutes to protect those who are unmarried, those in queer relationships, and, in some states, those who reside with an alleged offender—regardless of whether an intimate or familial relationship is involved.³ Some states permit consent agreements for orders of protection.⁴

1. Julie Saffren, *Professional Responsibility in Civil Domestic Violence Matters*, 24 HASTINGS J. GENDER & L. 3 (2013).

2. Domestic abuse, domestic violence, and intimate partner violence are used interchangeably in this article. One definition of intimate partner abuse is “Intimate partner violence (IPV) is a pattern of assaultive behavior and coercive behavior that may include physical injury, psychologic abuse, sexual assault, progressive isolation, stalking, deprivation, intimidation, and reproductive coercion. These types of behavior are perpetrated by someone who is, was, or wishes to be involved in an intimate or dating relationship with an adult or adolescent, and is aimed at establishing control of one partner over the other.” AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION: INTIMATE PARTNER VIOLENCE 1–6 (2012).

3. See, e.g., MASS. GEN. L. 209A; LA. REV. STAT. § 46:2136; WYO. STAT. ANN. § 35-21-105 (2023).

4. See, e.g., LA. STAT. ANN. § 46:2136. Consent agreements permit the court to enter an order of protection without a finding that a party engaged in domestic abuse. “The advantage to the victim of agreeing to a consent agreement is that the victim will be sure to get the protection order.” *How Can I Get a Civil Protection Order?*, IOWA LEGAL AID, (May 2, 2023), <https://www.iowalegalaid.org/resource/how-can-i-get-a-civil-protection->

Historically, and currently, legal system actors tended to associate domestic violence solely with the criminal side of law. Given that so many federal and state resources were and are used to support the criminal legal system in addressing domestic abuse, the association is understandable. In the 1970s, abused women and their advocates expressed that their most urgent need was for an effective police response.⁵ Indeed, then and today, appropriate police responses are critical to successfully ending many abusive situations, and some survivors will only feel safe when their abusers are confined. For the sake of this article, however, any focus on criminal law as the final arbiter of domestic abuse is faulty and outdated. Such a view hurts abuse survivors because it is often their civil needs that are the most urgent and most necessary for maintaining safety and independence. Surprisingly, the reasons discussed below reveal that the criminal side of the law often harms those who have been abused and may not serve survivor interests.⁶

Many also associate the family law system with domestic violence cases. In some jurisdictions, protection orders may be heard in family courts and may be preceded or followed by one party filing for divorce, custody, or other family law action.⁷ The association is an expected one. Most survivors, particularly those with children, turn to family courts to secure safety for their children as well as needed financial support. As set out later, family law practitioners expose themselves to the same risks as criminal law attorneys when they are not familiar with the peculiar dynamics of abuse, including counterintuitive responses.⁸

order. [<https://perma.cc/UN34-7EJN>].

5. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1219-1220 (1993) for why women may decide not to call the police based on prior experiences.

6. For a comprehensive discussion on the barriers for survivors created by the criminal processes see LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018).

7. See, e.g., COMMONWEALTH OF MASS. TRIAL CT., GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS 17, 46, 230-273 (2021); ALA. CODE § 30-5-3 (2024); HI. REV. STAT. § 586-2 (“An application for relief under this chapter may be filed in the family court in the circuit in which: (1) the petitioner resides or is temporarily located.”). Some of the articles, cases and laws cited herein are decades old. See, e.g., *supra* notes 44–45. I note these resources because the information remains vital and to demonstrate how long this information has been available to practitioners. Outside of criminal and family law fields of practice, survivors may engage lawyers who specialize in other legal fields, such as tort lawyers, when seeking relief for the harm they experienced due to abuse. Ronald Keith Perkins, *Remember: Intimate Partner Violence Creates Domestic Tort Claims*, ABA (Oct. 11, 2024), https://www.americanbar.org/groups/family_law/resources/family-advocate/2024-fall/remember-intimate-partner-violence-creates-domestic-tort-claims/?login [<https://perma.cc/PAD3-YQ2L>]. Lawyers skilled in Social Security Benefits may assist survivors obtain benefits due to the lasting injuries incurred through intimate partner abuse. *How A Woman With Mental Health Trauma From Domestic Violence Can Qualify For Social Security Disability Benefits*, NEWHOUSE, <https://newhousekc.org/2020/11/19/how-a-woman-with-mental-health-trauma-from-domestic-violence-can-qualify-for-social-security-disability-benefits/> [<https://perma.cc/32ZJ-YVK7>] (last visited May 13, 2025); see also Michelle Shvarts, *PTSD and Social Security Benefits*, DISABILITY ADVOC. GRP. (Sept. 14, 2022), <https://ssdisabilityaccess.com/blog/entry/ptsd-and-social-security-benefits/> [<https://perma.cc/7XPE-2HPR>].

8. “Domestic Violence is counterintuitive which leads to misinformation.” Barry Goldstein, *Why Don't We End Domestic Violence?*, GOLDSTEIN & YORK, <https://barrygoldstein.net/articles/why-don-t-we-end-domestic->

Incarceration of an abusive partner may be a temporary path to survivor safety. But often survivors' long-term security can happen only with the expanded aid that civil support can bring. That support may come in the form of educational and financial assistance, access to safe and habitable housing for survivors and their children, or some other form.⁹ Exercising all the remedies available under civil protections can be the beginning of a survivor's path to independent living. Suing the abusive party in tort can be exercised as a remedy to ensure both validation for the party that was harmed as well as financial resources that assist with recovery from medical and psychological trauma. Civil suits on behalf of survivors, or their heirs, may be available against landlords, employers, universities, and other institutional players who fail to take even minimal safety measures to prevent harm to survivors at risk. Attorneys practicing disability law provide relief to survivors through public benefits systems, including Social Security Disability.¹⁰ Those lawyers can also assist survivors in obtaining new social security numbers.¹¹ All to say that domestic abuse has consequences that reach into many aspects of civil law. Only willful ignorance can explain attorneys who avoid learning the nuances of the dynamics and consequences of abuse. Yet, some courts tolerate this negligent behavior. In any setting, failure of counsel to acknowledge the signs and symptoms of abuse for those who harm their partners and those who are targets of abuse, contributes to the target's ongoing risk of harm and can place counsel for abusive partners in an unwitting collaboration with their clients. Likewise, counsel for those who have been harmed can collaborate with the abusive party by encouraging survivors to agree to settlement terms that place her and her children in high-risk situations, ignoring what is safe. These practices violate the Rules of Professional Conduct.

I. A MORE INCLUSIVE COMPLIANCE WITH THE MODEL RULES OF PROFESSIONAL CONDUCT

What follows is a discussion of the ways in which the Model Rules are implicated in cases involving domestic abuse.¹² Several Rules of Professional Conduct

violence [<https://perma.cc/BD6Q-G5BJ>] (last visited May 14, 2025). See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018) [HEREINAFTER MODEL RULES].

9. For example, transitional housing is a powerful means of assisting survivors in obtaining permanent housing. Often housing is part of a larger plan to ensure the survivor's financial independence. "The comprehensive services provided by the YWCA can help survivors escape violent relationships by assisting with locating and accessing safe housing and connecting survivors with employment and other resources necessary to remain stably housed and self-sufficient." *Domestic Violence Support*, YWCA OF CINCINNATI, <https://ywcacincinnati.org/domestic-violence-support> [<https://perma.cc/A7VZ-5MSM>] (last visited February 7, 2025).

10. *How A Woman With Mental Health Trauma from Domestic Violence Can Qualify For Social Security Disability Benefits*, *supra* note 7.

11. *New Social Security Numbers for Domestic Violence Victims*, SOC. SEC. ADMIN. (July 2021), <https://www.ssa.gov/pubs/EN-05-10093.pdf> [<https://perma.cc/87HW-BLYH>].

12. As noted, each jurisdiction has implemented its own set of Rules of Professional Conduct. All have implemented some version of each rule cited, but the competence standard is largely uniform.

touch upon domestic abuse cases. The primary rules involved are Rule 1.1 (Competence), Rule 1.2 (Scope of Representation & Allocation of Authority Between Client & Lawyer), Rule 1.3 (Lawyer Client Relationship, particularly as to diligence), Rule 3.1 (Meritorious Claims & Contentions), and Rule 8.4 (Misconduct).

None is more relevant than Rule 1.1, which demands competency in the subject matter of any given field in which the lawyer engages. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹³ For lawyers to serve as competent counsel in a field, the Rule can demand that lawyers stay current with research beyond the strict confines of legal information or at minimum retain the services of an expert to advise. This concept will be explored in Section II. In addition, attorney errors can be violations of professional rules, as well as a basis for a malpractice claim, but that is not always the case. In some instances, a malpractice claim may be proved even when there was no violation of a professional rule.¹⁴ In other instances, a lawyer may be subject to discipline for a rule violation, yet no malpractice can be proved.¹⁵ Family law practitioners need to be aware of the comments addressing Rule 1.1. The areas of needed skill may be familiar to many practitioners. But a deep understanding of the nuances of the impact of abuse is essential for competent representation.¹⁶

Rule 1.2(d) requires that lawyers not “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”¹⁷ This section explores when a lawyer, whose competency includes understanding the dynamics and risks present in a domestic violence situation, wittingly or not encourages a client to commit further acts of abuse.

Rule 1.3’s demand is seemingly simple: “A lawyer shall act with reasonable diligence and promptness in representing a client.”¹⁸ The complexity is contained

13. MODEL RULES R. 1.1.

14. “Nevada’s Rules of Professional Conduct track the ABA’s Model Rules. Borrowing from the Scope section of the ABA’s rules, Nevada’s RPC 1.0A(d) provides, in part, that: ‘Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.’” Joseph P. Garin, *The Rules of Professional Conduct in Malpractice Litigation*, NEV. LAWYER (May 2016), https://nvbar.org/wpcontent/uploads/NevadaLawyer_May2016_CLE_RPCsInLegalMalpractice_0.pdf [<https://perma.cc/5JJU-53BG>].

15. MODEL RULES R. 8.4 cmt.6.

16. “In order to understand the dynamics of a domestic violence, sexual assault or stalking case, it is important to understand the broader continuum of violence in which these cases occur.” *Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking*, ABA COMM. ON DOMESTIC VIOLENCE iii (2007). See generally AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING IN CIVIL PROTECTION ORDER CASES (2007).

17. MODEL RULES R.1.2(d)

18. MODEL RULES R. 1.3.

in Comment 1¹⁹, which discusses the requirements and limitations of zealous advocacy. Often zealous advocacy does not require being the most aggressive advocate in the room, but rather being the reasonable voice in the room, one that can ratchet down emotions and thereby prevent further risks for the targeted partner. This requirement applies both to counsel for the abusive partner and the target.

Rules 3.1 and 8.4(g)²⁰ contain what may be the most crucial obligations and limitations on practitioners of cases involving intimate partner abuse. The critical term of Rule 3.1 reads: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” Particularly in family court cases involving abuse, allegations may be made without proper investigation as to supporting law or facts. Unfounded allegations add stressors to a case by way of increased tensions between the parties, excessive court time, and unnecessary attorneys’ fees. Yet, unfounded allegations abound in family court matters, with many allegations attributable to “gender wars,” which is a focal point of Rule 8.4(g).

Rule 8.4(g) states that

it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Much of the observable gender discrimination is targeted at heterosexual partners who have the misfortune to land in family court.²¹ The same dynamics can

19. “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued . . . [t]he lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” MODEL RULES 1.3 cmt. 1.

20. MODEL RULES R. 3.1, 8.4(g).

21. *Gender bias in custody battles places women and children at risk*, UNITED NATIONS (June 30, 2023), <https://www.ohchr.org/en/stories/2023/06/gender-bias-custody-battles-places-women-and-children-risk> [<https://perma.cc/V3QL-8NPH>]. “The consequences of domestic violence and its effects on children are also misunderstood and underestimated by judges, who tend to prioritize and grant contact with fathers. In doing so, judges fail in their duty to protect children from harm, giving abusive fathers unsupervised access to their children, including in cases where judges have found that physical and/or sexual violence has occurred.” Reem Alsalem (Special Rapporteur), *Custody, violence against women and violence against children: Report of the Special Rapporteur on violence against women and girls, its causes and consequences*, Reem Alsalem, United Nations Gen. Assembly Hum. Rts. Council, U.N. Doc. A/HRC/53/36 (Apr. 13, 2023).

be found in same sex and other gender cases where stereotypes and myths also abound.²²

Many behaviors that are “acceptable” in family law cases are rooted in gender biases. This culture is explored in the following sections.

II. LAWYERS HAVE AN OBLIGATION UNDER RULE 1.1 TO LEARN ABOUT INTIMATE PARTNER ABUSE AND THE IMPACT OF ABUSE

As previously noted, lawyers cannot hide behind the excuse of not being obligated to understand the dynamics and consequences of intimate partner abuse. Some lawyers and judges say they are not “social workers” and are unwilling to learn or acknowledge what is safe for targets of abuse and what behavior encourages abuse. Yet, for lawyers practicing criminal law, a client’s past abuse can become a key argument for mitigation.²³ Ignoring those circumstances could have adverse consequences for the client’s case.²⁴

A. IGNORANCE OF THE LAW IS NOT A DEFENSE

“Ignoring the problem of domestic violence has not made it go away, nor will it. Domestic violence will go away only with a concerted effort on the part of virtually every element of society.”²⁵ In over the two decades since Professor Burman wrote those words, little progress has been made in educating lawyers on the dynamics of domestic abuse.²⁶ While continuing legal education programs are offered on recognizing signs of domestic abuse, in my experience lawyers seem reticent to bring those skills to their work in representing abusers in both the criminal and civil legal arenas. Under Rule 1.1, lawyers are required to learn the areas of law brought to them by their clients.²⁷ There appears to be little self-

22. “A gender stereotype is a preconceived belief that causes the believer to presume that all men or all women do or should possess particular characteristics or perform certain roles.” Ellen R. Gutowski et al., *Vocational and Financial Losses as Mediators Between Legal Abuse and Mental Health for Family Court-involved Survivor-Mothers*, J. OF FAM. VIOLENCE (Dec. 24, 2024), <https://link.springer.com/article/10.1007/s10896-024-00798-6> [<https://doi.org/10.1007/s10896-024-00798-6>].

23. The study of neuroscience has become increasingly important in criminal cases, particularly juvenile cases. “Childhood trauma is especially relevant to the criminal justice system because of society’s entrenched recognition that ‘defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.’” Deborah W. Denno, *How Courts in Criminal Cases Respond to Childhood Trauma*, 103 MARQUETTE L. REV. 301-363, 305 (2019).

24. See *id.* at 352.

25. John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 209 (2003).

26. In 1994 the American Commission on Domestic Violence (now Domestic and Sexual Violence) was established. Educating lawyers on domestic violence was and is their primary mission. Educating lawyers on the topic was a goal across several ABA entities, particularly its impact on children. Despite their efforts and the efforts of others over the past thirty years, little progress has been made on lawyers’ understanding of the dynamics of intimate partner abuse. See DEBROAH GOLEMAN ET AL., WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE, A LAW SCHOOL REPORT (1997).

27. MODEL RULES R. 1.1 cmt.1

study of domestic abuse for lawyers representing either party in civil practice. While criminal defense counsel must be knowledgeable of relevant domestic violence statutes to build a defense, I argue that their expertise cannot stop there. Civil family law attorneys and the criminal defense bar must learn the warning signs of abuse from both the abusers and the abused perspectives. This becomes particularly urgent when a civil action proceeds contemporaneously with a criminal one. With the abundance of case and statutory law, as well as secondary sources covering the topic, failure to be competently informed can no longer serve as an excuse. This creates a frustration for survivors' lawyers when court presentations argue scientifically unproved, or even disproved, theories to a court and the court accepts them. "[I]ncreasingly, attorneys' strategic decisions and courts' acceptance of them may reflect more of a willful blind eye to scientific advances than a protection for the decisions that attorneys make... each day, wisely or not."²⁸ Their strategy unnecessarily increases the burden on the survivors' attorneys to engage experts to dispute the inaccurate information. This is an expense many survivors cannot afford.

B. MODEL RULE 1.1 CLIENT-LAWYER RELATIONSHIP LEGAL KNOWLEDGE AND SKILL

Rule 1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²⁹

Rule 1.1 demands that the lawyer have the legal knowledge to handle a matter.³⁰ Lawyers do not have to be knowledgeable in a field before accepting a case, which allows inexperienced lawyers opportunities to develop. Lawyers who are unfamiliar with a certain area of the law, however, are charged with learning about that field of law in order to provide competent representation.³¹ If the lawyer has the time and skill to become competent in the matter they accept, the competency standard of Rule 1.1 has been met. Some may view the practice of family law and related matters as not requiring particular knowledge or skill. But given the number of lawyers who spend their careers learning and practicing family law, this is a dangerous perspective.³² Rule 1.1 demands that lawyers remain

28. Denno, *supra* note 23, at 363.

29. MODEL RULES R. 1.1.

30. Comment 1 to Rule 1.1 reads: "In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances." MODEL RULES R. 1.1 cmt.1.

31. . MODEL RULES R. 1.1 cmt. 2.

32. "There are more than 1.3 million lawyers in the United States. To be precise, there were 1,322,649 active lawyers as of Jan. 1, 2024, according to the ABA National Lawyer Population Survey." *Demographics*,

current with changes in the law.³³ Competency in domestic abuse cases may demand being current on medical or social science developments, as well. For example, knowledge of the consequences of brain injury may be as important to the family law lawyer dealing with intimate partner abuse as it is to the tort lawyer who seeks recovery for an injured client.³⁴ While not considered legal information, this knowledge is integral to competent representation. Failing to maintain updated information in essential, related fields may open the practitioner to malpractice claims, even if no violation of Rule 1.1 is found.

C. DOMESTIC VIOLENCE IS A WELL-ESTABLISHED FIELD OF LAW

Scholars, judges, and practitioners have written hundreds of articles answering elementary questions posed by new domestic abuse learners and discussing sophisticated topics for advanced readers.³⁵ Trainings by local intimate partner abuse service providers are an option as well.³⁶

Every state has a law that addresses domestic abuse. Case law, statutes, and commentary are easily available to practitioners. Below are examples of how various jurisdictions address intimate partner abuse.

Courts across the country have identified abusive tactics as well as the risks to survivors. In 1997, in one of Ohio's seminal cases on domestic violence, the court wrote: "Women who are divorced or separated are at higher risk of assault than married women . . . Furthermore, studies in Philadelphia and Chicago revealed that twenty-five percent of women murdered by their male partners were separated or divorced from their assailants."³⁷ The principles of Felton have been

Am. Bar Ass'n, <https://www.americanbar.org/news/profile-legal-profession/demographics/?login> (LAST VISITED APR. 4, 2025). WHILE STATISTICS ON THE NUMBER OF THOSE LAWYERS PRACTICING FAMILY LAW ARE FEW, IT IS ESTIMATED THAT APPROXIMATELY 57,000 LAWYERS PRACTICE FAMILY LAW. *FAMILY LAW & DIVORCE LAWYERS & ATTORNEYS IN THE US - NUMBER OF BUSINESSES (2005–2030)*, IBIS WORLD, <https://www.ibisworld.com/united-states/number-of-businesses/family-law-divorce-lawyers-attorneys/4814> [https://perma.cc/F5Y8-ZYV4] (LAST VISITED MAR. 28, 2025).

33. MODEL RULES R. 1.1 cmt. 8; "These factors are as applicable today as they were in 1997, when the Supreme Court decided Felton". *M.D. v. M.D.*, 121 N.E.3d 819, 839 (Ohio Ct. App. 2018); *E.A. v. A.A.*, No. 113295, 2024 WL 3533976, at *11 (Ohio Ct. App. July 25, 2024); see *Family Law & Divorce Lawyers & Attorneys in the US—Number of Businesses*, *supra* note 32.

34. See, for example, *Simon v. State Farm Mut. Auto. Ins. Co.*, et al., 43 So.3d 990, 1006 (La. Ct. App. 2010), where victim's lawyer presented evidence of the medical consequences of injuries as part of the case for damages. "Moreover, because of her cognitive impairment she will need apprentice training." *Id.* at 1005.

35. Lisa Goodman, Mary Ann Dutton, Leigh Goodmark, Deborah Epstein, Julie Goldschied, Beth Richie, Donna Coker, Sarah Buel, Evan Stark, and Rachel Snyder are just a few of the established authors.

36. In person trainings are offered by local groups and national organizations. See, e.g., *Trainings*, ABA, https://www.americanbar.org/groups/domestic_violence/Trainings/ [https://perma.cc/4W9B-Z8MH] (last visited May 14, 2025); *Training and Technical Assistance*, PA. COALITION AGAINST DOMESTIC VIOLENCE, <https://www.pcadv.org/resources/training/> [https://perma.cc/4L5G-8AP5] (last visited May 14, 2025); *Simmons Domestic Violence Training*, SIMMONS DOMESTIC VIOLENCE TRAINING <https://dvtraining.simmons.edu/home> [https://perma.cc/NP35-GAS9] (last visited May 14, 2025).

37. *Felton v. Felton*, 679 N.E.2d 672, 676-677 (Ohio 1997).

affirmed in Ohio case law as recently as 2024.³⁸

In 1999, Massachusetts declared that “the Commonwealth’s public policy against domestic abuse—[includes] preservation of the fundamental human right to be protected from the devastating impact of family violence.”³⁹

Every U.S. state has criminal and civil cases addressing acts of domestic violence.⁴⁰ Often those acts focus on physical abuse, yet far more domestic abuse arises out of an abuser’s coercive control over the victim. Many states have expanded their definitions of domestic abuse to include non-physical forms of abuse. Colorado defined domestic abuse as: “any act, attempted act, or threatened act of violence, stalking, harassment, or coercion . . .”⁴¹ Maine has long defined abuse as: “Compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage in”⁴²—a definition also adopted by Missouri.⁴³ Puerto Rico’s laws state, “Domestic Abuse shall mean a constant pattern of conduct involving physical force or psychological abuse, intimidation or persecution against a person . . .”⁴⁴

Massachusetts recently amended its statute to include coercive control.⁴⁵ The language is expansive, and the examples of coercion are numerous. The statute is quoted below at length because the described acts are common among abusers everywhere.

Coercive control “[c]an occur in a relationship even when there has been no prior violence or threat to “soften” the partner’s resistance.”⁴⁶ While many look for proof of physical abuse as evidence that intimate partner abuse has occurred, the reality is that physical abuse comprises only a small portion of domestic violence. Coercion is far more common and can be a predictor of danger.

“Coercive control,” can be:

- (a) a pattern of behavior intended to threaten, intimidate, harass, isolate, control, coerce or compel compliance of a family or household member that causes that family or household member to reasonably fear physical harm or have a reduced sense of physical safety or autonomy, including, but not limited to: (i) isolating the family or household member from friends, relatives or other sources of support; (ii) depriving the family or household member of basic

38. See *E.A. v. A.A.*, 2024 WL 3533976, at *11 (“These factors are as applicable today as they were in 1997, when the [Ohio] Supreme Court decided *Felton*.”); *M.D. v. M.D.*, 121 N.E.3d. at 839.

39. *Champagne v. Champagne*, 708 N.E.2d 100, 102 (Mass. 1999)

40. See, e.g., *Achille v. Achille*, 117 A.3d 1144, 1152 (N.H. 2015) (“the respondent then yelled at the petitioner, pursued her through the home, grabbed her by the hair, threw her against a counter, choked her, slammed a door on her, and pushed her to the floor.”).

41. COLO. REV. STAT. § 13-14-101 (West 2025).

42. ME. REV. STAT. tit. 19-A, § 4002 (2024).

43. MO. REV. STAT. § 455.010 (West 2021).

44. P.R. LAWS ANN. tit. 8, § 602 (2025).

45. MASS. GEN. LAWS ANN. ch. 209A § 1 (West 2024).

46. Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 747 (2005).

needs; (iii) controlling, regulating or monitoring the family or household member's activities, communications, movements, finances, economic resources or access to services, including through technological means; (iv) compelling a family or household member to abstain from or engage in a specific behavior or activity, including engaging in criminal activity; (v) threatening to harm a child or relative of the family or household member; (vi) threatening to commit cruelty or abuse to an animal connected to the family or household member; (vii) intentionally damaging property belonging to the family or household member; (viii) threatening to publish sensitive personal information relating to the family or household member, including sexually explicit images; or (ix) using repeated court actions found by a court not to be warranted by existing law or good faith argument; or (b) a single act intended to threaten, intimidate, harass, isolate, control, coerce or compel compliance of a family or household member that causes the family or household member to reasonably fear physical harm or have a reduced sense of physical safety or autonomy of: (i) harming or attempting to harm a child or relative of the family or household member; (ii) committing or attempting to commit abuse to an animal connected to the family or household member; or (iii) publishing or attempting to publish sexually explicit images of the family or household member.⁴⁷

In addition to the itemization contained in the cited statute, Professor Jackie Campbell,⁴⁸ an expert in the field of intimate partner abuse and risk, developed risk assessment tools which are easily accessible online.⁴⁹ Among the high-risk factors⁵⁰ are stalking, substance abuse, pregnancy⁵¹, and threats of suicide.⁵²

In one case, when issuing a civil protection order, the judge noted lethality risk factors that supported his decision to issue the protection order and supported the court's findings.⁵³ The lethality factors and the parties' testimony were key components to its decision.⁵⁴ The husband appealed the protection order, claiming that the judge improperly used "facts" not evidence.⁵⁵ The Supreme Court of Kentucky disagreed with appellant, holding that the judge's findings did not include facts taken through judicial notice but originated in "judicial knowledge."⁵⁶

47. MASS. GEN. LAWS. ANN. ch. 209A § 1 (West 2024).

48. *Jacquelyn Campbell: PhD, MSN, BSN, RN*, JOHNS HOPKINS SCH. OF NURSING, <https://nursing.jhu.edu/faculty-research/faculty/directory/jacquelyn-campbell/> [<https://perma.cc/9GY8-FN39>] (last visited Mar. 23, 2025).

49. Jacquelyn C. Campbell, *Danger Assessment*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE, <https://vawnet.org/material/danger-assessment> [<https://perma.cc/TH4P-2KMU>] (last visited Mar. 23, 2025).

50. One factor on its own may not necessarily indicate high risk of danger. The danger tool may additional information and to assess context. Nonetheless, the factors listed are concerning and need to be accounted for during safety planning for survivors.

51. The risk associated with pregnancy continues post birth. For recent reporting on the risk see Sara Chodosh, *The Killing of Young Mothers*, N. Y. TIMES, (Dec. 9, 2024), <https://www.nytimes.com/interactive/2024/12/09/opinion/pregnant-women-homicide.html> [<https://perma.cc/P7HS-Z3MV>].

52. Campbell, *supra* note 49.

53. *Pettingill v. Pettingill*, 480 S.W.3d 920 (Ky. 2015).

54. *Id.*

55. *Id.* at 923.

56. *Id.* at 924.

The court noted, “In other words, the court employed its background knowledge of domestic violence risk factors⁵⁷ to inform its judgment as to whether the facts of this case indicated that domestic violence may occur again.”⁵⁸ The cautionary lesson is that if judges are familiar with the factors that could be interpreted as “high risk” in a certain case, then the lawyers must be familiar with the same factors as well, regardless of whether the lawyer is prosecuting or defending the case.

Similarly, for years, various police departments have used a risk factor model that includes consideration of the danger assessment factors.⁵⁹ The departments assess the level of dangerousness the abusive partner presents to the victim. The assessment is one tool that the police can use in making bail recommendations and bail conditions to the prosecuting attorneys.

There are common risk factors among domestic abusers who are likely to kill their partners. Domestic Violence High-Risk Teams created an algorithm that assess variables such as stalking, choking, death threats, and chronic unemployment. These differentiate high-risk abusers from lower-risk ones. With this intervention program, these abusers are targeted and stopped by the criminal/legal system before they can cause further harm to their victims.⁶⁰

In addition to legislative, statutory, and judicial opinions and interpretations, secondary sources on intimate partner abuse abound. For example, “50 Obstacles to Leaving, a.k.a., Why Abuse Victims Stay” remains a timely article on why some women do not leave their abusers.⁶¹

D. CHILDREN AND THE CONSEQUENCES OF ABUSE

Children are entwined with domestic abuse either as direct victims or because a parent was abused. Motherhood increases vulnerability to threats involving children.⁶² In custody cases that involve abuse, judges often ask if the children were physically abused, and defense counsel argues that the father’s access to the children should not be restricted because the father did not abuse the children. This argument evidences a lack of understanding on how connected domestic

57. *Id.* at 922 (“The Court finds: 9 out of 12 top lethality factors in intimate partner [abuse] including threats of harm, pet abuse, possessiveness, property damage, cyber stalking, rulemaking, recent purchase of a firearm, prior felony conviction, and separation of the parties.”).

58. *Id.* at 924.

59. See Christopher D. Maxwell et al., *New Approaches to Policing High-Risk Intimate Partner Victims and Those Committing the Crimes*, NAT’L INST. JUST. (June 22, 2020), <https://nij.ojp.gov/topics/articles/new-approaches-policing-high-risk-intimate-partner-victims-and-those-committing> [<https://perma.cc/84FF-8JZP>]. For a list of Massachusetts police departments using the high-risk model as of 2019, see DOMESTIC VIOLENCE HIGH RISK RESPONSE TEAMS IN MASSACHUSETTS: DIRECTORY OF EXISTING PROGRAMS, EXEC. OFF. OF PUB. SAFETY AND SEC. (2019).

60. See Aurora Curtis, *Expand the Massachusetts Domestic Violence High-Risk Response Model*, QUALITY POLICING: VIOLENCE REDUCTION PROJECT, <https://qualitypolicing.com/violencereduction/curtis/> [<https://perma.cc/L5ND-WXH7>] (last visited Mar. 23, 2025).

61. Sarah M. Buel, *50 Obstacles to Leaving a/k/a Why Abused Women Stay*, 28 COLO. LAW. 19, 19 (1999).

62. Dutton & Goodman, *supra* note 46, at 746.

violence of the mother is with risk to the child. Abuse of the mother indicates a higher risk of her children being abused, even if the children had not been significantly abused when the parties lived together.⁶³ In addition, since it is the mother's children who are at high risk, stepchildren of the abuser face additional risks, as noted on the danger assessment scale.⁶⁴

Courts and legislatures have recognized the importance of protecting children from abusive parents and partners. Since many lawyers and judges do not understand or do not accept the high risk of abuse faced by the mothers and children when the other parent is abusive, they would do well to incorporate the acknowledgment of the Supreme Court of Wyoming when it said: "Domestic violence and spousal abuse are always contrary to the children's best interests,"⁶⁵ but legislative intent and judicial actions are not always in sync. The ideal judicial perspective would incorporate the following from the statute as well: "The court shall consider evidence of spousal abuse or child abuse as being contrary to the best interest of the children. If the court finds that family violence has occurred, the court shall make arrangements for visitation that best protects the children and the abused spouse from further harm."⁶⁶ While advocates argue for safety to be a priority, the failures of courts to follow the strictures of statutory protections for children can foster serious mental and physical risks for children of abusive parents.

Abuse reaches into every aspect of a family's life and must be considered at all steps of litigation and settlement.⁶⁷ The resources necessary to have a keen understanding of the impact of abuse on individuals and families have been available for decades, yet many lawyers who practice in the field lean on gender stereotypes in their representation rather than on credible research.⁶⁸

63. *Id.*

64. *Id.* See also Campbell, *supra* note 49.

65. *Sears v. Sears*, 479 P.3d 767, 774 (Wyo. 2021) (citing *Johnson v. Johnson*, 458 P.3d 27, 35 (Wyo. 2020)).

66. WYO. STAT. ANN. § 20-20-201(c) (West 2018).

67. See generally LUNDY BANCROFT, JAY SILVERMAN & DANIEL RITCHIE, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2d ed. 2011).

68. Gender bias has been documented in the courts, including family courts, for generations. Court initiated gender bias studies were first constituted in the late 1980's and the 1990's. See, e.g., *THE REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, GENDER BIAS STUDY COMM. OF THE MASS. SUPREME JUD. CT.* (1989); Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143 (1993); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors and Dismissing Their Experiences*, 167 U. PA L. REV. 399 (2019); Patricia Fersch, *Gender Bias In The Courts: Women Are Not Believed*, FORBES (Apr. 6, 2023), <https://www.forbes.com/sites/patriciafersch/2023/04/05/gender-bias-in-the-courts-women-are-not-believed/> [https://perma.cc/PZ5W-6GQ2]. Some states, such as New Jersey, have updated gender bias studies, although not necessarily regarding courts. *Equity for Women in New Jersey: Identifying Needs and Priorities*, CTR. FOR WOMEN AND WORK (Mar. 2024), <https://www.nj.gov/def/documents/Equity%20for%20Women%20Report%20FINAL.pdf> [https://perma.cc/KF9S-HAJ9].

III. RULE 8.4: MISCONDUCT & MAINTAINING THE INTEGRITY OF THE PROFESSION

Attorneys have an ethical obligation to maintain the integrity of the profession, which includes not promoting negative biases and stereotypes against women. This section addresses existing biases within the family court system which often draw on stereotypes of women and policies that undermine women's ability to maximize their parenting abilities. For example, I address how financial policies can promote breadwinners' abusive tactics, the questioning of abuse claims by raising arguments that have no basis in fact, and promoting myths that women lie.

Bias against women in the family courts and related institutions⁶⁹ has been a topic of much study and research. Recognizing intersectionality and the often overlapping layers of bias, I am aware of the additional burdens placed on and biases against women of color and members of the LGBTQ+ community.⁷⁰ Mothers of all types are often viewed within the framework of stereotypes that consider women as liars, mentally ill, or vindictive.⁷¹ Behaviors that reinforce these stereotypes are prohibited under Rule 8.4.⁷² Also implicated is counsel's obligation to investigate under Rules 1.16(a)⁷³ and 1.2(d) and counsel's candor

69. Many states will not collect alimony unless there is a co-existing order for child support. Also, some states that will collect alimony do not have all of the enforcement tools available to the collection of child support. See Joseph Pandolfi, *Enforcing Alimony Orders*, DIVORCENET, (Dec. 27, 2023), <https://www.divorcenet.com/resources/divorce/spousal-support/enforcement-alimony> [<https://perma.cc/8YD7-YHBW>].

70. "Domestic violence occurs in 25-33% of same-sex relationships, about the same rate as heterosexual relationships. One study, however, found that half of transgender and intersex individuals report being raped or assaulted by an intimate partner, significantly higher than national averages." *Facts*, RES. CTR. ON DOMESTIC VIOLENCE: CHILD PROT. AND CUSTODY, <https://rcdvpc.org/facts.html> [<https://perma.cc/UNR3-WZZX>] (last visited Mar. 23, 2025).

71. Fersch, *supra* note 68. See generally Suzanne Zacour, *Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes*, 31 CAN. J. FAM. L. 57 (2018); see also Barry Goldstein, *Custody Courts Assume Protective Mothers Are Just Being Vindictive*, NAT'L ORG. OF MEN AGAINST SEXISM <https://nomas.org/custody-courts-assume-protective-mothers-are-just-being-vindictive/> [<https://perma.cc/3QHA-PM49>] (last visited May 22, 2025).

72. MODEL RULES R. 8.4.

It is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Note that when adopting a form of this rule, some jurisdictions have eliminated the reference to socioeconomic status. For further discussion of the rule and its concerns see Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121 (2021) (discussing Model Rule 8.4 (g), freedom of speech and state modifications to the rule).

73. Rule 1.16(a) Client-Lawyer relationship: A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. MODEL RULES R. 1.16(a) cmt.

with the tribunal under the “Advocate” section of Rule 3.3.⁷⁴ Let’s explore a few of the damaging stereotypes that some attorneys exploit in domestic abuse cases.

A. FINANCIAL OBLIGATIONS

Beginning in the 1980s, at least nine states started conducting gender bias studies.⁷⁵ Some of the findings substantiated the hardships for women, particularly in the enforcement of child support and alimony orders.⁷⁶ A positive result of some of those studies was that child support collection improved with increased mechanisms for collection created and the courts’ willingness to hear child support contempt actions.⁷⁷ What was not improved, however, was that abusive fathers continued to complicate mothers’ lives by either not paying child support on time or not paying it at all.⁷⁸ The lack of predictability in receipt of needed funds kept, and continues to keep, mothers under the control of the abuser. There are fewer enforcement mechanisms for alimony collection.⁷⁹ The unpredictability of these payments mirrors the unpredictability of the abuser’s behavior when the family lived together.⁸⁰

74. “(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (3) offer evidence that the lawyer knows to be false.” MODEL RULES R. 3.3 (Section 3 does not apply in the same way to criminal cases.)

75. Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, 26 TRIAL 28, 28 (1990).

76. “Women seeking child support enforcement have frequently found themselves facing an unresponsive and sometimes hostile system.” *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745 (1990). For an updated report see Frances Raday, *Gender Equality and Women’s Rights in the Context of Child Custody and Child Maintenance: An International and Comparative Analysis* (UN Women Discussion Paper Series No. 30, 2019).

77. The improved collection procedures began with what is known as Title IV-D. Child support collection was funded with federal monies, which was a turning point for enforcement. See *IV-D Child Support and Establishment of Paternity*, STATE JUST. INST., <https://fundingtoolkit.sji.gov/title-iv-d-child-support-and-establishment-of-paternity/> [<https://perma.cc/F4SQ-HYWL>] (last visited Apr. 6, 2025).

78. The relationship between non-payment of child support and domestic violence was essential to implementation of child support enforcement efforts. This problem was recognized in the policy drafted for child support collection. “Safely pursuing child support is a key issue for domestic violence victims,” and providing child support services safely to survivors is a key issue for child support programs. Research finds that “90% of domestic violence victims want to pursue child support if they can do so safely.” *Essentials for attorneys in Child Support Enforcement, Domestic Violence and Child Support*, ADM. FOR CHILD. & FAM., DEPT. OF HEALTH & HUM. SERV. 16-1 (Jul. 29, 2021), https://www.acf.hhs.gov/sites/default/files/documents/ocse/essentials_for_attorneys_16.pdf [<https://perma.cc/X782-FP27>]. Over time, the federal government recognized particular needs of minority women. For example see guidelines for tribal jurisdictions. See ADM. FOR CHILD. & FAM., DEPT. OF HEALTH & HUM. SERV., ACF-OCSS-AT-24-09, REVISION TO TRIBAL DIRECT FUNDING REQUEST: 45 CFR 309 PLAN (Sept. 10, 2024) <https://www.acf.hhs.gov/css/policy-guidance/revision-tribal-direct-funding-request-45-cfr-309-plan> [<https://perma.cc/L8NB-NSRV>].

79. *Supra* note 69.

80. *Child Support Delinquency: How Financial Abuse Can Continue After the Relationship Ends*, BREAK THE SILENCE DV (October 5, 2021), <https://breakthesilencedv.org/child-support-delinquency-how-financial-abuse-can-continue-after-the-relationship-ends/> [<https://perma.cc/4FVP-2YBR>].

Courts may need to reconsider the relationship between having access to one's children and fulfilling financial obligations. A parent who is unable to pay support due to unavoidable financial hardship should not be deprived of access to their children, as both the children and the parent benefit from an uninterrupted relationship. But failure to meet financial commitments when a parent can do so is child neglect behavior at best. Often nonpayment is a way to continue the abuse of the mother with the consequences also falling on the children.⁸¹ Courts often fail to recognize the link between abuse of the mother and abuse of the children.⁸² Depriving the mother of sorely needed funds adds not only stress to the mother in her daily existence but abuses the children for whom the mother struggles to provide. "For many women this translates into working multiple jobs, going on welfare, and living on the edge of poverty;"⁸³ while this statement was written in 1990, it is just as true today. Financial starvation can coexist with the father giving lavish gifts to the children, thereby creating excitement in them to be with the father. Manipulation of the children in a way that diminishes the mother's parenting efforts, along with other tactics, can result in children having favorable attitudes towards the abusive father, which may influence a custody evaluator.⁸⁴ Counsel for the mother must inform—even educate—the court about the imbalance of power in the parental relationships. A father's manipulative behavior towards the children's mother, the children, or both is evidence of abusive behavior from which the children should be protected. This may be sufficient, when considered with prior abusive behavior, to establish supervised visitation rights for the abuser, granted when the safe relationship between the parent and children is a priority and if the abuser's gifts to the children can be restricted.

To ignore tactical financial deprivation of the family is to embrace harmful stereotypes. One being that women somehow should be able to provide for their children regardless of their need for outside financial support. This extends to women's need for state support. For black women, the stereotype of the "strong black women" is magnified, continuing a belief that women, particularly black women, inevitably find a way to overcome hardship.⁸⁵ That "neglect" of children is somehow unrelated to financial resources is another harmful myth. Should child protective services become involved, the stigma of a "bad" mother is

81. "People who use coercive control might use economic and financial abuse as part of their abusive behaviour." *Understanding Coercive Control and Economic and Financial Abuse*, AUSTL. GOV'T., ATT'Y GEN. DEP'T (Mar. 5, 2024), <https://www.ag.gov.au/families-and-marriage/publications/understanding-coercive-control-and-economic-and-financial-abuse> [<https://perma.cc/XT2T-2CCM>]; see also SARAH DAVIDGE & LIZZIE MAGNUSSON, *THE DOMESTIC ABUSE REPORT 2019: THE ECONOMICS OF ABUSE* 27 (2019) ("[c]hild maintenance was used as a means to continue control in some cases, with over half of respondents who had left saying their partner had withheld child support.").

82. See Dutton and Goodman, *supra* note 46, at 30.

83. Ellen R. Gutowski & Lisa A. Goodman, *Coercive Control in the Courtroom: Legal Abuse Scale (LAS)*, 38 J. FAM. VIOLENCE 527, 527 (2022).

84. . BANCROFT ET AL., *supra* note 67, at 49-51, 74, 76-77, 80, 92-93.

85. Haleigh Nickerson, *S.B.W. # 1*, 32 HASTINGS WOMEN'S L.J. 25 (2021).

enhanced when the children are neither properly fed nor clothed. Women who demand access to the financial resources to which they have a legal right are often labeled as “gold-diggers”⁸⁶ or otherwise are framed as “harassing” the partners who fail to support them.⁸⁷ When a lawyer makes baseless claims that promote gender bias against women, the abuser’s lawyer is not only presenting false information to the court but also colluding with the payor client to continue the abuse, which is directly contrary to the provisions of Rule 8.4(g). Clients who abuse their partners find affirmation of their abuse when lawyers use or permit the use of derogatory terms referencing the client’s former partner. The same result is accomplished when aggressive allegations are made that have no basis in fact or science. At some point, the attorney’s behavior qualifies as collusion with their client, the abuser, both criminally and civilly. This should serve as a cautionary note to family law attorneys who promote gender biases within the client-attorney relationships or in court proceedings.

In 2023, Rule 1.16 was amended to make the lawyer’s obligation to investigate the facts and circumstances of a case explicit.⁸⁸ The authors of the change felt that the lawyer’s obligations were implicit in the prior version of the Rule, but that practitioners would benefit from a rule that was more explicit and one that provided more guidance.⁸⁹ While the term collusion tends to elicit ideas of large financial schemes, the American Bar Association (ABA) has expanded its commentary to implicate a broad scope of crimes that fall under the Rule.⁹⁰ The ABA Ethics opinion 513 specifically addressed the larger scope of Rule 1.16 with explicit guidance;⁹¹ the authors

86. The term “gold-digger” is applied nearly exclusively to women, which one author defines as “women who are in, or seek, romantic relationships primarily for financial gain” See Jon Niccum, ‘*American Gold Digger*’ reveals untold history of stereotype’s influence on society, law, KU NEWS (Oct. 29, 2020), <https://news.ku.edu/news/article/2020/10/28/american-gold-digger-reveals-untold-history-stereotypes-impact-society-and-law> [<https://perma.cc/DU76-7USF>].

87. *Id.* (“What I show in the book is it’s a construct with consequences. The image of the gold digger and the language of gold-digging became part of the way people talk about marriage law. And, in the case of Anna Nicole Smith, inheritance law. It’s not a frivolous stereotype; it influences how judges, juries and politicians make sense of things like breach of promise law and alimony that have a real impact on people’s finances.”).

88. MODEL RULES R. 1.6.

89. See ABA Comm. on Ethics & Prof’l Resp., Formal Op. 513 (2024).

90. In 2014, the television program “60 Minutes” aired a segment where a fake client recorded preliminary interviews with lawyers who were consulted on how to bring laundered money into the United States. Shockingly, most lawyers entertained the discussion, with various degrees of interest. One of the lawyers interviewed was the then ABA president James R. Silkenat. While he was cautious during the interview, only one attorney definitively stated that he would not entertain the case. In a subsequent interview, CBS reporter Steven Kroft noted that “The Bar Association will need to step up and do something. . .” CBS Mornings, *Are U.S. lawyers helping launder money?*, YOUTUBE (Jan. 31, 2016), <https://www.youtube.com/watch?v=CbvN1BiWk1k> [<https://perma.cc/7XHH-QZ54>]. The entire segment may be watched here: Steve Croft, *Anonymous, Inc.*, CBS NEWS (Jan. 31, 2016), <https://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation/> [<https://perma.cc/5W9X-6YBU>].

91. Model Rule 1.16 addresses withdrawal from representation including (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: the client or prospective client seeks to use or persists in using the lawyer’s services to commit or further a crime or fraud, despite the lawyer’s discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct. Formal Op. 513, *supra* note 89.

wrote, “Although these amendments arose from concerns about lawyer facilitation of criminal transactions such as money laundering and terrorist financing, lawyers’ existing obligations apply more broadly and so, too, does the amended Rule.”⁹² A lawyer must withdraw from representation once the lawyer realizes that the lawyer may be drawn into promoting a crime or fraud.⁹³

B. WOMEN’S TESTIMONY IS NOT CREDITED

In 1999, Lynn Hecht Schafran wrote, “Most fundamental is that women’s credibility is often devalued on the basis of sex not on substance.”⁹⁴ A lot remains unchanged since those words were written, and today, some challenges to women’s credibility are even more patently unfounded. One only has to look as far as how women’s credibility is questioned before the courts. Women’s alleged lack of credibility stems from one of the oldest stereotypes about women: They lie. The failure to believe women and the characterization of women as “wicked” have origins in our earliest stories.⁹⁵ The use of these stereotypes allows men to escape accountability, shifting the blame on to the women. Lack of accountability for abusive behavior is a significant and tested theory as to why abusers continue their behaviors and create higher risk for the survivors.⁹⁶ This is the same no matter the gender or sex of the abusive partner.

1. LACK OF WOMEN’S CREDIBILITY WHEN DISCLOSING THEIR ABUSE BY AN INTIMATE PARTNER AND OTHERS

Lynn Hecht Schafran told a story of a male attorney who did not initially believe a prospective client’s narrative of sexual harassment at her place of employment.⁹⁷ I repeat part of this story, in shortened form, to emphasize the widespread cultural disbelief of women, with a focus on the legal field and its historic application in the profession.

A male attorney responded with a letter about a sexual harassment case he almost refused to take because on the telephone the victim sounded “hysterical.” When he finally met with her—at his female secretary’s urging—he thought her story of outrageous abuse from a distinguished⁹⁸ company division head seemed

92. *Id.* at 2.

93. MODEL RULES R. 1.2 cmt.10

94. Schafran, *supra* note 75, at 31.

95. Going back to the story of Eve, and other cultural stereotypes, women are untrustworthy if not demonized. Feminist research on violence against women has long highlighted the ways in which women have been responsibilised in both policy and practice for preventing male violence. Nicole Renehan, Charlotte Barlow & Sandra Walklate, *Self-blame and (becoming) the crazy ex: Domestic abuse, information sharing and responsibilisation*, CRIMINOLOGY & CRIM. JUST. 1, 2 (2023).

96. See ANDREW R. KLEIN & JESSICA L. KLEIN, ABETTING BATTERERS: WHAT POLICE, PROSECUTORS, AND COURTS AREN’T DOING TO PROTECT AMERICA’S WOMEN xi (2016).

97. Schafran, *supra* note 75, at 32.

98. Abusers frequently hide behind their professional or community status in questioning the victim’s credibility.

“crazy.” After the woman’s psychiatrist and psychologist told this lawyer that they believed her, he went forward with the case.⁹⁹

Most importantly for this discussion, the lawyer stated that “he was about to reject a meritorious case, because it seemed to be too awful to believe” and that he “was mistaking the client’s desperate cries for justice, with hysteria.”¹⁰⁰ Gender stereotyping nearly prevented the lawyer from understanding the significance of what he was hearing.

2. UNBELIEVABLE: THE CASE OF GISELE PELICOT

Research for this article coincided with the highly publicized trial in France of the men accused of sexually assaulting Gisèle Pelicot.¹⁰¹ The fifteen-week trial included the distressing testimony of Ms. Pelicot’s husband, who for years repeatedly drugged his wife and solicited men to rape her while she was unconscious.¹⁰² The details about the extent of the abuse are horrific; for instance, her husband drove her to doctor appointments to address the physical and emotional injuries she sustained during the druggings and sexual assaults.¹⁰³ When arrested, her husband admitted to the charges.¹⁰⁴

When considering this case, I could almost understand why some judges do not credit women’s claims; many cannot imagine that the horrible acts described by the women could happen and simply decide to dismiss them as lies rather than messy and uncomfortable facts of abuse allegations.¹⁰⁵ When Pelicot’s son-in-law was asked by defense counsel, “How could the family not have realised what was happening?” He responded stating, “You are forgetting one thing, you cannot imagine the unimaginable.”¹⁰⁶

I wondered how a U.S. family court would have received Ms. Pelicot if she had sought a protection order without any criminal charges pending and without such substantial evidence in play. Given the skepticism with which most survivors

99. Schafran, *supra* note 75, at 32.

100. Lynn H. Schafran, *Lawyers’ Lives, Clients’ Lives: Can Women Liberate the Profession*, 34 VILL. L. REV. 1105, 1116–1118 (1989). We have Sigmund Freud to thank for women unfairly marked as “hysterical”. Unable to withstand his peers’ criticism when Freud reported on the frequency of incest reports he observed in his female clientele, he changed his view and called the women as suffering from neurosis, commonly referred to as hysteria or other diagnoses.

101. For a summary see Laura Gozzi, *New name, no photos: Gisèle Pelicot removes all trace of her husband*, BBC NEWS, (Dec. 14, 2024), <https://www.bbc.com/news/articles/cvqx7xy77ydo> [<https://perma.cc/LD2A-N8MK>].

102. *Id.*

103. *Id.*

104. *Id.*

105. “Only unconscious denial can adequately explain the illogical and counterfactual court decisions sometimes issued even by respected judges.” Joan S. Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law*, 110 GEO. L.J. 836, 838 (2022); see also James H. Stark & Maxim Milyavsky, *Towards a Better Understanding of Lawyers’ Judgmental Biases in Client Representation: The Role of Need for Cognitive Closure*, 59 WASH. U. J.L. POL’Y 173 (2019).

106. Gozzi, *supra* note 101.

are met, particularly with the passage of time between events and reporting, my fear is that many judges would have considered Ms. Pelicot's revelations too fantastic to credit. What if Ms. Pelicot had not been drugged prior to the rapes and sought protection with only her testimony to support her allegations? Would Ms. Pelicot have been denied protection because the judge could not accept that the unimaginable happens? Many judges cannot acknowledge how rampant intimate partner violence is, particularly sexual violence.¹⁰⁷

Two factors gave Ms. Pelicot credibility at trial. Firstly, while Ms. Pelicot had growing suspicions that she was being drugged, it was police detectives who uncovered her husband's facilitated rapes after Mr. Pelicot was arrested on an unrelated charge.¹⁰⁸ The police seized Mr. Pelicot's electronic devices and discovered that Mr. Pelicot had filmed the rapes, which provided supporting evidence.¹⁰⁹ Secondly, it was the police who sought charges against Mr. Pelicot and others.¹¹⁰ The work of these men instantly brought credibility to the allegations, given the automatic respect they receive in such a male-dominated institution. Actors within the criminal legal system were accepted as credible sources.¹¹¹

While it would be helpful to understand why some judges dismiss survivors' testimony and disbelieve targets of abuse. Judges have the same resources available to them as practitioners do. Statistically, at least one in four family law cases involves abuse.¹¹² Because most civil cases settle¹¹³, family court judges may perceive their caseload as an inordinate number of partners alleging abusive behavior.¹¹⁴ Rather than negatively interpreting women's narratives as false, legal actors need to ask themselves why so many women are targets of abuse.

Deborah Epstein and Lisa Goodman studied what is called the "credibility discount" experienced by survivors who report abuse to the courts.¹¹⁵ They wrote

107. *Id.*; Meier, *supra* note 105, at 838. See also Stark & Milyavsky, *supra* note 105.

108. French woman Gisele Pelicot says police uncovering alleged mass rape organized by husband "saved her life", CBS NEWS (Sept. 5, 2024), <https://www.cbsnews.com/news/france-rape-case-gisele-pelicot-husband-dominique-trial-drugging-mass-rape/> [<https://perma.cc/Y9UF-37PA>].

109. *Id.* Notably the films disproved expected defenses that Ms. Pelicot had consented or that the men did not realize she was unconscious.

110. *Id.*

111. Without the documentary evidence one wonders whether the French police would have believed the extent of Ms. Pelicot's abuse.

112. Martin R. Huecker et al., *Domestic Violence*, NAT'L. LIB. OF MED. (Apr. 9, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK499891/#:~:text=According%20to%20the%20CDC%2C%201%20in%204,in%20over%2010%20million%20people%20each%20year> [<https://perma.cc/W8JB-33TV>].

113. The frequency of settlement in divorce cases has long been recognized. See Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994).

114. In the lingo of family courts, these cases may be referred to as "high conflict". See Clare Dalton, Judge Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. AND FAM. CT. J. 11 (2009).

115. Epstein & Goodman, *supra* note 68, at 399. For a discussion of credibility when race and criminal history are added, see Elizabeth Langston Isaacs, *The Mythology of the Three Liars and the Criminalization of Survival*, 42 YALE L. POL. REV. 2 (2024).

that “[G]atekeepers unjustly discount women’s personal trustworthiness, based on both inaccurate interpretations of survivors’ courtroom demeanor and negative cultural stereotypes about women and their motivations for seeking assistance.”¹¹⁶ While the era since Lynn Heckt Schafran addressed women’s credibility in her 1990 study may have changed, the credibility discount remains.

IV. THE ROLE OF CROSS-EXAMINATION AND THE PERPETUATION OF WOMEN’S STEREOTYPES

By their very nature, many defense tactics advance stereotypes of women. Cross examination is used to create presumptions against survivor’s credibility. Indeed, many of the questions asked have no basis in fact and are not scientifically supported and run afoul of Rule 3.3. Comment 3 of Rule 3.3 states,

[A]n assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.¹¹⁷

In many instances, if counsel simply conducted a reasonably diligent search on the relevancy of questions asked, questions based on myth would be eliminated.

A. MEDICAL TREATMENT

Questions invoking incredulity are asked of women who reveal abuse in civil law courtrooms, as well as criminal ones. Many of those questions are based on myths and are inappropriate under the cited professional rules.¹¹⁸ The questions reveal a lack of diligence and competence in the attorney asking them, along with the promotion of bias against women who have been abused. They also raise issues of candor to the tribunal.

Specifically, when a member of the Bar uses the stereotypes that women are manipulative and vindictive liars, mentally ill, or some other trope, that lawyer is presenting empirically false information to the court and relying upon stereotypes that are intended to promote bias against women. Invoking these stereotypes is in violation of Rule 8.4 (g).¹¹⁹

For example, survivors are often asked whether they sought medical care. The vast majority of survivors who are physically abused either do not require or do not seek medical care, with only twenty percent of women seeking medical care

116. Epstein & Goodman, *supra* note 68, at 400.

117. MODEL RULES R. 3.3 cmt. 3.

118. In criminal trials the same questions build on cultural presumptions on how targets of abuse “should” respond in the hopes that the questioning will persuade a jury.

119. The rule has been criticized as overbroad and limiting lawyers’ free speech rights. Many states have taken measures to narrow the scope of the rule so that lawyer first amendment rights are protected. But all have included the practice of law as subject to Professional Rules of Conduct addressing bias provisions.

for their injuries.¹²⁰ There are many reasons for not seeking care, such as not having health insurance or a misconception that the injury is not severe enough. Such a downplaying of one's injuries could be understood; Why would someone receive medical treatment for bruises on an arm squeezed too tightly? Most bruises heal, particularly in places where no vital organs are located. Bruising and pain following a kick to the shin is not an injury for which most people seek medical care. Just because the injury was from an abusive incident, rather than say a soccer injury, it does not change the usually low-level medical consequences of the injury. Yet, in reality, even more severe injuries often go untreated. For states that require medical personnel to report adult abuse, survivors may shy away from seeking medical assistance. The survivor may do this for many reasons. One of the more common ones is that reporting an injury as intimate partner abuse could further endanger the injured partner.¹²¹ Also, it is not uncommon for the abusive partner to prevent the survivor from seeking medical care.

The question of whether the survivor sought medical treatment for their injuries presumes that seeking medical treatment is the norm; this is misleading and can create unwarranted doubt in the jurist's mind.¹²² Creating a false impression with the court, while knowing the statistical likelihood that not seeking medical treatment is the norm, the practitioner is not being candid with the court under Rule 3.3 (a)(1) and can create a credibility bias against the survivor under Rule 8.4(g). Under any circumstance, a failure to seek medical treatment should not be a measure of credibility.

Criminal defense counsel faces a dilemma in these circumstances. For example, raising whether a survivor received medical treatment can be an expected and successful defense of the client. The tension between zealous advocacy and ethical responsibility may demand defense counsel to raise the question as part of zealous advocacy in the criminal arena. This may be a situation where malpractice and ethical violations conflict. In any event the primary burden of contesting this and other questions lies with the prosecutor in criminal cases and with counsel for the survivor in civil cases.

B. SURVIVOR REPORTING

Similarly, survivors are frequently probed during cross-examination about whether they reported the incidents of domestic abuse to the police. Again, this question presumes some level of validity if survivors report incidents to the

120. *Domestic Violence/Intimate Partner Violence Facts*, EMORY UNIV. SCH. OF MED., https://med.emory.edu/departments/psychiatry/nia/resources/domestic_violence.html [<https://perma.cc/BS8V-FWU2>] (last visited Jan. 2, 2025).

121. See *Five Considerations for the Intersection of Health Care and Domestic Violence*, ABA COMM. ON DOMESTIC AND SEXUAL VIOLENCE, https://www.americanbar.org/groups/domestic_violence/Initiatives/five-for-five/health-care/ [<https://perma.cc/PY9R-LKRT>] (last visited Jan. 2, 2025).

122. While counsel for the survivor must object to this question and others that feed on misinformation, I argue that asking the question can be a violation of competency rules as well as candor with the court and as promoting bias.

police. At some point during abusive relationships, many survivors do call the police.¹²³ Sometimes the reporting actions occur when the survivor realizes that they could be killed or seriously injured the next time their abuser strikes. Yet, many abusive incidents, including murder, occur with no history of prior police involvement.¹²⁴ The question of whether the abuse was reported avoids the complexity of what happens when a survivor calls the police. Many women who called the police as a result of a prior incident are reluctant to do so again.¹²⁵ Survivors will sometimes reach out to the police when they are unaware of other resources to call. Whether a survivor called the police has little probative value if the attorney hopes to use the answer as a measure of credibility.

“I do think that many people measure a survivor’s credibility by whether or not she called the police,” says Julie Goldscheid, professor of law at CUNY Law School in New York. But, she says, it’s important “not to use whether someone called the police as a proxy for whether or not they’re abused.”¹²⁶

A report by the National Domestic Violence Hotline discussed the results of a survey of approximately 1500 callers.¹²⁷ The 2021 survey queried callers on whether they had called the police.¹²⁸ Nearly eighty-two percent of responders reported having called the police, with twelve percent reporting they had not.¹²⁹ Thirty-eight percent of those who called the police felt less safe after calling. More than seventy-five percent of those who called the police expressed fear of doing so again.¹³⁰ The reasons for the fear varied,¹³¹ but the survey illustrates that

123. “More than half of all domestic-violence victimizations – 56 percent – were reported to police, with reporting rates similar for intimate-partner violence and violence committed by other relatives.” Crime and Justice News, *Report: Nearly Half of Domestic Violence Goes Unreported*, THE CRIME REPORT (May 3, 2017), <https://thecrimereport.org/2017/05/03/report-nearly-half-of-domestic-violence-goes-unreported/> [https://perma.cc/78GT-6DAM].

124. Jaquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH (2003).

125. LEIGH GOODMARK, LAW ENFORCEMENT EXPERIENCE REPORT: DOMESTIC VIOLENCE SURVIVORS’ SURVEY REGARDING INTERACTION WITH LAW ENFORCEMENT 3 (2022). This can be particularly acute when the domestic partner is a police officer. Alexandra Heal, *Nowhere to Turn: Women say Domestic Abuse by Police Officers Goes Unpunished*, THE BUREAU OF INVESTIGATIVE JOURNALISM (May 1, 2019), <https://www.thebureauinvestigates.com/stories/2019-05-01/police-perpetrators-domestic-violence> [https://perma.cc/YFF8-MBBE]. See Leigh Goodmark, *Hands Up At Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 BYU L. REV. 1183 (2016).

126. Natalie Schreyer, *Too terrified to speak up: Domestic abuse victims afraid to call police*, USA TODAY (Apr. 9, 2018), <https://www.usatoday.com/story/news/nation/2018/04/09/too-terrified-speak-up-domestic-abuse-victims-afraid-call-police/479855002/> [https://perma.cc/TW2P-A8E5].

127. GOODMARK, *supra* note 125, at 3.

128. *Id.* The question does not give a time range. I interpret the question as ever having called the police at any time during the abusive relationship.

129. *Id.* This high rate at which survivors called the police may have some empirical concerns. Those queried had voluntarily contacted the Hotline, indicating that the callers were already searching for assistance; and the participants were not selected randomly. Nonetheless, the follow-up data does not present the same concerns. Indeed, the data on whether a caller would contact the police again is reliable. These are survivors who had reached out for help and yet were significantly disinclined to do so again.

130. GOODMARK, *supra* note 125, at 9.

131. *Id.*

when a survivor does not call the police, there is no evidence to suggest that not calling was because the abuse was tolerable or never happened.

Counsel for the survivor must be ready to object to the question regarding police reporting. Counsel for the abuser likely will not be able to produce data connecting seriousness of the offense to calling the police. The question lacks probative value. When counsel for the survivor is unprepared to object to the question of whether a survivor should have called the police, both the competency and diligence requirements of the Model Code are implicated.¹³²

C. MISINTERPRETING FEAR AND COUNTERINTUITIVE BEHAVIOR

Counsel for the abusive party will often use voluntary contact by the survivor with the abusive party as proof that the survivor lacks the fear required to obtain a civil protection order. For example, in a recent case, counsel for the accused argued that the survivor was not in fear because she contacted the party against whom a protection order had issued.¹³³ The flaw in the argument was that the survivor felt safer in contacting the abusive husband *because* a protective order was in place. The judge focused on the survivor's actions rather than on the actions of the accused, even though there had been several violations of the order by the husband. The judge agreed with the husband's counsel and modified the protection.¹³⁴

Fear may or may not be constant. Fear responses are individualized, with "freezing," "fleeing," or "fighting" being some of the very different responses to the same event.¹³⁵ Choosing one or the other does not invalidate a threat. The woman who fights back when harmed by an abusive partner is no less a survivor than the woman who does not.¹³⁶ It is also important to consider the external factors that may promote a survivor to preference one response over another. Mothers are in a particularly precarious position. As in the cited case, the mother was attempting to make the home life for the children run as smoothly as possible, especially for those with already strained environments. She may have limited resources to do so without assistance. Mothers often are court ordered to have some contact with their abusers, such as at visitation exchanges, despite the existence of a protection order. This contact does not reduce fear and may increase fear. When someone does what is necessary to survive, it is not suggestive

132. See MODEL RULES R. 1.1, 1.3.

133. Ignored in this argument was the fact that the Husband (a skilled worker) had canceled the Wife's credit cards after the protection order entered. The kitchen stove was not working properly. Also left unstated was that the Wife and children left the home during the time that the Husband completed repairs. Identifying details have been removed for privacy reasons.

134. Details of the hearing are on file with the author and withheld here for client privacy reasons.

135. See generally *Flight/Fight/Freeze Response*, UNIV. OF TOLEDO COUNSELING CTR., <https://www.utoledo.edu/studentaffairs/counseling/anxietytoolbox/fightflightfreeze.html> [https://perma.cc/23PF-HCEM] (last visited Mar. 28, 2025).

136. Leigh Goodmark, *When is a Battered Woman not a Battered Woman*, 20 YALE J.L. & FEMINISM 75, 85 (2008).

of a lack of fear but rather reflects courage.¹³⁷ Courage, as opposed to fearlessness, has been defined as “[a] behavioral approach despite the experience of fear.”¹³⁸ Courage has also been defined as “persistence in the presence of perceived threat.”¹³⁹ When put into a male context, the existence of fear is unquestioned. Following Judith Herman’s powerful book *Trauma and Recovery*, which analogized abused women’s experiences with returning war veterans,¹⁴⁰ I offer the following example: A male soldier in combat can have extreme fear that can be relieved when returning to base. But his fear does not dissipate entirely. A lesser level of fear may be present even when back on base; fear may remain as the soldier anticipates the next attack or off-base assignment.

An additional response has been added to the trio of freeze, flight, and fight—fawn, which has sometimes been used to describe survivor behavior. For these purposes, fawning is defined as “the submissive response which serves to avoid conflict.”¹⁴¹ Many survivors of abuse employ this behavior, particularly when they sense heightened danger. The behavior aligns with the common understanding that survivor behavior is often counterintuitive.¹⁴² One seasoned expert and former prosecutor has defined counterintuitive behavior as follows:

The term “counterintuitive” describes the public’s perception of victim behavior as not comporting with its expectations of a “real” victim’s behavior. Counterintuitive victim behavior refers to: Actions or statements made by victims in the aftermath of an assault which appear to other people as illogical or poor decisions by the victim. Behaviors that are not what the average person would “expect” from a victim.¹⁴³

Importantly, the author goes on to say:

The term “counterintuitive behavior” is not a psychological term, nor does it define a victim’s behavior. Rather, it defines the public’s perception of the

137. Peter J. Norton & Brandon Weiss, *The Role of Courage on Behavioral Approach in a Fear-Eliciting Situation: A Proof-of-Concept Pilot Study*, 23 J. ANXIETY DISORDERS 212, 212 (2009) (Citing D. Cox et al., *An experimental analysis of fearlessness and courage*, 74 BRIT. J. PSYCH. 107 (1983); T.M. McMillan & S.J. Rachman, *Fearlessness and courage: A laboratory study of paratrooper veterans of the Falklands War*, 78 BRIT. J. PSYCH. 375 (1987); T.M. McMillan & S.J. Rachman, *Fearlessness and courage in paratroopers undergoing training*, 9 PERSONALITY & INDIVIDUAL DIFFERENCES 373 (1988); K. O’Connor, R.S. Hallam & S. Rachman, *Fearlessness and courage: A replication experiment*, 76 BRIT. J. PSYCH. 187 (1985)).

138. *Id.*

139. *Id.*

140. JUDITH L. HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* (2015).

141. Zukiswa Zingela et al., *The psychological and subjective experience of catatonia: a qualitative study*, 10 BMC PSYCH. 173, 175 (2022).

142. “These myths create a conflict between how many people assume victims *should* behave and the way in which victims *actually* behave; this in turn impacts how our justice system responds to survivors.” *Explaining Victims’ “Counter Intuitive” Behavior*, NAT’L CRIME VICTIMS L. INST., <https://law.lclark.edu/live/news/26284-explaining-victims-counter-intuitive-behavior> [<https://perma.cc/55Z2-P6J3>] (last visited Jan. 23, 2024).

143. Jennifer Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, NAT’L DIST. ATT’YS ASS’N, AM. PROSECUTORS RSCH. INST. 11 (2007).

victim's behavior and the failure of the public's expectations to match actual victim behavior. As a result, it is useful in arguing the necessity and relevance of expert testimony that addresses sexual and domestic violence victim behavior.¹⁴⁴

As one journalist who spent a year learning about domestic violence stated: "[A]ttempts to look at it [domestic violence] through the lens of common sense can actually drive you further from the truth."¹⁴⁵ All of which leads us to our obligation to understand trauma responses and practice trauma-informed lawyering.

D. TEMPORAL DISSONANCE

1. DELAYED REPORTING WRONGLY INTERPRETED AS LACK OF CREDIBILITY

Claims of their failure to "timely" disclose abuse is a weapon used against survivors of both sexual and domestic abuse. Where this false criterion developed is unclear, but this assertion that timely reporting is related to credibility somehow have been persuasive in the courts.¹⁴⁶ There is no scientific basis for asserting that credible survivors of gender violence report traumatic events, particularly sexual assault, soon after the abuse occurs.¹⁴⁷ "Survivors who experience assaults that conform to 'classic rape' scenarios (e.g., involving strangers, weapons, and severe injuries) are more likely to disclose" and less likely to delay disclosure than survivors whose assaults do not meet these assumptions.¹⁴⁸ These results suggest that stereotypical assumptions about what constitutes sexual assault may affect the likelihood and timing of disclosure. There is no one pattern that survivors of traumatic occurrences implement in disclosing the distressing event.¹⁴⁹

The same analysis applies to other acts of abuse. Betrayal trauma theory applies to acts of intimate partner abuse. Like any trauma those who experience one can have widely varying reactions. When a victim is abused by someone known to them, and particularly those trusted by them, a unique type of trauma can result. In a study done by Brigid Marriott on physiological trauma, she found that "Betrayal traumas are a class of events wherein people that are depended on for survival injure or violate that person."¹⁵⁰ When and if a person chooses to disclose trauma varies, as

144. *Id.* (emphasis removed from "not.")

145. Jess Hill, *What I've learned about domestic violence in my year reporting on it*, THE GUARDIAN, (Sept. 11, 2015), <https://www.theguardian.com/commentisfree/2015/sep/11/most-people-dont-get-domestic-violence-because-it-doesnt-make-sense> [<https://perma.cc/KP4R-7X9N>].

146. Feminist theory would posit that the myth of timely disclosure relating to credibility as stemming from largely masculine symptoms whose artificial standard can be attributed to misogyny. The belief of early reporting as credible was developed at a time when court systems had few women actors and sexual assault victims who came forward were primarily women.

147. See Courtney E. Ahrens, Jana Stansell & Amy Jennings, *To Tell or Not to Tell: The Impact of Disclosure on Sexual Assault Survivors' Recovery*, 25 VIOLENCE AND VICTIMS 631, 631 (2010) (discussing how sexual assault is a common tactic used by intimate partner abusers).

148. *Id.* at 632.

149. *Id.* at 637. The authors discuss "slow" disclosers averaging a first-time disclosure delay was 3.58 years.

150. Brigid R. Marriott, Robyn L. Gobin & Cara C. Lewis, *Disclosing Traumatic Experiences: Correlates, Context, and Consequences*, PSYCH. TRAUMA: THEORY, RSCH., PRAC., AND POL'Y 141, (2015).

well. “Despite the observed benefits of disclosure, [Marriott’s] study reaffirms that delayed disclosure and nondisclosure endure . . . The majority (56.5%) of the sample delayed disclosure.”¹⁵¹ When one is traumatized by an abuser they relied upon, the trauma can result in serious mental health consequences. “HB [high betrayal] traumas are associated with more depression, anxiety, physical illness, and dissociative tendencies. This finding has important implications for understanding posttraumatic outcomes and treatment for trauma survivors.”¹⁵² The resulting trauma symptoms create a particular fragility in the survivor of which counsel must be aware and able to adapt techniques for communication and strategy.

2. WOMEN DISCLOSING ABUSE AT THE TIME OF SEPARATION ARE CONSIDERED NOT CREDIBLE AND MANIPULATIVE

*and when we speak we are afraid/our words will not be heard/nor welcomed/
but when we are silent/we are still afraid/So it is better to speak/remem-
bering/we were never meant to survive*¹⁵³

—Audre Lorde

The timing of women’s disclosures of abuse during family court proceedings should not be surprising given the science supporting delayed disclosures. Nor should they be presumed untrue or ill-motivated. Historically, abused women do not readily disclose their abuse.¹⁵⁴ Shame and fear are two strong motivators not to disclose. Still residing with an abusive partner leaves targets with little opportunity to safely report danger, particularly if no safety plan or exit strategy is in place. Separation carries an increased risk, as it may signal imminent disclosure of the abuse as well as loss of control over the target.

Given the increased danger of separation for the survivor,¹⁵⁵ it may only be then that a survivor seeks protection from a court. More importantly, if the abusive parent is demanding access to the children, a mother may be urgently motivated to disclose previously undisclosed abuse to prevent the abuser’s access to

151. *Id.* at 145.

152. *Id.* at 146.

153. AUDRE LORDE, *THE BLACK UNICORN: POEMS* 31 (1st ed. 1978).

154. “One of the barriers that the victims often mentioned was a fear of the consequences that disclosing domestic abuse could have.” Rebecca L. Heron & Maarten C. Eisma, *Barriers and facilitators of disclosing domestic violence to the healthcare system: a systematic review of qualitative research*, 29 *HEALTH AND SOC. CARE IN THE CMTY.* 612, 623 (2020).

155. Joanne Hulley et al., *Continuous Traumatic Stress: Examining the Experiences and Support Needs of Women After Separation From an Abusive Partner*, 38 *J. OF INTERPERSONAL VIOLENCE* 6275, 6277 (2022) (“[I]n Women remain at high risk of lethal and nonlethal violence from abusive ex-partners. . . . In one UK study 90% of women reported experiencing post-separation abuse, and in a study based in Wales, looking at experiences of help-seeking at the juncture of leaving an abusive relationship, 10 out of 12 women reported experiencing post-separation abuse. Furthermore, 18% of UK femicide cases included in the 2020 Femicide Report, that were by an intimate partner, occurred post-separation.”).

the children to prevent the children from situations in which the mother is not available to protect them.

When women disclose abuse to the court, they expect to be heard and assume that the court will want to protect them and—more importantly, to many—their children. To their shock, many women are met with resistance and suspicion.¹⁵⁶ Particularly when the abuse of children is raised, a presumption of ill-intent can be created. What many fail to understand is that timing is important; it can be unsafe for a woman to disclose abuse unless she is separating or separated from the abusive partner. Even though separation is an incredibly dangerous period, for many it also may present the first opportunity for them to seek assistance, and it is the time when survivors and their children are in the most need of protection.

A random internet search for “child abuse disclosures in divorce” leads one to advertisements by counsel who promise to deal with “false allegations” of abuse. One website reads that “False allegations of abuse are serious and difficult to handle. Often, individuals take domestic and sexual abuse laws, which are meant to be shields and use them as weapons.”¹⁵⁷ Another states, “False accusations in a child custody case can take many forms, including unfounded claims of child abuse or domestic violence, or lies intended to gain an advantage in the custody process.”¹⁵⁸ When counsel does their due diligence on the allegation that abuse claims are brought for a custody advantage, they will discover that when a mother raises abuse during a custody dispute, she lowers her chances of obtaining custody of the children.¹⁵⁹ If the mother alleges child abuse that includes sexual abuse, her odds of being awarded custody of the children further decline.¹⁶⁰ Add cross-claims of parental alienation and the chances of mothers losing custody further increase significantly.¹⁶¹ The promotion of stereotypes attached to women creates barriers for abused women and children seeking relief from abuse.

156. April M. Zeoli et al., *Post-Separation Abuse of Women and their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers*, 28 J. FAM. VIOLENCE 547, 548 (2013) (“When women make allegations of IPV or express concerns that fathers will harm children, the court often views them as obstructing the court process and the father’s right to have a relationship with their children. There is a tendency for courts to minimize the impact of IPV on women and children and to view the perpetration of abuse toward a partner as irrelevant to parenting.”).

157. *False Allegations of Abuse*, MILLER L. GRP., <https://www.apmillerlawgroup.com/divorce-resources/divorce-dangers/false-allegations-of-abuse/> [<https://perma.cc/59TS-TU4E>] (last visited Jan. 4, 2025).

158. *How to Handle False Accusations in Custody Battles*, SMEDLEY L. GRP., <https://www.smedleylawgroup.com/blog/how-to-handle-false-accusations-in-custody-battles/> [<https://perma.cc/C5R7-8ER6>] (last visited Jan. 4, 2025).

159. Joan S. Meier et al., *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, 42 J. OF SOC. WELFARE AND FAM. L., 92, 92,96, 97 (2020) (“It is likely, therefore, that many of these mothers were penalized with loss of custody at least in part because they reported the father to have abused themselves or their children, and the court did not believe them. . . women who allege abuse – particularly child abuse – by a father are at significant risk (over 1 in 4) of losing custody to the alleged abuser.”).

160. *Id.* at 92.

161. *Id.* at 98. “When fathers cross-claim alienation, courts are more than twice as likely to disbelieve mothers’ claims of any type of abuse than if fathers made no alienation claim; and [w]hen fathers cross-claim alienation, courts are almost 4 (3.9) times more likely to disbelieve mothers’ claims of child abuse than if fathers made no alienation claim.” *Id.* at 96.

According to Joan Meier, the Director of the National Family Violence Law Center at George Washington University, data suggests that it is imperative for the trial judge to “have a clear definition of what constitutes domestic violence and understand how domestic violence effects all family members and why this information is highly relevant to what is best for children.”¹⁶² Additionally, her study suggested that “unfettered discretion permits judges to incorporate their own personal history, experience and bias in adding content to the ‘best interest’ principles.”¹⁶³ In making decisions on custody, the family law trial court is hampered in several ways. First, there is a presumption that the courts understand the ramifications of domestic abuse on children. Most family law judges do not have sufficient—and in some cases any—training on the dynamics of intimate partner abuse. Second, claims of “parental alienation” simply reinforce stereotypes of women as vindictive liars.¹⁶⁴ “Parental alienation” is a term frequently asserted by lawyers in contested custody cases. Parental alienation is a belief system that a child’s refusal or reluctance to see a parent is the fault of an “alienating” parent, parental alienation is particularly concerning when raised in cases of domestic abuse where a parent’s actions to protect a child from the abusive parent may be characterized as “alienating” behavior.¹⁶⁵ Typically, the parent accused of alienating behavior is the mother.¹⁶⁶ Given the skeptical treatment that claims of abuse are often given, the presumption that women lie and are vindictive is well-fortified within the patriarchal family court.

162. Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence against Women*, 17 WIDENER U. J. GENDER, SOC, POL’Y & L. 163, 167 (2009).

163. Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 351 (1993).

164. See Jennifer Hault, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 CHILD. LEGAL RTS. J. 1, 40 n.97 (2006).

165. See CHALLENGING PARENTAL ALIENATION NEW DIRECTIONS FOR PROFESSIONALS AND PARENTS (Jean Mercer and Margaret Drew eds., 2022).

166. “Parental alienation accusations disproportionately target mothers, reflecting deeply ingrained societal biases about women, motherhood, and caregiving roles.” *Weaponized Silence: How Parental Alienation Accusations Punish Survivors and Endanger Children*. BATTERED WOMEN SUPPORT SERVS. (Jan. 31, 2025), <https://www.bwss.org/weaponized-silence/> [<https://perma.cc/Y6UB-LARC>].

In all cases we uncovered the father was the abusive parent and the mother sought to protect their child. Results revealed that initially courts were highly suspicious of mothers’ motives for being concerned with abuse. These mothers were often treated poorly and two-thirds of the mothers were pathologized by the court for advocating for the safety of their children. . . Judges who initially ordered children into custody or visitation with abusive parents relied mainly on reports by custody evaluators and guardians ad litem who mistakenly accused mothers of attempting to alienate their children from the father or having coached the child to falsely report abuse.

Johanna Silberg & Stephanie Dallam, *Abusers gaining custody in family courts: A case series of over turned decisions*, 16 J. CHILD CUSTODY 140, 140 (2019).

V. UNDERSTANDING TRAUMA

Sexual and domestic violence victims behave in individual, multi-faceted, and complex ways. Their behaviors, therefore, cannot be reduced to simple terms.

—Jennifer Long¹⁶⁷

Even in the best of times, separation and divorce can be jolting and traumatic experiences. Under certain circumstances, such as abuse, the psychological impact can be serious. Some survivors may come to court already suffering mental health consequences from the abuse. Anxiety, depression, and post-traumatic stress disorder (PTSD) may be experienced by some survivors. If family law attorneys do not understand these conditions, clients will be poorly represented.

A. THE NATURE OF TRAUMA

Only in recent legal history has trauma and trauma-related behavior entered the general legal lexicon. The significance of understanding trauma is well known to lawyers who work with personal injury clients. Trauma can be significant in other practice fields as well.¹⁶⁸ Workers' compensation, employment, family law, and veterans' law are just a few.¹⁶⁹ Family and partner separation can be traumatic, even for the most amicable of couples. When abuse or allegations of abuse are asserted, the stressors mount. As part of competence requirements under Rule 1.1, lawyers representing either party in a case involving allegations of abuse must be trauma informed.

One definition of trauma is offered by the American Psychological Association: "Trauma is an emotional response to a terrible event like an accident, crime, natural disaster, physical or emotional abuse, neglect, experiencing or witnessing violence, death of a loved one, war, and more."¹⁷⁰ Trauma can have behavioral consequences. Perhaps the most well-known behavioral consequence is PTSD, which some women display behaviors consistent with following abuse. According to the National Institute of Health, experiencing abuse can cause PTSD, and women are more likely to develop PTSD than are men.¹⁷¹

167. Long, *supra* note 143, at 11.

168. "In fact, trauma-informed practice can have relevance to all areas of practice, as clients may present with a trauma history whether central to the subject of the representation or not." Sarah Katz & Deeya Halder, *The Pedagogy of Trauma-Informed Lawyering*, 29 CLINICAL L. REV. 359, 371 (2016).

169. For example: "PTSD is slightly more common among Veterans than civilians. At some point in their life, 7 out of every 100 Veterans (or 7%) will have PTSD." *PTSD: National Center for PTSD: How Common is PTSD in Veterans?*, DEP'T OF VETERANS AFFS., https://www.ptsd.va.gov/understand/common/common_veterans.asp [<https://perma.cc/44K6-6X5Y>] (last visited April 1, 2025).

170. *Trauma*, AM. PSYCH. ASS'N, <https://www.apa.org/topics/trauma> [<https://perma.cc/L3DD-FUHD>] (last visited Apr. 2, 2025).

171. See *Post-Traumatic Stress Disorder*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd> [<https://perma.cc/9XBT-Y4AM>] (last visited Apr. 2, 2025) ("Anyone can develop PTSD at any age. This includes combat veterans and people who have experienced or witnessed a physical or sexual assault, abuse, an accident, a disaster, a terror attack, or other

Some of the symptoms of PTSD can be misinterpreted because they can be perceived as “annoying” to the viewer or the listener. For instance, abuse survivors may appear disorganized in court presentations, where they may not remember all details of events at one hearing but include additional details they just recalled at another hearing. Flashbacks and intrusive thoughts are common. Inability to sleep well can exasperate the symptoms.¹⁷² Women are more likely than men to be “easily startled, feel numb or otherwise have difficulty feeling emotions, avoid things that remind them of the trauma.”¹⁷³ Seeing the abuser can be fear-inducing and otherwise retraumatizing. While counsel for the abuser often refers to the behavior as “crazy,” the symptoms can be evidence of abuse.

Drawing upon personal experience, I once represented a severely abused client. In that case, there was a civil protection order hearing when both parties were present, which resulted in my client shaking so much that she could not speak. The partner denied the abuse. The judge, who was well trained in intimate partner violence, noted the client’s shaking and, together with a previously filed sworn affidavit detailing the abuse, found that the client was afraid of the defendant and entered a protective order. Often, most untrained judges simply take notice of a woman’s unusual or erratic behavior, which may include an aggressive and angry demeanor, and find her not credible as a result. Importantly, not every survivor will have mental health consequences from the abuse, but most will have some level of fear.

B. TRAUMA-INFORMED LAWYERING

Clients in intimate partner abuse cases often come to the attorney in a traumatized state. This can apply to both parties. While much has been written about trauma informed lawyering, practitioners may need some guidance in defining the practice; “Simply put, the hallmarks of trauma-informed practice are when the practitioner puts the realities of the clients’ trauma experiences at the forefront in engaging with clients and adjusts the practice approach informed by the individual client’s trauma experience.”¹⁷⁴

Trauma-informed lawyering incorporates understanding a client’s trauma and the needs that trauma creates, with one’s legal strategy on how best to proceed with a case. “One of the most harmful things that can happen to someone who has been traumatized are experiences of disempowerment.”¹⁷⁵ An empowered client

serious events. People who have PTSD may feel stressed or frightened, even when they are no longer in danger.”)

172. *Post-Traumatic Stress Disorder*, U.S. DEP’T OF HEALTH AND HUMAN SERVS., OFF. ON WOMEN’S HEALTH, <https://womenshealth.gov/mental-health/mental-health-conditions/post-traumatic-stress-disorder> [<https://perma.cc/335F-CJMC>] (last visited Apr. 2, 2025).

173. *Id.*

174. Katz & Haldar, *supra* note 168, at 361.

175. Claudia Peña, *Trauma Abounds: A Case for Trauma-Informed Lawyering*, 26 UCLA WOMEN’S L.J. 7, 9 (2019).

is more dependable, more open, and more cooperative.¹⁷⁶ When a client has been controlled in an intimate relationship, the lawyer who insists on making all decisions is unlikely to gain trust in the lawyer-client relationship.¹⁷⁷ Just because a client may be dealing with mental health concerns does not diminish her credibility or suggest incompetence. Each step of the dissolution or other process will demand partnership with the survivor in a different way than the approach taken in non-abuse cases. Safety must be a component of case planning at each step of the process. Additionally, a traumatized client may need support referrals if the client is open to seeking assistance.¹⁷⁸ Assessing the ability to represent a client with zeal is at the core of any attorney-client relationship.¹⁷⁹ The lawyer representing a client suffering with PTSD will need to explore ways in which the client's seemingly odd behavior is best explained to the court.¹⁸⁰

A serious burden is on counsel for the abusive party. One goal of reputable family law attorneys is to find a way to reduce tensions between the parties. The hoped-for outcome is to reach a settlement between the parties and avoid a trial. Even if a matter is heading to trial, moderating tension between the clients and the lawyers is important. In criminal matters the goals are different: The state has the burden of proof, and the standard of proof is beyond a reasonable doubt.¹⁸¹ Defense Counsel may find the use of more aggressive tactics effective in this arena where the goals of trial are to create reasonable doubt and hold the government to its high burden.

Criminal counsel who also practice in family court often cannot or choose not to successfully transition between family law and criminal context and goals; whereas, family law is regularly focused on the best interests of the children and their safety, while criminal law is hyper-focused on a dismissal or a not-guilty verdict. When criminal strategies are used in family court, the harshness of interrogations and other aggressive tactics can further traumatize a witness. Disrespectful tone, harsh characterizations, inappropriate questioning of a witness' credibility, and other tactics employed in criminal courtrooms can do harm to abuse survivors, all of

176. *Id.*

177. Each step of the litigation requires survivor-based decisions. For example, the lawyer for the survivor has the burden of educating the judge on the role that PTSD from the abuse relates to the survivor's presentation. With medical records and the client's testimony this often can be done without expert testimony. Other witnesses may be able to describe changes in the client's behavior pre- and post-abuse. But that is getting into evidentiary weeds that is best left for a separate writing.

178. The lawyer will need to decide whether they can form a successful lawyer-client relationship with an extremely traumatized client who refuses to seek any support. That would be a rare event in my experience, but it is a possibility.

179. "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." ANNOTATED MODEL RULES OF PROF'L CONDUCT R 1.3 commentary at 1 [hereinafter ANN. MODEL RULES].

180. There are numerous strategic and evidentiary issues to be considered in domestic abuse. Those are a topic for a separate writing.

181. "Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt." NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS 115 (2022 ed.).

whom are afraid and some of whom have a mental health diagnosis. Such tactics are beyond what is permitted under the Model Rules and expose counsel to tort claims for negligent infliction of emotional distress.¹⁸² As in any tort claim, the Eggshell Skull theory applies that the person inflicting damage takes the victim as they find them.¹⁸³ The fact that the survivor has pre-existing conditions, such as depression or PTSD, does not shield the transgressor from responsibility for further damage caused to the victim.¹⁸⁴ Likewise, counsel has a duty to litigators who are without counsel. Failure of a client to retain counsel arguably can increase a lawyer's duty to treat the opposing party respectfully.¹⁸⁵

In a civil matter, the burden of proof is not beyond a reasonable doubt but a preponderance of the evidence.¹⁸⁶ This is particularly concerning when criminal tactics are brought to a civil action such as custody and divorce.¹⁸⁷ In criminal cases, counsel has more leeway to rely upon information from a client, which is not the case in civil matters. Lawyers have a duty to investigate.¹⁸⁸ Often abusers lie about their own histories and about their target's history. This transcends simply having a different perspective than the spouse; the abusive client creates falsehoods. When counsel repeats and promotes these fabrications without investigating the client, the facts, and the motivations, the court is deceived and the survivor harmed. To do so changes the tone of a case, makes resolution less likely, harms the survivor, and opens the offending lawyer to sanctions. An additional serious consequence of counsel's behavior is encouraging the client to continue with his abusive and often criminal behavior in violation of Rule 1.2.

C. LEGAL ABUSE

In intimate partner abuse cases, the accused party's goal may go beyond simply disproving allegations of abuse, but rather to impoverish and in other ways punish

182. See *Negligent Infliction of Emotional Distress*, CORNELL LEGAL INFO. INST. (Dec. 2022), https://www.law.cornell.edu/wex/negligent_infliction_of_emotional_distress [<https://perma.cc/3RY2-NSH4>].

183. Vaidehi Mehta, *The 'Eggshell Plaintiff' Rule*, FINDLAW (Jan. 22, 2024), <https://www.findlaw.com/legalblogs/law-and-life/the-eggshell-plaintiff-rule/> [<https://perma.cc/652W-KTL5>] (“[T]he rule encapsulates the notion that if someone is particularly delicate (has a skull as thin as an eggshell, say), then someone who injures them is still responsible for the extent of the damage, even if it's unforeseeable because a non-delicate person wouldn't have suffered the same damage. In other words, the principle states that a defendant takes their victim as they find them. This means that a defendant is liable for all the injuries they cause to a plaintiff, even if the plaintiff's pre-existing condition or susceptibility made the injuries worse than what a typical person would suffer.”).

184. I am not arguing that using the same tactics in criminal court shields criminal defense counsel from liability. The focus of this article is primarily on family court practice.

185. See MODEL RULES R. 4.1. cmt. 1.

186. “When a party has the burden of proving any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.” NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 8 (2017 ed.).

187. I do not exclude such behavior in criminal cases from the possibility of creating liability for defense counsel, but the focus of this article is where criminal lawyers handle domestic matters.

188. MODEL RULES R. 1.16.

the party making the allegations. Continuing or initiating unnecessary litigation is an abusive tactic in itself, and for a lawyer to participate in frivolous litigation, the lawyer violates the profession's ethical duties. The topic of legal abuse was addressed in a recent study; "For those who leave an abusive partner, separation presents multifaceted challenges, including an escalated risk of violence and diminished access to social and economic resources."¹⁸⁹ There are many tactics abusers can use to financially punish targets who leave, such as scheduling frequent but unnecessary court hearings is one tactic that can lead to the targets losing their jobs—a tactic referred to as litigation abuse.¹⁹⁰ "Many participants reported being unable to perform at or show up for their job as a result of the court process. One participant shared: 'These things have seriously affected my work status and made my work very stressful.' 'Some described losing income or hours due to the court process.'¹⁹¹ "My ex-partner intentionally depleted [my assets] for the stated purpose of leaving me with nothing after the divorce."¹⁹²

Judges may view these cases as high-conflict divorce, but most of the matters labeled "high-conflict" are actually abuse cases. In one study, over eighty percent of participating parents explained that their concerns were about child safety.¹⁹³ Over sixty-six percent cited abuse or neglect.¹⁹⁴ Judges may easily discount lawsuits responding with a "these two can't stop fighting" view when a more thorough exploration of the case history may present strong indicators that abuse has occurred and may be ongoing. Judges and abuser's counsel are in the best positions to draw appropriate boundaries around frivolous or punitive legal actions. Lack of boundaries around harassing strategies and actions is considered a major reason why abusers are able to continue their behavior.¹⁹⁵

189. Gutowski et al., *supra* note 22.

190. *Abusive Litigation*, VT. JUDICIARY, <https://www.vermontjudiciary.org/self-help/abusive-litigation> [<https://perma.cc/YY9P-JWAN>] ("Survivors of domestic violence, sexual assault, or stalking can ask the court for an order to restrict the other party's ability to file new litigation against them. The court will decide whether the other party filed the litigation primarily for the purpose of abusing, harassing, intimidating, threatening, or maintaining contact with them.") *Litigation Abuse*, WOMENSLAW.ORG <https://www.womenslaw.org/laws/general/litigation-abuse> [<https://perma.cc/CHZ6-EJG9>]; *Abusive Litigation: When Your Abuser Exploits the Legal System*, LEGAL VOICE (Jan. 2021), <https://legalvoice.org/abusive-litigation/> [<https://perma.cc/F9MQ-HFE4>].

191. Gutowski et al., *supra* note 22, at 8.

192. *Id.* at 9.

193. Judith A. Cashmore & Patrick N. Parkinson, *Reasons for Disputes in High Conflict Families*, 17 J. FAM. STUD., 186, 191 (2011).

194. *Id.* at 192.

195. KLEIN & KLEIN, *supra* note 97, at 18. "In the context of IPV, accountability is often framed as men being held responsible as perpetrators for abusing female victims by being sentenced to complete a BIP, taking responsibility for their actions rather than blaming the victims or others, and discontinuing their violent behaviors." Chelsea L. Pallatino et al., *The Role of Accountability in Batterers Intervention Programs and Community Response to Intimate Partner Violence*, 34 J. FAM. VIOLENCE 631, 632 (2019) (Noting the hetero normative nature of the stated definition).

D. ADDITIONAL CONCERNS WHEN CRIMINAL LAW AND STRATEGIES ARE INTRODUCED TO FAMILY LAW MATTERS

I discussed in section C the potential for counsel to be sued in tort for negligent infliction of emotional distress. Typically, this applies to counsel for the abuser, but counsel for the survivor is exposed as well, but more likely a complaint will be filed in the form of a malpractice claim.¹⁹⁶

There are other complications that arise when criminal and domestic law intersect. For example, the standard of proof is often confused in family courts. If a companion domestic violence case is brought in criminal court, a dismissal is often treated by the allegedly abusive partner as an exoneration. The result of a criminal trial other than a conviction carries no probative value in civil matters.¹⁹⁷ Yet family courts adopt this information and perspective while opposing counsel often fails to object.¹⁹⁸ After accepting evidence of dismissal in the criminal case, some judges unintentionally begin assessing the survivor's allegations of abuse employing the "beyond a reasonable doubt" standard.¹⁹⁹

Permitting aggressive attorney behavior in the courtroom encourages incivility. Incivility is on the rise and a topic of concern to many lawyers and judges. Just as boundaries are an important part of curbing abusive behavior, lawyers who are permitted to perform with aggressive antics need to be curbed to prevent further harm to the parties. While the client might value these tactics, the client's wishes cannot be allowed to override the obligations of professionalism. "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."²⁰⁰

The emotional toll of practicing family law can be mitigated when the lawyer's behavior is civil and professional. I venture that most lawyers have moments when exhaustion or secondary trauma might overwhelm them and impact the professionalism of their performance. But such behavior should be the exception, not the norm.²⁰¹ A noted tactic of an abuser's counsel has been to avoid addressing allegations of abuse and other relevant issues and instead attack opposing

196. For example, sometimes survivor's counsel is unnecessarily aggressive without regard to their client's safety concerns. Such behavior can raise the survivor's risk for future abuse.

197. See generally FED. R. EVID. 609 (describing how criminal convictions can be used).

198. For additional ways in which counsel for the survivor can mis-serve the client see Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L. Q. 7 (2005).

199. When I have raised this confusion at judge's trainings, several typically acknowledge this unwitting phenomenon.

200. ANN. MODEL RULES R. 1.3 commentary at 1. "The public's perception of the legal system is shaped not only by the outcomes of cases but also by the behavior of legal professionals involved. Legal civility plays a significant role in preserving and enhancing the public's perception of the legal profession." Minh Nguyen, *The Importance of Civility in the Practice of Law*, ADVOC. MAG. (July 2023), <https://www.advocatemagazine.com/article/2023-july/the-importance-of-civility-in-the-practice-of-law> [https://perma.cc/EL3Q-JZGZ].

201. *Id.*

counsel personally.²⁰² This sort of behavior is a violation of the Model Rules and should be addressed and even sanctioned by judges. The obligation to be a zealous advocate does not encompass behavior intended to offend opposing counsel or their client.²⁰³

CONCLUSION

No longer will cavalier excuses for abusive behavior by either the abusive party or counsel be tolerated within the profession. With courts lamenting the lack of civility in the practice (much of which is focused on the family law bar), misogynistic behavior can be tied to increased suffering for the target of abuse and the frustration of their counsel, which should not be tolerated. Keeping a professional tone and employing emotionally restrained strategic actions will not impair, and may enhance, zealous advocacy. Lawyers need to be mindful of doing no further harm to the parties and the situation. The ABA and state commissions need to review their Rules of Professional Conduct to include more commentary on the Rules to ensure adequate restraints on lawyers' behavior, with a focus on discouraging and disciplining actions that serve no purpose other than to intimidate and promote racism and misogyny. Lawyers who engage in coercive tactics must be disciplined under the applicable professional standards.

202. Michael Mortimer, *The Courtroom: No Place for Personal Attacks*, PLAINTIFF (Jan. 2009), <https://plaintiffmagazine.com/recent-issues/item/the-courtroom-no-place-for-personal-attacks> [<https://perma.cc/DWV9-M8JV>].

203. MODEL RULES R.1.3 cmt. 1 ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.").