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Leigh S. Goodmark

*University of Maryland Francis King Carey School of Law, lgoodmark@law.umaryland.edu*

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# GOING UNDERGROUND: THE ETHICS OF ADVISING A BATTERED WOMAN FLEEING AN ABUSIVE RELATIONSHIP

Leigh Goodmark\*

## I. INTRODUCTION

In her novel *Black and Blue*, Anna Quindlen tells the story of Fran Benedetto, an emergency room nurse battered by her husband, a police officer. After one particularly vicious beating, Fran flees her home with her son Robert and goes into hiding. Fran Benedetto of New York City becomes Beth Crenshaw of Lake Plata, Florida, with the assistance of an unnamed organization that aids battered women. As Fran recounts,

There are people who will help you get away from your husband, who will find you a new house, a new job, a new life, even a new name. They are mysterious about it because they say it's what they need to do to keep you safe; when she goes on television, their leader, a woman named Patty Bancroft, likes to say, "We do not even have a name for ourselves."<sup>1</sup>

After leaving New York, Fran is not permitted to contact her sister, and Robert is forbidden to ever call his father; the organization requires them to essentially disappear. "Secrecy, Patty Bancroft had said when she came to speak at the hospital, was the hallmark of her organization. No stray piece of paper, no phone number, no newspaper clipping, could give her volunteers away as they spirited women out of their own homes and into the anonymous America where Robert and I were now living."<sup>2</sup> Despite her best efforts to keep herself and her child safe, however, her abuser ultimately finds her and, after beating her unconscious, kidnaps her son. As the book closes, four years after her flight, her son is still missing.

Fran never consulted an attorney about going underground. Since reading the book several years ago, I have sometimes wondered what I would have told Fran had she sought my counsel. The question is not so far-fetched. Although some domestic violence agencies disavow the idea of an "underground railroad"<sup>3</sup>

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<sup>1</sup> ANNA QUINDLEN, *BLACK AND BLUE* 9 (1998).

<sup>2</sup> *Id.* at 57.

<sup>3</sup> See, e.g., Diane Wetendorf, Inc., Changing Your Identity, [www.abuseofpower.info/ChangeID.htm](http://www.abuseofpower.info/ChangeID.htm) (last visited Aug. 10, 2006) (explaining that "[n]ovels and movies have created the fiction of an underground for battered women. . . . To our knowledge, there is no such underground other than the established network of domestic violence shelters."); but see Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 676 n. 56 (1998) (explaining that "[s]o great is the fear of violence at the time of separation that an 'underground railroad' has developed through the banding together of battered

for battered women, it is undeniable that women flee from their abusers and attempt to keep their whereabouts hidden.<sup>4</sup>

K.J. Wilson describes her experience of going underground in her book, *When Violence Begins at Home: A Comprehensive Guide to Understanding and Ending Domestic Abuse*:

In the early morning hours of July 28, 1991, I arose after having spent an exhausting evening of being harassed and threatened by my abusive boyfriend. I packed a small suitcase and waited for my mother, father, brother, and nephew who were soon to arrive. Upon seeing me, my brother confided to my mother that he had seen a lot of scared people in his life, but never anyone as scared as I. He was right. I was about to begin running for my life and I was terrified.<sup>5</sup>

Wilson bases her chapter on going underground both on her own experiences and on those of women she has met and counseled, and notes that all of these women “made [their] plans and protected [themselves] without the benefit of talking to anyone who had personally accomplished the feat.”<sup>6</sup>

Wilson advises women considering going underground to find a lawyer through a close friend or battered women’s shelter to consult with before disappearing.<sup>7</sup> But most lawyers are not familiar with the myriad issues facing women who choose to flee:<sup>8</sup> the many legal questions confronting battered women who go underground, the alternatives, legal and otherwise, available to such women, and the ethical issues posed by counseling a woman planning to flee.<sup>9</sup> Those ethical issues involve not only the lawyer’s duties to the client who

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women’s shelters and service providers in order to help battered women escape their abusers in safety.”); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN’S RTS. L. REP. 283, 290 (1997) (arguing that injustice towards slaves and battered women spawned underground railroads for both groups).

<sup>4</sup> Jeffrey T. Even, *Washington’s Address Confidentiality Program: Relocation Assistance for Victims of Domestic Violence*, 31 GONZ. L. REV. 523, 525 (1995-96) (quoting a domestic violence advocate’s admonition to “get out and go underground”). It is impossible to know how many women have used this strategy, for what periods of time, and how successful their efforts have been, although today’s technology may make it nearly impossible for battered women to disappear..

<sup>5</sup> K.J. WILSON, *WHEN VIOLENCE BEGINS AT HOME: A COMPREHENSIVE GUIDE TO UNDERSTANDING AND ENDING DOMESTIC ABUSE* 88 (1997).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 94.

<sup>8</sup> Sarah M. Buel, *A Lawyer’s Understanding of Domestic Violence*, 62 TEX. B.J. 936 (1999). John Burman argues that an attorney’s assertion that she need not know or care about domestic violence might have been permissible fifteen or twenty years ago, but is now “ethically and legally unreasonable.” John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 233 (2003).

<sup>9</sup> These issues are not necessarily specific to battered women who decide to flee. Any lawyer counseling a battered woman might confront the same questions, and flight might be one of the options on the table. The lawyer’s duty of competence is implicated regardless of the posture in which the case comes to her; counseling around safety planning for women who choose to stay raises an equally complex array of legal questions that the lawyer should be able to address. I have

goes underground, and to third parties involved with the client, but also whether the lawyer can in good conscience counsel the client that the legal system provides her with a viable alternative to keep herself and her children safe.

## II. THE LEGAL ISSUES

### A. Women Without Children

Going underground raises a variety of legal questions. Simply disappearing without changing one's identity does not guarantee safety. "Public records alone afford numerous opportunities for locating an individual. Simple and ordinary acts of life, such as obtaining a driver's license or registering to vote, create public records containing an individual's address"—public records that governmental agencies are often required to provide to anyone who asks.<sup>10</sup> Even seeking medical care could expose the woman's whereabouts.<sup>11</sup> For this reason, some women (like Fran Benedetto) seek to establish new identities.

The choice to become someone else in order to remain hidden has serious legal implications. Although at common law a judicial declaration was not necessary to effectuate a change of name,<sup>12</sup> the difficulty of securing revised government documents without a court order presents a practical impediment to using the common law method. As a result, women who go underground may need to legally change both their names and social security numbers.<sup>13</sup> The lawyer must know the requirements for effectuating such a change. The lawyer should also consider whether the batterer or any third party (for example, a landlord seeking to enforce a lease agreement)<sup>14</sup> is entitled to notice that the change has been requested.<sup>15</sup> The name change may also have implications for the woman's ability to access bank or retirement accounts or maintain insurance coverage.<sup>16</sup>

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chosen to focus on battered women who have already made the decision to flee because it provides a more specific context for the ethical issues I seek to raise in this article.

<sup>10</sup> Even, *supra* note 4, at 525.

<sup>11</sup> See, e.g., *Judge: Hospital Privacy Law Not Absolute*, ASSOCIATED PRESS, Apr. 3, 2007 (discussing a federal judge's ruling that HIPAA does not prohibit hospital personnel from giving police access to a victim of domestic violence, despite her unwillingness to report the abuse).

<sup>12</sup> 57 Am. Jur. 2d *Names* §§ 2, 16.

<sup>13</sup> Changes of name are generally governed by state statutes and are permitted so long as the change is not sought for an illegal, immoral or fraudulent purpose. See, e.g., Maryland Rule 15-901(c)(1)(E) (2006) (requiring petitioner to certify that name change is not requested for illegal or fraudulent purpose); see also 57 Am. Jur. 2d *Name* § 17 (2006). The Social Security Administration will change a Social Security number of a victim of violence when "evidence shows you are being harassed or abused or your life is endangered." SOCIAL SECURITY ADMINISTRATION, NEW NUMBERS FOR DOMESTIC VIOLENCE VICTIMS (2006), [www.ssa.gov/pubs/10093.pdf](http://www.ssa.gov/pubs/10093.pdf).

<sup>14</sup> For a discussion of statutory provisions allowing a battered woman to terminate her lease early because of domestic violence, see Anne C. Johnson, *From House to Home: Creating a Right to Early Lease Termination for Domestic Violence Victims*, 90 MINN. L. REV. 1859 (2006).

<sup>15</sup> See, e.g., Md. Rule 15-901(f) (2006) (enabling anyone to object to a name change petition).

<sup>16</sup> The confidentiality policies of the courts do not prevent individual banks, retirement accounts or insurance providers from disclosing identifying information; banks, retirement accounts and

Even if the woman changes her name legally, she may still feel pressure to disclose her previous identity. An employer, for example, may require a background check using not just the new identity, but her old one as well. Given the problems that security companies sometimes have with keeping personal information confidential, a computer savvy abuser might be able to find his victim by linking screenings done of the old and new identities.<sup>17</sup>

The choice to assume a new name without seeking a judicial declaration, as permitted at common law, has legal implications as well. One attorney tells the story of a woman who went underground after she learned that her husband had tried to hire someone to kill her. While living in another county under an assumed, but not legally changed, name, she voted using her old name in her home county. A local prosecutor with a relationship to the abuser charged the woman with felony voter fraud.<sup>18</sup>

Wilson suggests that a woman going underground needs a contact person who is the only person who will know her whereabouts while she is in hiding. "Carefully evaluate your existing relationships with family and friends to determine whether there is a person you can trust and who is willing to help you. You must be able to trust this person with your life."<sup>19</sup>

But there are legal obligations that come with the responsibility for acting as the contact person. To be able to act on her behalf, the contact person might benefit from having the woman execute a power of attorney; the attorney that drafts it should counsel the battered woman both on the choice to enter such a relationship and the implications for the contact person. The contact person may need to take steps to help preserve the battered woman's financial standing, like collecting debts, seeking access to joint accounts, or appearing in the woman's stead in any action brought by the abuser. The lawyer should be prepared to counsel the fleeing woman about those obligations, as well as about any protection the contact person might be able to seek against a vindictive abuser.<sup>20</sup>

Married women may want to seek a divorce; Wilson advises considering filing for divorce immediately upon going underground.<sup>21</sup> But whether a fleeing woman can file for divorce without disclosing her whereabouts—in the

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insurance providers function under their own administrative policies.

<sup>17</sup> One domestic violence advocate had a client in just such a situation; because Choicepoint, the firm doing the background check, has had problems with security, the client was particularly afraid that her abuser would have little difficulty finding her. E-mail from attorney (name kept confidential to protect client) (Oct. 27, 2006) (on file with the author).

<sup>18</sup> E-mail from attorney (name kept confidential to protect client) (Aug. 18, 2006) (on file with the author). Minnesota has recently passed a law that allows victims of domestic violence to vote through the Secretary of State's office as permanent absentee voters, enabling them to exercise their rights without disclosing their whereabouts. Minn. Stat. Ann. § 5B.06 (2006).

<sup>19</sup> WILSON, *supra* note 5, at 94.

<sup>20</sup> Although the ethics rules generally preclude attorneys from requesting that a person other than a client refrain from giving relevant information to another party, an exception is made where the person is the agent of the client. MODEL RULES OF PROF'L CONDUCT 3.4(f)(1). Attorneys should consider whether the contact people function as the client's agents when formulating strategies for protecting the contact person.

<sup>21</sup> WILSON, *supra* note 5, at 94.

complaint or by emerging from hiding for a hearing—could profoundly change her thinking about pursuing that option.<sup>22</sup> Similarly, going underground could affect the woman's ability to seek alimony or distribution of marital property.<sup>23</sup>

A fleeing woman may also want to know what responsibility she will bear for marital debt incurred while she is underground,<sup>24</sup> or what will happen if the woman or her spouse declares bankruptcy.<sup>25</sup> Some women may choose not to file for divorce, a choice that also surfaces legal issues if she remains underground for a considerable period of time. For example, she may wonder whether her spouse will be able to have her declared deceased,<sup>26</sup> and what legal implications that might have for access to alimony or property distribution. A lawyer counseling a married woman who is thinking about fleeing might have to answer any of those questions, and hundreds more.

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<sup>22</sup> If only requesting a divorce, the battered woman could choose to file either where she is domiciled or where her abuser is domiciled; state laws vary on the length of time one must be domiciled within the state before filing. While she must personally serve her abuser with her complaint for divorce, she does not necessarily need to identify her whereabouts in order to do so, particularly if she chooses to file where he is domiciled. The battered woman might also be able to request that the court keep her address confidential as a result of the abuse; although, as discussed below, even when such requests are made, they are not always honored. Depending on state law, the battered woman might even be able to secure her divorce without appearing in court, particularly if her abuser wants the divorce as well.

<sup>23</sup> Again, it is possible that the battered woman could get personal jurisdiction over her abuser without disclosing her whereabouts, either by personally serving him in the jurisdiction where the matter will be heard, or by bringing the matter in a jurisdiction with minimum contacts in the state. But it would be difficult to establish a case for alimony or distribution of marital property in an equitable distribution state without the woman's testimony; her refusal to be present in court may preclude those remedies. The attorney should certainly attempt to negotiate a settlement agreement that deals with these issues, although the abuser, understanding the advantage created by his wife's unwillingness to come out of hiding, would likely reject such overtures.

<sup>24</sup> In Maryland, for example, marital debt continues to accrue until the date of divorce. The court can, however, consider each party's responsibility for the accrual of the debt when dividing the marital property. *See* Md. Fam. Law Art. § 8-205(b) (2006).

<sup>25</sup> By choosing to go underground, battered women may forgo some bankruptcy protections. Underground women may not be able to file Chapter Seven bankruptcy. *See, e.g.,* *In re Gloria J. King*, 234 B.R. 515 (holding that a conservator cannot file for bankruptcy on behalf of a missing person). The underground woman may also face the release of confidential information. *See, e.g.,* *In re John C. Fairbanks*, 135 B.R. 717 (1991) (holding that the bankruptcy trustee may waive the attorney-client privilege on behalf of a missing debtor).

<sup>26</sup> At common law, a person missing seven years was presumed dead. Some states have established a shorter statutory period; others have created a process allowing death to be proven by circumstantial evidence prior to the expiration of the statutory period. 22A AM. JUR. 2D *Death* § 438 (2006). Under the Uniform Probate Code, death is presumed to have occurred at the end of a five year period unless there is sufficient evidence to determine that death occurred earlier. UNIF. PROBATE CODE § 1-107 (5).

## B. Women with Children

Wilson notes that all of the women she knew who successfully concealed themselves went underground without children.<sup>27</sup> Certainly women with children confront an even thornier set of legal issues as they decide whether to flee their abusers.<sup>28</sup> As Catherine Klein, Leslye Orloff and Hema Sarangapani warn,

Individuals who, without the consent of the other parent, leave with their children to confidential locations in or out of their home state may face serious criminal penalties under state parental kidnapping statutes. Further, survivors may also face restrictive state civil statutes on child custody as well as related case law that encourage adverse custody decisions to penalize parents who deprive the other parent of access to or contact with their children.<sup>29</sup>

The vast majority of the states have statutes forbidding parental kidnapping or interference with a parent's custody or control of the child.<sup>30</sup> Some state laws apply only when a custody order is in effect, some apply regardless of whether a court has issued a custody order, and in some states the law is unclear.<sup>31</sup> Moreover, while these laws may seem largely similar, "statutory provisions concerning the definitions of lawful custodian, the availability of statutory exceptions or defenses, and the severity of the criminal penalty for conviction vary greatly between states."<sup>32</sup> Attorneys advising battered mothers considering flight must know the particulars of the law of the client's home state.

The lawyer should also be familiar with relevant provisions of federal law. A fleeing parent may be subject to the federal Parental Kidnapping Prevention Act (PKPA) if a temporary or permanent custody order has been entered.<sup>33</sup> Although a violation of the PKPA itself carries no criminal penalties, the PKPA operates in conjunction with the Federal Fugitive Felon Act in states where parental kidnapping is defined as a felony under state law.<sup>34</sup>

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<sup>27</sup> WILSON, *supra* note 5, at 89.

<sup>28</sup> Even pregnant women risk exposing themselves to liability. Although "courts generally have no jurisdiction over unborn children, . . . some judges are ordering pregnant women to return to the original state once she has the child if the father of the unborn child asks the court to order the child back." Joan Zorza, *Tips for Representing Battered Mothers in Relocation Cases*, DOMESTIC VIOLENCE REP., Aug./Sept. 2006, at 83.

<sup>29</sup> Catherine F. Klein, Leslye E. Orloff & Hema Sarangapani, *Border Crossings: Understanding the Civil, Criminal and Immigration Implications for Battered Women Fleeing Across State Lines with Their Children*, 39 FAM. L.Q. 109, 110-11 (2005); *see, e.g.*, Mitchell v. Lane, 2006 WL 133421 (Iowa Ct. App. 2006) (reversing a trial court's decision to award custody to a mother because she absconded with her child, despite evidence that she fled because the father abused her).

<sup>30</sup> Zorza, *Tips*, *supra* note 28, at 117.

<sup>31</sup> *Id.* at 118.

<sup>32</sup> *Id.* at 117.

<sup>33</sup> *Id.* at 116.

<sup>34</sup> *Id.*

The impact that fleeing with a child can have on child custody determinations must also be considered. In a case where an order has not yet been entered, a mother who goes underground with her child and is not present to participate in custody proceedings will likely lose custody, and possibly visitation as well.<sup>35</sup> Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the fleeing mother can file for custody, asking the court to assert temporary emergency jurisdiction, but may still be forced to return to the child's home state to litigate the case.<sup>36</sup> Upon her return, she can also be compelled to disclose her whereabouts, exposing herself and her children anew to the danger she fled.<sup>37</sup> When a court has already made a custody determination, fleeing with the child may mean that the mother violates the visitation provisions of that custody order; such violations could expose her to a finding of contempt of the court's order.<sup>38</sup> Going underground could also be used to justify a court's decision to modify an initial grant of custody to the mother, even in cases where the violence was egregious. The mother who flees without her child could be disadvantaged by that decision in the custody context as well; the court could find that the mother abandoned the child and use that abandonment to justify a grant of custody to the abuser.<sup>39</sup>

Once the mother flees, she will have to reestablish not only herself, but also her child, in a new community. Enrolling the child in school or day care,<sup>40</sup> seeking medical care for the child, or applying for public benefits for herself or the child could make the mother's whereabouts vulnerable to disclosure.<sup>41</sup> The

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<sup>35</sup> A battered mother who goes underground with her child necessarily impedes the child's relationship with the abusive parent. Such actions may trigger adverse findings under "friendly parent" provisions of custody laws, which are designed to reward parents who are willing to facilitate relationships between their children and the other parent. Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1421 (2005).

<sup>36</sup> Joan Zorza, *The UCCJEA: What Is It and How Does It Affect Battered Women in Child Custody Disputes*, 27 FORDHAM URB. L.J. 909, 917-18 (2000).

<sup>37</sup> See, e.g., Amy Calder, *Victim's Family Questions Custody Proceedings*, BLETHEN, MAINE NEWS SERVICE, Jan. 18, 2007 (explaining how battered woman was killed by her estranged husband after being required by a judge to tell her husband where she would be living with her children).

<sup>38</sup> Although a mother could raise the possibility of relocation at her initial custody hearing, alerting the court to the possibility that she will leave the jurisdiction is risky; the court might decide, in light of the potential move, to award custody to the abuser. Zorza, *Tips*, *supra* note 28, at 83.

<sup>39</sup> Naomi Cahn, *Child Witnessing of Domestic Violence*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 14 (Nancy E. Dowd et al., eds. 2005).

<sup>40</sup> Under the Family Educational Rights and Privacy Act, a natural parent, guardian, or person acting as a parent in the natural parent's absence is entitled to access to a child's school records unless the educational institution has been given evidence of a court order, state statute, or other legally binding document regarding divorce, separation or custody that specifically revokes these rights. 34 C.F.R. § 99.4 (2007). Advocates for battered women should be careful, then, to include such provisions in protective orders to ensure that if a battered woman decides to flee with her children, the children's educational information will be secure.

<sup>41</sup> Federal law requires that a woman seeking Temporary Assistance to Needy Families name her child's father in order to attempt to recoup those welfare payments through the collection of child



mother could seek a change of identity not only for herself, but for her child as well, in order to address this concern.<sup>42</sup> The lawyer should know how to effectuate such a change, but should also be prepared to counsel the client on the notification requirements around such changes. The lawyer must have some familiarity with all of these issues before counseling a battered mother who is considering leaving the jurisdiction.

### III. THE ETHICAL ISSUES

#### A. The Attorney's Ethical Obligations to the Client

A lawyer working with a battered client can find some guidance in the ethics rules. A number of the American Bar Association's Model Rules of Professional Conduct are relevant to that work.<sup>43</sup>

##### 1. Competence

Rule 1.1 requires that a lawyer provide competent representation to a client. Competent representation is defined as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>44</sup> Consider the myriad questions posed earlier in this article about the various legal issues that could be raised by a woman's decision to go underground. What constitutes competent representation in that context? It would be difficult for any lawyer to have ready answers to all of these questions, given their scope and variety. Just in the examples I have offered, which cannot possibly touch on all of the issues presented by going underground, questions of family law, debtor/creditor issues, criminal law, federal benefits, civil procedure, housing law and bankruptcy are raised.

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support. Although many states have adopted Family Violence Options, which enable the state to forgo establishing paternity and child support in cases where doing so could present a danger to the parent or child, those laws are frequently ignored by welfare workers and not explained to applicants for assistance. Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 372-73 (2005).

<sup>42</sup> Neither parent has a superior right to name a child or to change a child's name without the other parent's consent; judges must consider whether the change of name is in the child's best interests. 57 AM. JUR. 2d *Name* §§ 14, 44. Only a few states recognize that a name change may be necessary to protect a parent or child. Washington, for example, permits name change petitions to be sealed where the petitioner has experienced domestic violence and fears for her own safety or the child's safety. Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 65 n.257 (1996).

<sup>43</sup> As of 2005, forty-one states had adopted the American Bar Association's Model Rules of Professional Conduct, and the remaining states employ similar rules. Klein et al., *supra* note 29, at 140. For that reason, the Model Rules will be used to ground this discussion.

<sup>44</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006). For a comparison of several perspectives on what constitutes competence, see ALEXIS ANDERSON ET AL., ETHICS IN EXTERNSHIPS: CONFIDENTIALITY, CONFLICTS, AND COMPETENCE ISSUES IN THE FIELD AND IN THE CLASSROOM, 74 (2004), <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1021&context=bc/bclsfp>.

In looking only at the narrow issue of battered immigrant mothers fleeing with children to another jurisdiction, Klein, Orloff and Sarangapani pose nine essential questions that a lawyer should be able to answer before counseling a client.<sup>45</sup> Competent representation does not require the lawyer to be able to answer all of these questions automatically, without research and careful thought. As Comment 2 to Rule 1.1 notes, “[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.”<sup>46</sup> But it does require the attorney to know that these kinds of questions need to be asked and to know where to find the resources to answer them.<sup>47</sup> One such resource may be other attorneys with experience working with victims of domestic violence; Comment 2 to Rule 1.1 suggests that competent representation can be provided by associating with “a lawyer of established competence in the field in question.”<sup>48</sup>

Competent representation also requires the attorney to think about how the existence of domestic violence severe enough to drive the client underground affects the analysis. Too often in cases involving domestic violence, lawyers are ignorant about context—they may understand the substantive law in a vacuum, but they fail to appreciate how the context of violence shapes the client’s reactions, goals, options and the appropriate legal responses.<sup>49</sup> Without a

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<sup>45</sup> Those questions are:

What types of parental kidnapping, custodial interference, or child concealment law does the original state have? . . . Is there a defense or exemption related to domestic violence that could protect your client from criminal charges if she flees across state lines with the children? . . . If your client is a battered immigrant and is not a citizen of the United States, what are the possibilities that either the original state or the new state could prosecute her for parental kidnapping or custodial interference and how do you assess the potential harm to her future eligibility for legal immigration status? . . . What type of relocation statute does the state have? . . . Would a survivor be violating a court order by fleeing the jurisdiction? . . . How have courts in each of the states typically handled interstate custody matters that involved domestic violence? . . . Do the two states have different custody laws related to domestic violence? . . . Do the states have different laws protecting the confidentiality of information about domestic violence survivors? . . . When can a court modify a custody or visitation order that was issued by a court in another state?

Klein et al., *supra* note 29, at 148-51.

<sup>46</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. (2004). The Comment also cautions against providing representation which the lawyer is not competent to provide in the case of emergency, the context in which many of these cases will arise. The Comment notes that while the lawyer can provide representation in an emergency, such representation should be “limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client’s interest.” *Id.*

<sup>47</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt 2 (2004) (explaining that a lawyer can accept representation where competency can be achieved through reasonable preparation).

<sup>48</sup> *Id.*

<sup>49</sup> Because so few lawyers understand domestic violence, the American Bar Association Commission on Domestic Violence has recommended that “law schools . . . fill this desperate gap in legal education by incorporating domestic violence law into core curricula courses, upper level

grounding in the dynamics and dangers of domestic violence, the lawyer cannot provide competent representation to a client considering going underground.

## 2. Communication & Confidentiality

Maintaining communication with an underground client poses a number of ethical challenges. Rule 1.2, "Scope of Representation and Allocation of Authority Between Client and Lawyer," is certainly implicated in the representation of a woman considering flight, particularly if she plans to flee with her children. The Rule requires that attorneys abide by clients' decisions about the objectives of the representation and consult with clients about the means for pursuing those objectives. Similarly, Rule 1.4 requires lawyers to maintain open communication with clients.<sup>50</sup> Such consultation can prove challenging when the client cannot be in regular contact with the attorney; while the rules allow the attorney to "take such action on behalf of the client as is impliedly authorized to carry out the representation,"<sup>51</sup> those lines may be difficult to draw with a client whose need to remain hidden may regularly raise new legal questions.

Safeguarding client confidences is particularly important for clients who have gone underground. Rule 1.6 generally precludes lawyers from disclosing information relating to the representation of the client, permitting (but not requiring) lawyers to disclose confidential information in certain situations.<sup>52</sup> Comment 2 to Rule 1.6 notes the importance of confidentiality to the development of trust between lawyer and client. Battered women going underground may literally be trusting their lawyers with their lives; safeguarding information the lawyer has about the client's whereabouts may prevent that client from being killed.<sup>53</sup> The comments to the Rule stress the need to guard confidential information closely and take precautions to ensure that such information is not inadvertently disclosed.<sup>54</sup>

Lawyers working with women who flee must take these admonitions more seriously than most. While the lawyer "may reveal information" as permitted by Rule 1.6, the lawyer should assess the potential danger posed to the client by disclosing the information. Consider, for example, the client who, against or without the lawyer's advice, has used her abusive partner's ATM card and PIN to clean out his checking account in order to fund her travels. While the lawyer could, under Rule 1.6(b)(3), disclose the client's whereabouts in order to help the partner recoup his financial losses, the lawyer's inclination to do so should almost certainly be checked by his or her awareness of the harm that will likely come to the client if she is unearthed.<sup>55</sup> Before the attorney takes any action, she

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courses, and clinical programs." DEBORAH GOELMAN & ROBERTA VALENTE, WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT I-5 (1997).

<sup>50</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2006).

<sup>51</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2006).

<sup>52</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2006).

<sup>53</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2006).

<sup>54</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2, 16 (2005).

<sup>55</sup> At least one court has recognized that the potential danger to the battered woman is sufficient

should, if possible, consult with her client as to whether the client is willing to consent to the disclosure.<sup>56</sup> Such consultations not only protect the lawyer should she decide to disclose, but also underscore the notions of client empowerment and autonomy that are particularly important for lawyers working with battered women.<sup>57</sup>

### 3. Client Counseling and Criminal Behavior

Rule 1.2(d) states, “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”<sup>58</sup> Though the prohibitions of Rule 1.2(d) must be balanced against the duties outlined by Rule 2.1, which requires a lawyer to provide “candid advice” and enables the lawyer to think about the “moral, economic, social and political factors . . . that may be relevant to the client’s situation,” Rule 1.2(d) seems to trump.<sup>59</sup> A woman decides to flee after a particularly vicious beating and the promise of more to come. She has no money or access to transportation and calls her lawyer hurriedly to ask whether she can take her boyfriend’s car; although it is titled in his name, they have been sharing the car and she has a set of keys. Rule 1.2(d) requires the lawyer to know whether taking the car constitutes theft and/or motor vehicle theft, as defined by state law;<sup>60</sup> given that she has the keys and has had permission in the past to use the car, the answer may not be clear. If the lawyer believes that taking the car does violate the statute, however, she must not advise her client to flee in the car, although she can tell the client what the penalty might be for fleeing in the car. Even if, in the course of that counseling, the moral and social factors—the likelihood that the client will be subjected to serious physical harm if she does not leave, the client’s isolation and inability to escape any other way, and the lack of immediate resources available in the community—seem to

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reason not to require her lawyer to disclose information protected not by the Rules, but by the attorney-client privilege. In *Taylor v. Taylor*, 359 N.E. 2d 820 (Ill. App. Ct. 1977), a trial court held an attorney in contempt after he refused to provide the court with the client’s address in a custody case. The appellate court declined to compel disclosure of the battered mother’s whereabouts, believing that “a client in this type of situation should not have to worry about whether a court might compel her lawyer to disclose information that would threaten her safety.” Other courts mandate disclosure, however, when a court order is violated. Klein et al., *supra* note 29, at 147.

<sup>56</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (2005).

<sup>57</sup> Kathleen Waits, *Battered Women and Their Children: Lessons From One Woman’s Story*, 35 HOUS. L. REV. 29, 76-77 (1998).

<sup>58</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 (2006). Rule 1.4(a)(5) further requires the lawyer to consult with the client about any limitation on the lawyer’s conduct when the lawyer knows the client expects the lawyer to act in a manner inconsistent with the law or the Rules. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(5) (2006).

<sup>59</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 (2006).

<sup>60</sup> See, e.g., MD. CODE ANN, CRIM. LAW § 7-104-105 (2006).

militate in favor of advising the client to take the car, the Rules draw a fairly clear line. Despite the existence of a compelling reason for the client to engage in what might be criminal conduct, the lawyer cannot advise the client to do so.<sup>61</sup> The “candid advice” required by Rule 2.1 cannot include the suggestion that the lawyer sanctions the client’s inclination to engage in criminal behavior.<sup>62</sup>

Although there are few cases on point, the conduct of attorneys advising battered mothers who flee with their children has been closely scrutinized under Rule 1.2(d). While “simply counseling a client on the potential ramifications of interstate flight from abuse should not trigger disciplinary consequences,”<sup>63</sup> lawyers who provide assistance to fleeing clients or counsel clients to violate court orders on custody and visitation have been disciplined and even disbarred.<sup>64</sup>

In *People v. Chappell*, for example, a lawyer represented the mother in a child custody case in which mutual restraining orders prevented either parent from removing the child from the state.<sup>65</sup> After learning that the custody evaluator would recommend awarding custody to the father, the lawyer told the mother that the court would most likely follow the evaluator’s recommendation.<sup>66</sup> The lawyer advised the client “as her lawyer to stay, but as a mother to run.”<sup>67</sup> The attorney gave the client information about the “network of safehouses for people in her situation”—presumably, battered women.<sup>68</sup> The wife left Colorado for two weeks, moving into a battered woman’s shelter when she returned.<sup>69</sup>

In her absence, the court awarded custody of her son to the father.<sup>70</sup> At a prenatal visit for her unborn child, the mother was discovered and physical custody immediately given to the father.<sup>71</sup> The mother later pled guilty to violation of a child custody order, a felony in Colorado.<sup>72</sup> In a subsequent disciplinary hearing, the attorney was found to have violated Rule 1.2(d)’s prohibition on counseling a client to engage in a criminal or fraudulent act.<sup>73</sup> The attorney’s actions not only precipitated her disbarment, but also resulted in a felony conviction and a loss of custody for her client.

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<sup>61</sup> The lawyer can also advise the client as to the defenses that might be available should the client choose to engage in the prescribed conduct. Klein et al., *supra* note 29, at 144.

<sup>62</sup> See, e.g., *People v. Chappell*, 927 P.2d 829 (quoting attorney as telling the client “as her attorney to stay, but as a mother to run”).

<sup>63</sup> Klein et al., *supra* note 29, at 142.

<sup>64</sup> *Id.* at 143-45 (discussing *People v. Chappell*, 927 P.2d 829 (Colo. 1996) and *In re Rosenfeld*, 601 A.2d 972 (Vt. 1991)).

<sup>65</sup> *People v. Chappell*, 927 P.2d 829 (Colo. 1996).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 830.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

#### 4. Entering Into and Withdrawing From Representation

Before undertaking the representation of a battered woman who is considering going, or has gone, underground, the lawyer should think carefully about whether she can meet her ethical obligations. If she is not competent, if she cannot provide candid counsel, or if she believes that providing representation will require her to violate the rules of professional conduct or other laws, she should not undertake the representation—not only because of the implications for her, but because of the potential for harm to her client.

For the fleeing battered woman, building an attorney-client relationship means trusting the lawyer with information that could cost the client her life. While Rule 1.16 lays out the circumstances under which a lawyer can ethically withdraw from a case (which may be distinct from state law setting the conditions under which a lawyer can withdraw from representation), withdrawal may be quite harmful for the client. Not only does the client have to find another attorney (which, given the paucity of legal resources for battered women, particularly in matters other than advocacy around protective orders, may be impossible),<sup>74</sup> but she has to develop a trusting relationship with that attorney, which may take time that she cannot invest. She also has to enlarge the number of people who know where she is by at least one (and possibly more if the attorney's staff has access to her information), further jeopardizing her ability to remain hidden.<sup>75</sup>

For the lawyer, representing a battered woman who goes underground may well “result in an unreasonable financial burden” or feel “unreasonably difficult,” both valid reasons for withdrawal under the Rules.<sup>76</sup> The lawyer may not get paid on time, or at all. The lawyer may find herself bombarded with legal actions by the abuser or his counsel.<sup>77</sup> The lawyer may find the stress of dealing with the abuser on behalf of an absent client too taxing. All of these are acceptable reasons to withdraw from representation, but to best serve the potential client, the attorney should make every effort to determine whether she is likely to be susceptible to these pressures before undertaking the representation. If the lawyer does withdraw, she should do so without revealing information that could endanger the client.

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<sup>74</sup> Deborah Epstein, *Fighting Domestic Violence in the Nation's Capitol*, 3 GEO. J. ON FIGHTING POVERTY 93 (1995); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511 (2003).

<sup>75</sup> K.J. Wilson counsels that no more than two people, preferably one, know the battered woman's whereabouts while underground. WILSON, *supra* note 5, at 94.

<sup>76</sup> MODEL RULES OF PROF'L CONDUCT 1.16(b)(5).

<sup>77</sup> See, e.g., *Davey v. Dolan*, 453 F.Supp.2d 749 (S.D.N.Y. 2006) (enjoining the plaintiff from filing additional claims related to the end of his marriage without leave of court because of his use of the courts to harass his ex-wife, who he had abused physically).

## B. The Attorney's Ethical Obligations to Others

The attorney representing a battered woman who goes underground must consider not only her ethical obligations to her client, but also to third parties. Rule 3.3 precludes a lawyer from offering evidence to a tribunal that a lawyer knows to be false.<sup>78</sup> Similarly, pursuant to Rule 4.1, a lawyer may not make a false statement of material fact to a third person.<sup>79</sup> The lawyer must decide how to respond when asked by the court on the record to verify the client's current address, or what information to disclose to the creditor who demands to know whether "Cathy Gordon" is the name the client is currently using, though it is not her given name. Certainly the lawyer's duty to maintain the client's confidences is paramount so long as the party making the request is not entitled to such information by law. But when disclosure is required by law, the attorney faces a dilemma: assert confidentiality and endanger yourself (your professional reputation, your standing with the court) or disclose the information and endanger your client.<sup>80</sup>

It may seem that the safest posture, as criminal defense lawyers in movies have long believed, is ignorance. Just as criminal defense lawyers sometimes believe they are better off not knowing their client's version of the facts (lest the client admit to the crime),<sup>81</sup> it may seem best for the lawyer representing an underground client to know as little as possible about the client's identifying information. The lawyer cannot knowingly offer false evidence or make a false statement of material fact if the lawyer does not know what the truth is. The problem with such a strategy, however, is that avoiding essential information about the client's case may undermine the attorney's ability to provide competent representation.<sup>82</sup> Rule 1.1 defines competence as requiring "thoroughness and preparation."<sup>83</sup> Fact investigation is certainly central to both thoroughness and preparation; deliberately avoiding certain facts could preclude the lawyer from

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<sup>78</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3 (2006) *see also* MODEL RULES OF PROF'L CONDUCT 8.4 (prohibiting attorneys from engaging in acts prejudicial to the administration of justice).

<sup>79</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1 (2006).

<sup>80</sup> In a judicial proceeding, the attorney-client privilege is implicated when an attorney is asked to disclose confidential information. For example, in *People v. Chappell*, the attorney was asked for her client's whereabouts; the attorney replied that that information was protected by the attorney-client privilege. *People v. Chappell*, 927 P. 2d 829, 830 (Colo. 1996). The lawyer was found to have violated COLORADO RULE OF PROFESSIONAL CONDUCT R. 3.3(a)(2) by failing to disclose a material fact to the tribunal in order to prevent a criminal or fraudulent act by the client. *Id.*

<sup>81</sup> Randolph Braccialarghe, *Why Were Perry Mason's Clients Always Innocent? The Criminal Lawyer's Moral Dilemma — the Criminal Defendant Who Tells His Lawyer He Is Guilty*, 39 VAL. U. L. REV. 65, 72-73 (2004); *but see* ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1470 (1981) (stating "A lawyer cannot escape responsibility by avoiding inquiry."). For a discussion of the moral and ethical implications of "willful blindness," see David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999).

<sup>82</sup> Robert Rubinson, *Attorney Fact-Finding, Ethical Decision-Making, and the Methodology of Law*, 45 ST. LOUIS U.L.J. 1145, 1204 (2001).

<sup>83</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006).

performing competently. Even avoiding knowledge of the client's current address could have serious implications for the competency of representation—for example, if a legal action was filed in an inappropriate venue because of the lawyer's decision to refrain from ascertaining the client's exact whereabouts.

A similar question involves the attorney's duty under Rule 3.4 to refrain from obstructing access to evidence or concealing materials with evidentiary value.<sup>84</sup> The attorney's unwillingness to disclose the whereabouts of a client could constitute an unlawful obstruction of access to evidence. Certainly the opposing party is deprived of the opportunity to inquire into relevant facets of the client's life as a result of the refusal to provide access to the client. The client cannot be personally served or deposed; her neighbors, employment, friends and finances all remain hidden. Particularly in a custody battle, where information about the child's adjustment to home, school and community is essential to establish the child's best interests (the standard ultimately governing the court's decision),<sup>85</sup> strong arguments could be made that denial of access to information unfairly prejudices the opposing party's case. Unfair and unlawful are two different standards, however; the attorney representing the underground client must stand firm against disclosure so long as doing so is not unlawful.<sup>86</sup>

#### IV. THE ETHICS OF COUNSELING WOMEN TO USE THE LEGAL SYSTEM

So, if Fran Benedetto had entered my office and asked about her options, what would I have told her? That going underground raises a host of legal issues. That taking her son, Robert, would significantly complicate the legal landscape. Given my professional ethical obligations, I could not advise her to withhold her son, as that might be tantamount to counseling her to commit a crime,<sup>87</sup> although I could describe the potential consequences of doing so. But could I, in good conscience, have urged her to turn to the legal system instead of fleeing? Fran had not sought a restraining order, had not filed for custody or divorce. I would certainly have had a professional ethical obligation to counsel her about these options. But I think I would have had a personal ethical obligation to tell her about the many pitfalls that could await her within the system as well. The duty

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<sup>84</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2006).

<sup>85</sup> See Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449 (2005).

<sup>86</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2006). Of course, the decision not to disclose would likely have grave repercussions for the custody case and could easily result in the battered mother losing custody of her child. For that reason, the decision not to disclose must be discussed with and should be ratified by the client, as contemplated by Rule 1.6(a).

<sup>87</sup> Fran was a resident of New York, a state whose law on the application of custodial interference statutes is ambiguous. Klein et al., *supra* note 29, at 110-11. It is possible that taking Robert out of state and withholding his whereabouts from his father constituted custodial interference, even though no custody order existed when she fled.



to give candid advice necessarily includes the duty to give full advice—to engage the client in a comprehensive discussion of the risks and benefits of all her potential choices so that her decision is an informed one. Before counseling Fran Benedetto, then, I would have to take stock of the experiences I have had with the court system in my years as an advocate for battered women and what I have learned in the research I have done on the perils of turning to the legal system.

We could have started by discussing her husband, Bobby. I would have asked whether she believed that Bobby's violence could be curbed through court action and if she would consider bringing criminal charges against Bobby. We could discuss the likelihood of conviction and imprisonment<sup>88</sup> as well as the effect of his father's imprisonment on her son and on her relationship with her son. If she felt uncomfortable engaging the criminal system, we could talk about the civil system instead. We would discuss whether she believed Bobby would abide by the terms of a protective order, whether Bobby, a police officer, respected the law sufficiently that violating a court order would deter him from further violence.<sup>89</sup> We would have to consider whether Bobby's fellow officers would actually enforce her court order if she needed their assistance.<sup>90</sup> Some abusers make threats about what will happen if their victims turn to the legal system; had Bobby ever made such threats? Fran would surely have known that Bobby's job would be in jeopardy if she filed criminal charges or sought a restraining order;<sup>91</sup> we would need to discuss the impact Bobby's losing his job would have on her safety as well as her economic viability. We would have come back again and again to the same question: could the legal system keep Fran Benedetto safe?

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<sup>88</sup> Domestic violence crimes that could be characterized as felonies are frequently charged and tried as misdemeanors instead, and even when prosecutors are able to obtain convictions, the punishment is often probation and batterers treatment rather than incarceration. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508 (1998); Barbara J. Hart, *The Legal Road to Freedom*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 8 (1993), available at [www.mincava.umn.edu/documents/hart/legalro.shtml](http://www.mincava.umn.edu/documents/hart/legalro.shtml).

<sup>89</sup> JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE 85 (1999) (quoting Judge Albert Kramer on men who batter: "There is no other group of perpetrators of violence that is more tenaciously resistant to court orders and court efforts to curb their violence and prevent their almost relentless pursuit of their victims.").

<sup>90</sup> For a discussion of the issues surrounding police response to domestic violence involving police officers, see Diane Wetendorf, *The Impact of Police-Perpetrated Domestic Violence*, in DOMESTIC VIOLENCE BY POLICE OFFICERS (Donald C. Sheehan ed. 2000), available at [www.dwetendorf.com/Impact\\_PoliceDV\\_FBI.pdf](http://www.dwetendorf.com/Impact_PoliceDV_FBI.pdf).

<sup>91</sup> Federal law requires that convicted abusers and those subject to protective orders relinquish their guns, a requirement that precludes many police officers from remaining on police forces after such actions have been taken. As a result, some courts are inappropriately expunging the records of police officers or denying protective orders. See generally Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1 (2005); see also Peter Bronson, *A Misdemeanor Should Not Become a Death Penalty for a Man's Career*, THE CINCINNATI ENQUIRER (Ohio), Oct. 3, 2006, at 7B (arguing that the ban on owning firearms is unfair to police officers convicted of domestic violence offenses).

Several years ago, I wrote an article documenting the many ways in which the legal system fails women and children who seek protection.<sup>92</sup> During the symposium in which I presented the article, Jane Aiken, a professor at Washington University School of Law in St. Louis and longtime advocate for battered women, asked me why, if I was so critical of what the legal system had to offer battered women, I continued to work within that system. I was taken aback; although quick to criticize, I had never really considered abandoning the legal system or my legal work with battered women. I gave a predictable and unsatisfying response: because it works for some women, and because it is the only option that we have. But that exchange spurred me to question more deeply why I continue to work within the legal system, as well as, in the context of this symposium, the personal and legal ethical issues posed by counseling women to interact with a system that provides no certain promises of protection and, in fact, can leave women in substantially worse positions than they were before they sought the court's assistance. Battered women who turn to the legal system cannot always trust it to keep their identifying information confidential. Although a number of states have passed confidentiality statutes,<sup>93</sup> and courts have implemented policies designed to safeguard the locations of battered women, those programs are only as reliable as the human beings who run them.

After substantial planning and saving, a battered mother manages to find a new apartment that she can afford for herself and her daughter. The move is essential to her safety—her abuser has come to her home and destroyed property, physically abused her, and called the police with false complaints against her, sending them to her home to harass her. The move gives her a sense of security; despite an ongoing custody battle with her abuser, she knows that he can no longer come to her home to abuse and harass her. Her attorney files a motion to keep her address confidential, citing to the protective orders and criminal convictions that attest to the abuse she has endured.

While that motion is pending, her abuser requests that a guardian *ad litem* be appointed to represent their minor child. The court grants the motion; the forms used to appoint a guardian require disclosure of the mother's address. The mother's counsel objects to providing the address, but is told that there is no alternative, and, with the assurances of the court staff that they will keep the mother's address confidential, nervously provides it. The court, in turn, provides the address to the guardian *ad litem*—but fails to admonish him to keep it confidential. The guardian *ad litem* writes a letter to all counsel including her address; the abuser's counsel then sends a copy to his client before the mother's counsel has the chance to stop him. The abuser once again has his victim's address. The peace of mind the victim finally experienced from the knowledge that her address was confidential is shattered. In short order, the months of hard work the mother put into shielding herself from abuse has been undone—by the court system that claims that it will protect her.

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<sup>92</sup> Leigh Goodmark, *Law is the Answer? Do We Know That For Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004).

<sup>93</sup> See, e.g., Even, *supra* note 4.

Battered women who turn to the legal system cannot always trust that system to be interested in or sensitive to the abuse that they have suffered.<sup>94</sup> While the system might ultimately provide some protection for the woman, that protection may come at a cost. A woman who had been severely abused throughout the course of her nine year marriage finally decided to turn to the court system for assistance. Over the years, she lied to medical personnel about the origins of her injuries and refused when police repeatedly asked her to seek legal protection. Even after her husband chased her into the street and continued beating her in front of onlookers and, eventually, the police, she would not press charges against him. Coming from a culture that prizes women's loyalty to their husbands, she did not feel that she could publicly disclose his abuse and, in so doing, admit that her marriage was a failure. Only after he held a knife to her throat and threatened to kill her did she ask her pastor for help and enter a shelter. In a cruelly ironic twist, the housing her church found for her after she left the shelter was located just blocks from her abuser's new home; he saw her on several occasions and threatened her a number of times. Recognizing the danger she faced,<sup>95</sup> she asked the court for protection.

Finally turning to the court for assistance was a tremendously conflicted decision for this woman, and one she approached with great trepidation—it would be the first time that she would publicly testify to her abuser's crimes. Going before the court to request a temporary protective order, she described her nine year ordeal: the beatings that started soon after her marriage, the suicide attempt when she felt she could no longer endure the abuse, the inspection of her genitals each time she came home to ensure that she had not been intimate with anyone else, the isolation from her family and friends, the beating in the street, and the knife and the threat that proved to be the final straw. Ultimately she received protection from the court, but protection laced with skepticism, misunderstanding and insensitivity. Despite the low standard of proof to secure a temporary protective order,<sup>96</sup> the judicial officer made her repeat the abuser's threat to send her back to her native country in a body bag three times. After she described her abuser watching her flee but not following her after he made this threat, the court asked, “[w]hy didn't he follow you out to the street and beat you this time, since he beat you in the street before?” He repeatedly probed why she had not reported the abuse earlier, and why she had not left the marriage. The judicial officer's tone, body language and demeanor all suggested his skepticism of her story. He ultimately granted her temporary protective order—all of this for seven days protection—and another judge granted her final protective order, lasting for a year. While the system had given her the protection she sought, the woman felt so revictimized by the process that she believed she might have been

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<sup>94</sup> As Kathleen Waits notes, protecting battered women using the legal system requires changing attitudes more than changing the law. Waits, *supra* note 57, at 72-74.

<sup>95</sup> For a discussion of the dangers posed by separation, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

<sup>96</sup> The client needed to prove only reasonable grounds to believe abuse occurred, a very low evidentiary standard. See MD. CODE ANN., FAM. LAW. 4-505 (a)(1) (2004).

better off without it.<sup>97</sup> When her abuser predictably violated the order, the woman refused to return to court to enforce it. Her first brush with the legal system likely influenced that decision.

Battered women who turn to the legal system for protection from abuse sometimes find that the system provides no assistance at all. Depending on the definition of domestic violence or abuse used in state law, the law may not reach the violence experienced by the victim. In a recent Maryland case, a woman was denied a protective order by the court because the grounds she stated in her petition did not meet the state's definition of abuse, although she was clearly afraid of her boyfriend and apprehensive about what he might do next.<sup>98</sup> She was killed by her boyfriend six weeks later.<sup>99</sup> The judge in that case did nothing wrong; without some showing of assault or a basis to establish a reasonable fear of imminent serious bodily harm, the judge's hands were tied.<sup>100</sup> The law focuses heavily on the physical manifestations of abuse; emotional abuse, isolation, economic abuse and misgivings about what might happen next are not sufficient to trigger protection in many states.<sup>101</sup>

Other judges are more culpable in depriving women of the protection of the laws. In a New York village court, Justice Donald R. Roberts, a former state trooper, denied assistance to a mother of four who sought a protective order after her husband choked her, kicked her in the stomach and threatened to kill her. Justice Roberts later told the court clerk, "Every woman needs a good pounding every now and then."<sup>102</sup> In a notorious Maryland case, Yvette Cade requested the assistance of the court when her ex-husband, Roger Hargrave, asked to have her protective order dismissed.<sup>103</sup> Ms. Cade attempted to present Judge Richard Palumbo with pictures showing the damage he continued to do to her home and

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<sup>97</sup> Waits, *supra* note 57, at 74.

<sup>98</sup> Ruben Castaneda, *Woman Denied Court's Help is Killed by Boyfriend*, WASH. POST, Oct. 5, 2006, at B6.

<sup>99</sup> *Id.*

<sup>100</sup> Maryland law applies an individualized objective standard to the determination of whether the victim's fear of imminent serious bodily harm is reasonable. *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 138-39 (2001). Even applying that standard, the judge could not find that the fear was reasonable. *Not the Judge's Fault: But the System Didn't Work for Jackie Lewis*, WASH. POST, Oct. 8, 2006, at B6.

<sup>101</sup> Joy M. Bingham, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 N.D. L. REV. 837, 844 (2005) (explaining that many state statutes do not provide protection against emotional abuse).

<sup>102</sup> William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1. Other justices were similarly insensitive; the article details how one justice called a victim of abuse and pressured her to drop the charges against the son of former clients, how another asked during an arraignment whether the incident was "just a Saturday night brawl where he smacks her and she wants him back in the morning," and how a third laughed and asked, "What was wrong with this?" when arraigning a man on charges that he hit his wife in the face with a telephone. *Id.* (internal quotations omitted).

<sup>103</sup> Allison Klein & Ruben Castaneda, *Md. Victim of Burning Told Judge of Fears*, WASH. POST, Oct. 13, 2005, at B1.

described the fear that she and her daughter experienced. When asked if she wanted to go to counseling with her abuser, Ms. Cade stated that she wanted a divorce. Judge Palumbo responded that he wanted to be 6'5", but that neither of them could get what they wanted from his court. Judge Palumbo dismissed Ms. Cade's concerns and dismissed her protective order. Three weeks later, Hargrave walked into Ms. Cade's place of employment, doused her with gasoline and set her on fire. Ms. Cade suffered third degree burns over more than half of her body.<sup>104</sup>

That inability to rely on the courts for protection carries over into custody cases. *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* tells the stories of forty battered women who turned to the family courts in Massachusetts for assistance and instead experienced what the authors of the report characterize as "human rights violations."<sup>105</sup> Of the forty women interviewed, 65% reported that their abusers had received some form of custody of their children despite a history of physical, sexual, psychological and/or economic abuse;<sup>106</sup> in more than half of the cases, state actors recommended or granted joint or sole physical custody to abusers.<sup>107</sup> Judges refused to hear evidence about the past or current abuse and downplayed the women's concerns about their safety and the safety of their children.<sup>108</sup>

These cases are further complicated by accusations of parental alienation syndrome, which may sway judges and other professionals. Women who insist that courts hear evidence of their abuse are losing custody to abusers who argue that in telling these stories, the mothers are turning their children against them.<sup>109</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> CARRIE CUTHBERT ET AL., *BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS* 8 (2002).

<sup>106</sup> *Id.* at 16.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 21-22.

<sup>109</sup> Sarah Childress, *Fighting Over the Kids: Battered Spouses Take Aim at a Controversial Custody Strategy*, NEWSWEEK, Sept. 25, 2006, at 35. The article tells the story of Genia Shockome, who, after enduring six years of abuse, left her husband in Texas and moved with her children to New York. Despite a plea deal in which he agreed to stay away from her, her husband contended he was never abusive and argued that her allegations of abuse turned the children against him. A court agreed, and granted him full custody of the children, depriving Genia of any contact with them. See also Kiran Krishnamurthy, *Judge Grants Sole Custody of 9-year-old Girl to Father*, TIMES-DISPATCH (Richmond, Va.), Jan. 19, 2007 (describing case in which judge awarded custody to father who argued Parental Alienation Syndrome, despite medical expert's testimony that he had physically and sexually abused the child).

Mothers who allege abuse of their children face even greater hostility from the courts. As Ann Haralambie, author of *Child Sexual Abuse in Civil Cases — A Guide to Custody and Tort Actions*, notes, "[t]hose claiming to have been falsely accused have come forward and have really impacted common knowledge and perception. Mothers are often seen as vindictive, and such a high degree of scrutiny is applied to the mother, that the evaluators give anything but an objective evaluation." Miriam Raftery, *Desperate Moms Taking Abused Children Underground*, WOMEN'S E-NEWS, Sept.

Despite being derided as “junk science” by the National Council of Juvenile and Family Court Judges, “[p]arental alienation is now the leading defense for parents accused of abuse in custody cases.”<sup>110</sup> And according to Dr. Jay Silverman, the argument works. He recently found that abusers were granted custody in 54% of custody cases involving documented spouse abuse; in almost all of those cases, the abusers alleged parental alienation syndrome.<sup>111</sup> Battered women in a number of other states have publicized similarly negative experiences with family courts,<sup>112</sup> and advocates receive letters, phone calls and e-mails every day from women frustrated by the justice system’s refusal to keep them and their children safe.<sup>113</sup>

One could dismiss the stories I have told as anecdotal evidence, not representative of battered women’s experiences with the court system as a whole.<sup>114</sup> But in counseling clients, a lawyer must rely on her experiences and the experiences of her clients in negotiating the legal system.<sup>115</sup> I know from my own practice and from my study of the experiences of battered women in other jurisdictions that the legal system fails them in a variety of ways. Given that knowledge, I am ethically conflicted when a client wants to explore the pros and cons of going underground. Can I reassure her that the legal system is a viable alternative, knowing what I know about that system, or am I honest with her about its drawbacks? Can I, in good faith, counsel her that the legal system will protect her? And if I describe the system as I understand it, am I violating the rules of professional conduct?

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7, 2006, available at [www.womensenews.org/article.cfm/dyn/aid/676/context/cover](http://www.womensenews.org/article.cfm/dyn/aid/676/context/cover).

Of course, attorneys are ethically precluded from presenting claims of abuse if they believe those claims to be spurious, but studies suggest that false allegations of sexual abuse in child custody cases are rare. See, e.g., Nancy Thoennes & Patricia Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 151-163 (1990).

<sup>110</sup> Childress, *supra* note 109.

<sup>111</sup> *Id.*

<sup>112</sup> See, e.g., Emily Previti, *Custody Case Raises Energy, Awareness*, WEEKLY JOURNALS (Chi.), Sept. 29, 2006, available at <http://victimsoflaw.net/Motherhood.htm> (describing picketing by the Illinois Coalition for Family Court Reform, a group headed by a battered woman who lost custody of her child).

<sup>113</sup> After *Battered Mothers Speak Out* was released, Carrie Cuthbert, the lead author, received regular calls from battered women who told her, “This is my story. Your project made me feel like I’m not alone.” Wellesley Centers for Women, *Battered Mothers Fight to Survive the Family Court System: Research and Action Report* (Fall/Winter 2003), <http://www.wcwoonline.org/o-rr25-1b.html>. Like Ms. Cuthbert, I receive unsolicited e-mails from women all over the country telling me of their battles with both former partners and the judicial system.

<sup>114</sup> I have previously argued that the narratives of battered women serve as powerful evidence of the need for court reform. See Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers’ Testimony Project, Women’s Narratives, and Court Reform*, 37 ARIZ. STATE L.J. 709 (2005).

<sup>115</sup> William Felstiner and Austin Sarat describe the lawyer-client relationship as “a process of story-telling and interrogation in which lawyer and client seek to produce for each other a satisfying rendition of her distinctive world.” William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1454-55 (1992).

In her role as counselor, the lawyer has a duty to exercise independent professional judgment and render candid advice. That professional judgment is necessarily informed by the legal knowledge required by Rule 1.1.<sup>116</sup> Legal knowledge can take a number of forms. Knowledge can mean an understanding of the law, as set forth in statutes and cases. The judge may be unable to hold the abuser pending trial for a misdemeanor domestic violence offense, for example, which may influence the battered woman's decision to flee rather than pursuing a criminal case.

Legal knowledge can also include institutional knowledge, however—an understanding of how a particular case is likely to be handled in the legal system with which the client will engage not as a function of the law, but as a function of the actors charged with enforcing those laws. If the lawyer knows that the judges in a particular jurisdiction are unlikely to sentence an abuser to significant jail time (enough to ensure that the battered woman can safely reestablish herself elsewhere), the lawyer has a duty to share this information with her client so that her client can assess whether using the criminal system can keep her safe.

The substance of the advice that the lawyer can render is highly contextual. In some systems, protective orders are not difficult to obtain, police and judges take those orders seriously, orders are strictly enforced, and violations are punished quickly and meaningfully. Judges have been trained on the dynamics of domestic violence and are encouraged to treat victims of violence with respect, assuming that they are as credible as any other litigant before the court. In these systems, the lawyer can confidently counsel the client that the legal system will afford her some protection, though no lawyer can ever promise that the legal system will thwart an abuser determined to do harm.

In other systems, however, the eligibility criteria for protective orders are narrow, the standards of proof high, the judges and police untrained and the culture dismissive of violence against women. Domestic violence claims made in the context of divorce or custody actions are viewed with skepticism, seen as a way to take advantage of laws requiring consideration of fault in alimony and property distribution and of violence in custody and visitation determinations. Such claims may even cause finders of fact to view battered women not as victims of violence, but as perpetrators of alienation. In such systems, the lawyer has an ethical duty—her duty as a counselor—to inform the client of the obstacles she may face and to help her think creatively about other options that may be available to her, including flight.<sup>117</sup>

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<sup>116</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006).

<sup>117</sup> As noted earlier, however, the lawyer cannot counsel the client to engage in illegal or fraudulent activity. If fleeing the jurisdiction will require the client to commit a criminal act, like parental kidnapping or custodial interference, the lawyer can discuss the consequences of that act, but cannot encourage the client to undertake the course of conduct. One question this raises is whether discussing the positive consequences of violating the law breaches the lawyer's duty under Rule 1.2(d). While fleeing with the child may be illegal, it may also be a way to ensure that a batterer no longer has access, at least for some period of time, to the mother or child.

Too often, advocates for battered women assume that the legal system is the primary or the only alternative available to battered women seeking safety. For the past twenty years, the battered women's movement has focused on developing criminal and civil legal responses to domestic violence, lobbying for resources to build those systems and measuring success in assisting battered women by the percentages of cases prosecuted (with or without victim involvement) or by the numbers of women who seek restraining orders.<sup>118</sup> Funding has in turn followed this emphasis on the legal system, to the detriment of the development of non-legal interventions.<sup>119</sup> As a result, turning to the system isn't presented as one of a number of options, but as the only option. When that system fails, battered women are left with the feeling that there is nowhere else to turn, because nothing else has been presented to them.<sup>120</sup> And the system does fail, often enough that it should give pause to advocates uncritically counseling battered women to engage with it.

The Model Rules of Professional Conduct (or state equivalents thereof) impose an external constraint on attorney behavior. But a lawyer may also feel, as a matter of her personal ethical beliefs, a responsibility to warn her client of the unintended consequences of engaging with the system.<sup>121</sup> Much like the attorney in *People v. Chappel*, who counseled her client "as her lawyer to stay, but as a mother to run,"<sup>122</sup> lawyers may experience conflicts between their legal ethical duties and their personal ethical codes.

Years ago, I worked with a client who was considering filing for a protective order, but was concerned about whether that order would include visitation provisions that would require her to remain in the jurisdiction. I counseled her that the order would likely contain just such a provision; the judges

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<sup>118</sup> Goodmark, *supra* note 92, at 10-18.

<sup>119</sup> *Id.* at 40-41.

<sup>120</sup> The literature on lawyers as problems solvers suggests that lawyers "[t]hink out of the box (the legal box of precedent — the ways things are usually done)." Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 913 (2000). "A good problem solver must take the problem, transaction, or matter presented by the client, analyze what the problem or situation requires, and then use creative abilities to solve, resolve, arrange, structure, or transform the situation so it is made better for the client, not worse" — with no assumption that the legal system will provide the optimal setting for achieving that goal. *Id.* at 915; see also Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers By Teaching Law Students to Exercise Critical Judgment as Creative Problem Solvers*, 32 AKRON L. REV. 107, 124 (1999) (describing how law students assumed that litigation was the appropriate solution to a client's problem although resolving the dispute without litigation was, from the professors' perspectives, in the best interest of every party).

<sup>121</sup> Austin Sarat and William L.F. Felstiner have argued that despite their ethical obligations, most lawyers do not defend the legal order; in fact they use cynicism about the legal system as a means of controlling clients and maintaining professional authority. Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1665 (1989). My cynicism about the legal system is, I hope, employed in just the opposite pursuit — to empower clients to make choices that are most likely to keep them safe.

<sup>122</sup> *People v. Chappel*, 927 P. 2d 829 (Colo. 1996).



in that jurisdiction routinely awarded visitation to abusers in even the worst cases. I advised her of the legal ramifications of leaving the jurisdiction if such an order was entered and commiserated with her as she debated between the promise of safety offered by a court order and the desire to leave the area without leaving a trace. I did not feel comfortable counseling her to leave; I had little faith in the power of the protective order to keep her safe, but knew that if she fled with her child, she might be vulnerable to a charge of parental kidnapping.<sup>123</sup>

When the battered women's program she had been working with informed me that they had paid for her train ticket and seen her off, I was relieved and satisfied that she had made the choice with the greatest chance of ensuring safety for herself and her child. I did not cross the line between lawyer and mother (at that time, I was not yet a mother; I can only wonder how I would counsel her now, after having children of my own), but I sorely wanted to tell her to flee. The best I could do was to warn her of how the system could bind her to her abuser, holding out an illusory promise of protection from his abuse on one hand as it deprived her of her freedom to leave on the other.

The Preamble to the Model Rules states that "a lawyer should further the public's . . . confidence in the rules of law and the justice system."<sup>124</sup> Advising clients not to engage the legal system certainly runs counter to the spirit of this rule. Is it unethical, then, for a lawyer to be cynical about the legal system? Not so long as the lawyer works to "seek improvement of the law."<sup>125</sup> The Preamble prompts lawyers to "be mindful of deficiencies in the administration of justice" and to "employ . . . knowledge in reform of the law."<sup>126</sup> Similarly, Rule 6.1(b)(3) acknowledges the fallibility of the law by encouraging attorneys to engage in *pro bono* work designed to improve "the law, the legal system or the legal profession."<sup>127</sup>

The Rules contemplate situations where the law fails to deliver on its promises of justice, equality, and safety and tasks lawyers with remedying those failures. This is the real answer to Professor Aiken's question: I continue to work in the legal system, despite my deep skepticism about its utility for battered women, because I have a duty to work from within that system to seek change. Only by working within the legal system can lawyers document the ways that it fails battered women and attempt to remedy those failures. Working within the legal system gives lawyers the ability to teach judicial officers and others, through the cases that we bring, how their biases about battered women are driving negative results for these women and children. By presenting the lives of

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<sup>123</sup> In the District of Columbia, the parental kidnapping law applies regardless of whether a custody or visitation order is currently in place. D.C. Code Ann. § 16-1021 (2006) *et seq.* The statute contains a defense for a parent fleeing from imminent physical harm, but it is almost impossible to know how that affirmative defense will be received by the court, or how a civil court adjudicating custody or visitation will interpret the battered mother's flight.

<sup>124</sup> MODEL RULES OF PROF'L CONDUCT Preamble cmt. 6 (2006).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> MODEL RULES OF PROF'L CONDUCT R. 6.1(b)(3) (2005).

battered women and their children and pressing judges to find solutions that will keep them safe, by working for change within the system, lawyers earn the right to criticize that system when it fails and fulfill their ethical responsibilities by doing so.

The Rules permit lawyers to criticize the system so long as they also work to reform the system. For each client, then, the lawyer has a duty to counsel the client about what she can expect from the system, to help her understand the pros and cons of working within the system, and, if she chooses to experience the system, to ensure that the system does her no harm while, if possible, using that experience with the system to make it more hospitable to the next battered woman who seeks its protection.

## V. CONCLUSION

At the close of her story, Fran Benedetto asserts, "I don't give a damn for the law. What did the law ever do for me?"<sup>128</sup> One could argue that because Fran never consulted a lawyer, never attempted to seek protection through the legal system, her dismissal of the law as an effective tool is unfair. Had she sought counsel, though, the outcome may not have been much different. She could have gone to a lawyer without an understanding of domestic violence, who didn't know the questions to ask and was not attentive to the context in which her case arose, who counseled her that the system would bring safety for her and Robert and accountability for Bobby. Fran might have gotten a protective order and watched as her husband's fellow police officers refused to enforce it. She might have cooperated with prosecutors, only to find that judges were unwilling to convict or punish him. She might have lost custody of her son, or been granted custody, but had a judge award visitation that continued to put her in harm's—in Bobby's--way.

Or Fran could have gone to one of the thousands of lawyers throughout the country who specialize in working with victims of violence, who understand the context and the issues and the fears, who might have helped her articulate her goals, consider her options, understand how the legal system worked and the obstacles she might face, and who might feel ambivalent at best about how safe Fran would actually be if she turned to the legal system. A lawyer who might have been very relieved (not knowing what would happen to her in the future) when Fran fled. A lawyer just like me.

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<sup>128</sup> QUINDLEN, *supra* note 1, at 274.

