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LIFTING THE VEIL: THE INTERSECTIONALITY OF ETHICS, CULTURE, AND GENDER BIAS IN DOMESTIC VIOLENCE CASES

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I. INTRODUCTION

This article will explore both theoretical and pragmatic questions which arise out of deconstructing the term “objective and competent” representation inside the paradigm of zealous representation, when viewed through the lens of domestic violence cases. These cases invoke highly problematic issues when examined in a homogeneous, rather than a heterogeneous, context. The article will argue that the “ghettoization” or rendering of domestic violence cases to a non-specialization framework ignores patterns and practice issues which arise out of a failure of the legal profession to understand the many ramifications of domestic violence in a range of legal areas. Compression then occurs, which constricts the understanding of the dynamics that may cause the domestic violence to occur and the response to this problem by different subsets of our population. This is further complicated by racial and cultural gender stereotypes rooted in the legal profession itself. The article will also propose a series of recommendations regarding the preparation and continuing legal education of those practicing, counseling and rendering opinions in this area.

Recent news reports and surveys highlighting the continuing problem of domestic violence in our country test the resolve of the legal profession to provide competent representation in this area. Values expounded in our Model Rules of Professional Conduct

require that “lawyers play a vital role in the preservation of society.”¹ Thus, we have a special responsibility to not just provide representation when called upon, but to act affirmatively to address the recognized problems in our society. The rules governing our professional conduct underscore the idea that lawyers must engage in activities that improve the law, the legal system, and the profession.

II. THE PROBLEM

“If I leave, where will I go? What about money? What about my kids? It’s getting worse every time but I’m afraid to leave. . . .”² This type of hesitation, doubt, and fear are very real issues in domestic violence cases. Therefore, it is critical for lawyers and judges to have the requisite knowledge and understanding to respond promptly and properly to domestic violence situations. Without proper knowledge and training, “lawyers may actually harm, rather than help, their clients who are victims of domestic violence.”³ This would constitute “a clear violation of their ethical and legal obligation to help clients.”⁴ For example, without proper knowledge and training, judges may enter orders with damaging results.⁵ This article highlights a range of ethical concerns that are intricately embedded in domestic violence issues, which lawyers and judges need to consciously and carefully consider in their representation and deliberations.

Lawyers are obligated to provide their clients with competent representation.⁶ “Domestic violence often [presents] an amalgam of legal issues.”⁷ Generally, the Model Rules of Professional Conduct and the Model Code of Professional Responsibility do not provide

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¹ MODEL RULES OF PROF'L CONDUCT PMBL (2003).

² Allen Dowdell, *I Got Flowers Today*, <http://twotrees.www.50megs.com/poetry/flowers.html>. This poem was written by a man whose good friend, at the time, was in an abusive relationship.

³ John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 209 (2003).

⁴ *Id.*

⁵ *Id.*

⁶ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

⁷ Sarah M. Buel, *The Pedagogy of Domestic Violence Law: Situating Domestic Violence In Law Schools, Adding The Lenses of Race and Class*, 11 AM.U. J. GENDER SOC. POL'Y & L. 309, 343 (2003).

practitioners with sufficient ethical and substantive guidance in domestic violence issues.⁸ While both “offer[] a broad framework that may be sufficient for counsel handling legal matters without the complex layering of critical issues inherent in most domestic violence litigation,”⁹ many lawyers fail to satisfy this standard when representing clients of domestic violence.¹⁰

One major barrier to the provision of effective representation is the dangerous and faulty presumption, which many lawyers make, that domestic violence will only arise in family law cases and that a “one size fits all” approach will work.¹¹ Since those lawyers have little or no involvement with family law cases, they mistakenly conclude that domestic violence is not a matter of concern for their practices – a seriously mistaken assumption.¹²

This mistake has grave consequences for both a lawyer and a client, in that “virtually every lawyer will encounter domestic violence in his or her practice.”¹³ Unfortunately, because the operative level of knowledge and understanding about domestic violence is not as prevalent among lawyers as it should be, many battered women receive ineffective legal assistance.¹⁴

“The sheer incidents of domestic violence in this country make it clear that attorneys who ignore family violence issues may profoundly harm their clients and violate their professional and ethical obligations.”¹⁵ Based on reported cases, nearly one-third of American women are physically or sexually abused at some time during their lives.¹⁶

Contrary to the popular assumption about the limited sources for domestic violence cases, domestic violence issues can be embedded in a myriad set of legal situations.¹⁷ In addition, “counsel must become proficient at addressing the relevance of domestic violence to the

⁸ *Id.*

⁹ *Id.* at 344.

¹⁰ See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 218 (2003).

¹¹ See generally *id.* at 218.

¹² Burman, *supra* note 3, at 217.

¹³ *Id.*

¹⁴ See *id.*

¹⁵ Lisa E. Martin, *Providing Equal Justice for The Domestic Violence Victim: Due Process and The Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 335 (1998-1999).

¹⁶ In the year 2001, more than half a million American women were victims of non-fatal violence committed by an intimate partner. See Bureau of Justice Statistics Crime Data Brief, Intimate Partner Violence, 1993-2001, February 2003 (Hereinafter “BJSCD Brief”).

¹⁷ Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between the “Truly National and the Truly Local,”* 42 B.C. L. REV. 1081, 1128-1129 (2001).

individual case.”¹⁸ For example, a domestic violence situation may be present where an estate-planning lawyer is asked to represent a married couple.¹⁹ In a similar manner, a real estate lawyer representing a couple in a property transaction, or a corporate lawyer representing a business entity whose constituents include intimate partners, may find himself needing to address domestic violence issues.²⁰ Domestic violence may also be an issue where a lawyer’s secretary misses work or is unable to work efficiently because of the effects of domestic violence.²¹ In addition, domestic violence issues may also arise when an attorney is assisting a petitioner in obtaining a protective order or suing an abuser in tort. As another illustration, a tax attorney may be responsible for advising a client, who had no idea that her spouse was not filing their joint tax return, about the innocent spouse defense.²² Finally, a prosecutor and a defense attorney could be at odds in a case of an abused woman who has killed her batterer in self-defense.

The necessity for effective and ethical representation is underscored by the facts that of the four million women who are victimized each year nearly two thousand die.²³ “Every day four women die in this country as a result of domestic violence, the euphemism for murders and assaults by husbands and boyfriends. That’s approximately 1,400 women each year, according to the [Federal Bureau of Investigation].”²⁴ Ironically, this number is more than the 170 executions from death penalty cases during the first half of the 1990’s or the 370 executions in the second half of the decade.²⁵ In death penalty cases, several states have acknowledged that the nature of the cases requires specialized attention to ethics and professionalism.²⁶ The sheer magnitude of tragic deaths from domestic violence should highlight the need for similar attention to ethics and professionalism in domestic violence cases. As many domestic violence cases

¹⁸ Buel, *supra* note 10, at 265.

¹⁹ See Burman, *supra* note 3.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See BJSCD Brief, *supra* note 16.

²⁴ <http://www.now.org/issues/violence/stats.html> (last visited on Apr. 7, 2008).

²⁵ Laura M. Argys, & H. Naci Mocan, *Who Shall Live And Who Shall Die? An Analysis Of Prisoners On Death Row In The United States*, 33 J. LEG. STUD. 255, 259 (2004); see also The Death Penalty in 2004 Year End Report, Death Penalty Information Center (on file with author), available at <http://www.deathpenaltyinfo.org/DPICyer04.pdf> (reporting 59 executions in 2004 and 65 executions in 2003).

²⁶ A. Maurice Possley & Ken Armstong, *Revamp Urged in Handling of Capital Cases*, CHI. TRIB., Nov. 4, 1999, at N1 (reporting that at least a dozen states “have established minimum standards for defense attorney’s in capital cases”).

involve a similar life and death dilemma and the number of reported deaths is so high, these cases require the same specialized attention to ethics and professionalism. Unfortunately, that is not yet the reality.

In summary, the possibilities for encountering domestic violence situations are endless. Given the pervasiveness of domestic violence, the odds that a lawyer in general practice will never represent either a batterer or a victim are infinitesimally low. Each of these possible scenarios requires at least minimal knowledge about the dynamics involved and the law governing domestic violence. The legal community's professional commitment to provide competent representation elevates the level of knowledge and understanding that all lawyers should have in properly handling domestic relation issues.

As previously observed, too frequently, in both the criminal and civil contexts, attorneys fail to educate themselves on the special concerns that arise when representing clients of domestic violence.²⁷ As a result of their lack of knowledge of domestic violence issues, many attorneys fail to explore and utilize the full spectrum of available legal strategies in these matters.²⁸ "The American Bar Association's Commission on Domestic Violence reports that, overwhelmingly, the technical assistance calls they receive indicate that abuse victims are not receiving adequate representation."²⁹ Attorneys' insufficient understanding of the issues and complexities of domestic violence may impact the representation a client receives in countless different ways.³⁰ "Deficient education on [domestic violence issues] can have catastrophic consequences for the parties involved."³¹ The end result is a double deficit; the clients are underrepresented and the credibility of the bar is diminished.

Lawyers inadvertently failing to ethically represent abuse victims and offenders, as well as those reluctant to handle the cases at all, need support in establishing the requisite knowledge and strategic approaches to provide adequate representation in domestic violence cases. One practical approach would be to insure the inclusion of these issues in the continuing legal education curriculums.

²⁷ See Burman, *supra* note 3, at 218.

²⁸ Buel, *supra* note 7, at 310.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

In addition to attorneys, judges often lack the requisite knowledge to preside over domestic violence cases.³² “Judges are the most visible symbol of our justice system”³³ They are viewed as the pivotal actors who listen to cases with an open mind and offer the decisive words of judgment. “In domestic violence, as in other aspects of the law, how judges respond to cases shapes the responses of those who might use the courts, as well as the entire legal community.”³⁴ Therefore, it is imperative the judiciary and the legal community secure continuous education in the area of domestic violence.

To further compound the complexity of domestic violence matters, when these matters are put under a realistic microscope, the race and socioeconomic status of a battered woman will have a significant impact on the outcome of her case.³⁵ Professional responsibility scholarship often ignores the crucial impact that race and class play in measuring attorney competency.³⁶ The end result is the creation of another hazardous barrier to achieving justice in domestic violence matters. With this variety of ethical concerns as a backdrop, the ensuing discussion will offer a more detailed analysis of these matters and some practical steps to enhance the legal profession and judiciary’s capacity to fairly address these cases.

III. THE PLIGHT OF BATTERED WOMEN SHOULD BE GIVEN SPECIAL CONSIDERATION BY THE JUDICIARY, THE LEGAL PROFESSION, AND THE LARGER COMMUNITY

A. The Judiciary

Increasingly, the victims of domestic violence have sought protective relief from the courts, lawyers and the community. The pattern of unresponsive and ineffective results has left domestic violence victims feeling betrayed and deceived by the allusion of justice.³⁷ For example, many lawyers and advocates for battered women believe that the most effective method of eradicating domestic violence is to prosecute the perpetrators.³⁸ Although prosecution might

³² Buel, *supra* note 7, at 329-330.

³³ Lynn Hecht Schafran, *There’s No Accounting for Judges*, 58 ALB. L. REV. 1063, 1085 (1995).

³⁴ *Id.*

³⁵ Buel, *supra* note 10, at 217.

³⁶ *Id.* at 218.

³⁷ *Id.* at 223.

³⁸ Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman’s Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN’S L.J. 183, 190 (1997). Mills suggest that inflexible policies be reformed to reflect the diversity of battered women’s experiences and to expose the possibility

initially appear to be a simple and preferable solution to domestic violence, policies often do not produce the intended results and in the end only serve to further aggravate the situation.³⁹ For example, “when we force arrest and prosecution upon battered women, they often recant and lie.”⁴⁰ Moreover, prosecution does not guarantee that the batterer will be locked away forever and the battered victim will be free from his violence.⁴¹

Traditional approaches to domestic violence matters do not address the unique needs of individual battered women. As a result, battered women are generally crime victims who the justice system has failed. With this realization in mind, developing strategies to effectively address the plight of battered women should be given heightened consideration by the judiciary, the legal community, and the society at large.⁴²

As noted previously, many judges lack established knowledge and understanding of domestic violence issues. Therefore, they are ill-equipped to determine the critical elements of effective representation or fair judicial attention to these matters.⁴³ Judicial education is a critical necessity to establish a fair and trustful arena for the consideration of domestic violence cases. The judiciary has to be clear and unequivocal regarding its performance standards and expectations to lawyers involved in domestic relations matters. Most judges come to the bench with no training in the area of domestic violence. They are further plagued and riddled by a “lifetime of exposure to the same [mistaken] myths that shape [and bias] the public's attitudes.”⁴⁴ For example, victims are often blamed for causing, contributing, or inviting the abuse they have

that some battered women will need a legal response that does more than arrest and prosecute the batterer. Under such a system, women would be invited to file complains in informal and confidential settings. These reports could be retained for verification of patters of abuse. For women who want them, restraining orders and other legal remedies would be available. Criminal or civil actions would also be provided, but only if the battered woman is physically and emotionally prepared to take that step. Battered women need an array of options and a timeline that respects their individual pace.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 191. .

⁴² See Buel, *supra* note 10, at 224.

⁴³ *Id.*

⁴⁴ Schafran, *supra* note 34, at 1072.

suffered⁴⁵ because of their appearance or behavior. The ever-expanding scope of the mass media has resulted in the wider and more pervasive presence of these contaminating myths.⁴⁶

As a countervailing force, judges must be educated on domestic violence issues.⁴⁷ For meaningful and sustained impact, judicial education must be part of a continuous training program.⁴⁸ Too frequently, the initial introduction to and education on issues relating to violence against women does not equip judges with the full knowledge to deal knowledgeably with real life issues.⁴⁹ A comprehensive and continuous approach to training would allow for a more in depth knowledge building. Secondly, it would allow for instructive discussions of real life issues and the development of responsive strategic approaches. In short, judges need to be provided ongoing and sustained education with the latest knowledge in domestic violence issue. When afforded this type of sustained educational support in domestic violence matters, many judges respond with interest and care. This is evidenced by favorable changes in their judicial practice through the implementation of their learning.⁵⁰

The appreciable level of domestic violence in our society mandates that better results be secured from the legal system for the victims. Studies validate that “battered women who later engage in criminal conduct frequently had attempted to secure the aid of the legal system for protection.”⁵¹ These women were often denied assistance for reasons ranging from overwhelmed courts and uneducated staff to disturbingly racist practices.⁵² It has been documented that the single highest predictor of long-term reduction in domestic violence is access to legal assistance.⁵³

⁴⁵ Weissman, *supra* note 17, at 1116.

⁴⁶ The following song lyrics illustrate the point: “I flip flop and serve hoes with a fat d**k/Till I die I'm still screamin that (bitches ain't shit).” SNOOP DOGG, *Doggy Dogg World*, on DOGGYSTYLE (Death Row Records 1993). “Girl, you looks good, won't you back that azz up/You'se a fine motherf***er, won't you back that azz up/Call me Big Daddy when you back that azz up/Hoe, who is you playin wit? Back that azz up.” DJ JUBILEE, *Back That Azz Up*, on TAKE IT TO THE SAINT THOMAS (Take Fo Records 2000).

⁴⁷ Schafran, *supra* note 34, at 1072.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Buel, *supra* note 10, at 224.

⁵² *Id.*

⁵³ *Id.* at 225.

Currently, many judicial responses are predicated upon the premise of proactive self-help actions by the victims. A variety of factors preempt the viability for this premise of a victim taking the initiative to seek help.⁵⁴ “Some . . . are able to find and make use of the few self-help books [and guides] available.”⁵⁵ However, for a substantial number of other victims “illiteracy, language barriers, or lack of money and resources mean they can make little use of such guides.”⁵⁶ By illustration, it has been documented that language creates a barrier for most battered immigrant Asian American women.⁵⁷ In fact, Asian American women may not know that domestic violence is a crime or that services exist.⁵⁸ The inability to speak English hinders them from seeking assistance “from the police, an attorney, a shelter, or a service agency.”⁵⁹

B. Ineffective Counsel

Effective legal counsel is a derivative of acquired knowledge and understanding about domestic violence and its potential effect on a client’s legal issues. Using her or his established knowledge and understanding, the effective lawyer also renders candid and instructive advice. That advice is expansive, addressing not only the law but also other pertinent considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

Effective representation requires the establishment of a mutually respectful and trusting relationship between the attorney and her or his client. “The social disparity in life circumstances between counsel and the battered defendant may make it difficult for an effective relationship to develop, thereby hampering representation.”⁶⁰ Client-centered representation has grown in popularity; however, in traditional theories of representation, clients are not the center; instead the lawyer is at the center of the case.⁶¹ An additional problematic reality in domestic violence cases is that whether educated or not, incompetent or resourceful, the domestic violence

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women’s Movement and the Asian American Community*, 3 Asian L. J. 151, 163 (1996). The author also states that many immigrant Asian American women live at the mercy of abusive husbands because they are under the constant fear of deportation, whether or not such fears are legally justified.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Buel, *supra* note 10, at 226.

⁶¹ *Id.*

victims often experience utter powerlessness when in the presence of the batterer.⁶² Battered clients who have been silenced need their lawyers to knowledgably, accurately, and persuasively present their voices in court.⁶³ Often their only source of hope and strength is a competent attorney who can ensure that they receive equal justice and complete freedom from the violence that has consumed their life.⁶⁴

In order to build confidence, courage, and a spirit of collaboration, counsel should encourage the battered client to actively participate in their cases and elicit comprehensive narrations from clients.⁶⁵ “Narrative understanding is different than observation or study.”⁶⁶ The narrative strategy is based on an emphatic identification with the character and story that enables the listener to see the world in a different way.⁶⁷ When lawyers limit narrative, they are “at risk of missing important information” and misunderstanding their clients’ situation, expectations, fears, etc.⁶⁸

In addition, when battered clients are treated in ways that accord them a sense of “participation and dignity” and feel “that court actors have good intentions, they respond with higher satisfaction to judicial proceedings....”⁶⁹ This is the prevailing attitude even if the results are unfavorable.⁷⁰ At the essence of effective representation is a fundamental act of empowerment. This occurs as domestic violence clients are accorded a sense of “voice.” This voice empowers them with “the ability to tell their side of the story” and provides “validation” –

⁶² Martin, *supra* note 15, at 337.

⁶³ Buel, *supra* note 10, at 226.

⁶⁴ Martin, *supra* note 15, at 337.

⁶⁵ Buel, *supra* note 10, at 226.

⁶⁶ Leslie Espinoza Garvey, *The Race Card: Dealing With Domestic Violence in the Courts*, 11 AM. U.J. GENDER SOC. POL’Y & L. 287, 302 (2003). The peril of “color-blind” lawyering – pretending that race and racism do not exist - is that we perpetuate, indeed embody, racism. Lawyers need to develop cultural and race competencies. Like other professions, such as psychology and medicine, recognize the need to train professional to develop these skills, cultural knowledge is central to developing a legal and advocacy strategy for a case. The narrative requires that we hold onto the individual story, with all its unique characteristics, and simultaneously embrace the cultural context and metamessage of the story. As we lawyer in a way that is always about out personal, cultural and social history, so too does the client present a legal situation that is set in a personal context and a cultural reality.

⁶⁷ *Id.*

⁶⁸ *Id.* at 307.

⁶⁹ Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 63 (2000).

⁷⁰ *Id.*

“the sense that what they have to say is taken seriously.”⁷¹ This approach conveys through action and attitude that victims of domestic violence are being treated with dignity and respect. It creates the circumstances that facilitate the emergence of the critical trust and mutual respect required for a successful lawyer-client relationship.⁷² Forging this relationship with domestic violence clients will necessitate a multi-disciplinary perspective entailing “law, social work, and psychology.”⁷³ Without this type of expansive multi-disciplinary approach, lawyering is ineffective.⁷⁴

Beyond the vital necessity for and power of mutual trust and respect in the relationship, there are ancillary benefits from establishing a productive rapport with the client. This approach makes the practice of law more satisfying for the lawyer.⁷⁵ Secondly, it elevates a visit to a lawyer to “something more than just another bureaucratic encounter for the client.”⁷⁶ Most importantly, the well developed lawyer-client relationship helps obtain the victim's honest testimony and “makes the client more willing to offer information helpful to her case's development.”⁷⁷ Without taking the time to work with the victim and to understand her unique dilemma, the lawyer may alienate the victim, making her a reluctant or perjurious witness.

To establish the requisite trusting and respectful relationship, counsel should inquire into the details of abuse and obtain those facts essential for the formulation of a responsive case strategy.⁷⁸ Counsel should emphatically and unequivocally assert that his or her client did not deserve the abuse and that the client deserves optimal support services.⁷⁹

For example, counsel should vigilantly make every effort to assist the clients in obtaining counseling.⁸⁰ Concurrently, effective representation will require lawyers to “possess a degree of psychological skill and sensitivity.”⁸¹ Counsel should become aware of the special emotional

⁷¹ *Id.*

⁷² See Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1094 (1995).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Margulies, *supra* note 72.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Buel, *supra* note 10, at 227.

⁷⁹ *Id.* at 228.

⁸⁰ *Id.*

⁸¹ Winick, *supra* note 69, at 69.

issues battered women are likely to encounter and thereby assist in nurturing the victim emotionally.⁸²

In addition, lawyers need to be aware of their own emotions and how to manage those emotions in the most productive manner. The combined attention to their own emotions and the emotions of their clients is commonly referred to as “emotional intelligence.”⁸³ Emotional intelligence synchronized with substantive knowledge and understanding of domestic violence matters would position counsel to provide the ethically mandated effective representation.⁸⁴ Because many lawyers do not possess this indispensable combination of emotional intelligence and substantive skills, continuing legal education training should include education in emotional intelligence, interpersonal skills, interviewing, and counseling. Attorneys need to be equipped with the knowledge to deal with psychological defense mechanisms and how to engage in these highly sensitive conversations with the client.⁸⁵

“Dealing with these difficult issues in the context of the attorney-client relationship can be seen . . . as a psycholegal soft spot.”⁸⁶ As mentioned previously, having the emotional intelligence and accompanying skills is a mandatory prerequisite to providing effective representation. The emotionally intelligent and skilled lawyer who has the capacity to safely identify and constructively deal with such “psycholegal soft spots” are full service advocates.⁸⁷ As such, they offer their clients dramatically more comprehensive and responsive representation than lawyers who conceptualize their roles more narrowly.⁸⁸ Lawyers in domestic violence cases should not neglect their traditional role. Simultaneously, they must be cognizant that many domestic violence cases require an expanded role for counsel in order to provide representation “consonant with the client's interests and needs.”⁸⁹

It merits reiteration that “[e]qual justice for the domestic violence victim can only be realized if the victim has [effective] counsel.”⁹⁰ Equal justice under law is a fundamental

⁸² Mills, *supra* note 38, at 195.

⁸³ DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (Penguin Books, 1995).

⁸⁴ *Id.*

⁸⁵ Winick, *supra* note 69, at 69.

⁸⁶ *Id.* at 69-70.

⁸⁷ *Id.* at 70.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Martin, *supra* note 15, at 356.

premise of our society and our democratic governance structure. In our society, with its inherent emphasis on the rule of law, “the individual having access to a trained advocate and counselor enjoys an appreciable advantage in dealing with others who do not.”⁹¹ Therefore, in an effort to insure equal access to justice, “[s]ociety has a duty to see that no individual, because of economic circumstance, is disadvantaged by any inability to secure legal assistance.”⁹² Acknowledging that this is an obligation of society as a whole, the judiciary and the legal community have distinct leadership responsibilities. In short, it is incumbent upon “the legal community itself[,], the advocates, judges, as well as legislators,” to collectively work to ensure that domestic violence victims’ needs are understood and addressed.⁹³

C. The Unwillingness of Some Judges to Apply the Law

The third justification for giving the plight of battered clients heightened consideration is the prevailing pattern of judicial bias that has emerged against them.⁹⁴ “The legacy of past indifference to [and tolerance of] domestic violence . . . continues to insinuate itself in modern jurisprudence.”⁹⁵ The law has evolved from a standard that blatantly sanctions uxorial abuse to a standard that declares such matters to be private concerns beyond its reach. For example, courts equate domestic violence claims as family problems relating to “personality flaws, relationships gone bad, anger and jealousy.”⁹⁶ The progression falls short of viewing domestic violence as a prominent and epidemic-type occurrence that requires priority attention.⁹⁷

Although the actions and attitudes that demonstrate the most flagrant forms of inequality have shifted, “the perpetuation of certain judicial practices [confirms] a view that domestic violence claims are unwelcome in the courts.”⁹⁸ These claims are seen as “steerage cases – legal actions of low status that are bothersome and difficult.”⁹⁹ As a result of the judiciary’s dislike of domestic violence claims, many “dispense what may best be described as perfunctory justice.”¹⁰⁰

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Buel, *supra* note 10, at 234.

⁹⁵ Weissman, *supra* note 17, at 1111.

⁹⁶ *Id.* at 1116.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1112.

¹⁰⁰ *Id.* at 1114.

Under the guise of maintaining judicial efficiency, domestic violence cases are rushed through the system without being given the care and attention that “equal justice or effective representation” would require.¹⁰¹

Judges caught in this tidal wave of disregarding domestic violence matters “may even be unwilling to hear testimony about the violence itself.”¹⁰² Their demeanor is a direct reflection of their attitude and outlook on domestic violence cases and a predictive indicator of the likely outcome for the case. Their actions and behavior are devoid of emotional intelligence. They are not paying attention to their own emotions or the emotions of others. “They may act bored, impatient, or otherwise indicate that they are in a hurry to get through the proceedings.”¹⁰³ They reveal little empathy for the victim of domestic violence.¹⁰⁴ Judges often decline to consider factors outside the relationship which might facilitate an understanding for the context of domestic violence. They fail to take a panoramic outlook on the situation to assess economic, political, and socio-cultural dimensions of the problem.¹⁰⁵ This absence of emotional acumen and disengaging mechanisms may manifest themselves in subtle ways that are not overtly discriminatory.¹⁰⁶ Nonetheless they may unintentionally have an invidious impact and produce negative results. In the end, domestic violence cases are further denigrated to inferior legal status.¹⁰⁷

Many judges have managed to remain neutral in an effort “to better protect abuse victims, whether they are defendants, plaintiffs or witnesses in cases.”¹⁰⁸ Conversely, there remain members of the bench who have biases against battered women.¹⁰⁹ The biases in some instances can be directly attributed to the fallacious belief that domestic violence issues are less important, private matters.¹¹⁰ As a consequence, some judges view domestic violence matters as inappropriate for the courts' attention. This perspective contaminates the proceeding and

¹⁰¹ Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on An Effective Innovation*, 68 FORDHAM L. REV. 1285, 1293 (2000).

¹⁰² Weissman, *supra* note 17, at 1115.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1116.

¹⁰⁶ *Id.* at 1125-1126.

¹⁰⁷ *Id.*

¹⁰⁸ *See* Buel, *supra* note 10, at 234.

¹⁰⁹ *See id.*

¹¹⁰ Weissman, *supra* note 17, at 1118.

negatively “affect[s] the outcome of each case.”¹¹¹ Bias can become the defining element in the legal and judicial culture and practices in domestic violence matters. The pernicious impact of bias can impose discouraging outcomes for victims of domestic violence in court.¹¹²

Without training and discipline, “[j]udges . . . depend on cognitive strategies shaped by their past experiences that result in stereotypical assumptions.”¹¹³ “Regardless of intent, in domestic violence cases, the effect of such cognitive strategies may impair reasoning [and] distort the facts.”¹¹⁴ The practical result is the subjection of a battered woman's claims to stereotypical analysis and misjudgments. In the end, a flawed, systematically biased decision is rendered.¹¹⁵

“Bias [just] as ignorance may transform itself into obvious discrimination against women who bring domestic violence claims to court, manifesting itself in disrespectful and insensitive treatment.”¹¹⁶ Those become serious, if not insurmountable, impediments to just and fair outcomes in domestic violence cases. When battered women apply for civil protective orders, they are often wrongfully denied.¹¹⁷ Victims who become state witnesses in criminal cases are often disbelieved or treated rudely in spite of substantial evidence of abuse.¹¹⁸

Bias induces judges to jettison judicial standards of decency and resort to the “word from the underground” about the “fallacy” of domestic violence claims and the untrustworthiness of women who file them. Battered women’s credibility is thus diminished Credibility issues are critical in domestic violence cases [in which] a battered woman's testimony may be the only available evidence.¹¹⁹

Even though these decisions put victims in danger, they are not considered misconduct.¹²⁰ “Judges who comprehend the dynamics and costs of domestic abuse are more likely to make equitable decisions regarding testimony, rules of evidence and application of laws.”¹²¹

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1119.

¹¹⁶ *Id.* at 1121.

¹¹⁷ Buel, *supra* note 10, at 234.

¹¹⁸ *Id.*

¹¹⁹ Weissman, *supra* note 17, *Id.* at 1122-23.

¹²⁰ Buel, *supra* note 10, at 234.

¹²¹ *Id.*

D. The Interplay of Race, Culture, and Class When Representing Victims of Domestic Violence

1. Specialized Issues of Race, Culture, and Ethnicity

“Domestic violence intervention strategies frequently fail to appreciate the ways in which race, ethnicity, immigration status, culture and language structure the responses women are likely to encounter from helping institutions, the manner in which battering is understood by those around them, and the manner in which women understand the abuser’s behavior.”¹²² The intersection of race and class can significantly impact ethical practice and effective representation in domestic violence cases.¹²³

There are two main concepts of class. The first concept, “status class,” analyzes economic participation focusing on distribution and the market and emphasizing status as an important aspect of structural inequality.¹²⁴ The second concept of class “emphasizes class relations in a system of production and the exploitation of labor by capital.”¹²⁵ This reality is frequently overlooked. Having a fundamental understanding and giving careful attention to this intersection as well as its accompanying dynamics is critical to addressing domestic violence concerns. Situating race and class issues within domestic violence jurisprudence is logical and essential.¹²⁶ Integrating these topics starts with an unflinching recognition of the historic silence at best, or at worst, more direct complicity, which ensures that race and class are not explored in a manner that engenders needed reforms.¹²⁷

Unquestionably, domestic violence occurs among all races, ethnicities, religions, and classes.¹²⁸ With this realization as a backdrop, the experience of domestic violence is profoundly

¹²² Donna Coker, *Piercing Webs of Power: Identity, Resistance, and Hope in Latcrit Theory Andpraxis: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1025-1026 (2000).

¹²³ See Buel, *supra* note 7, at 312.

¹²⁴ Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-transformation Cases*, 76 S. CAL. L. REV. 799, 818 (2003) (Mahoney states that a class analysis in the Weberian tradition might divide American society into upper, middle, and lower classes while a class analysis in the Marxist tradition might divide American society into capitalists and workers).

¹²⁵ *Id.* at 818.

¹²⁶ Buel, *supra* note 7, at 318.

¹²⁷ *Id.*

¹²⁸ Leigh Goodmark, *The Legal Response to Domestic Violence: Problems and Possibilities: 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, 35 (2004).

different for women of color and battered poor women.¹²⁹ Women of color are often silenced or overshadowed by the discourse regarding domestic violence centered on white females.¹³⁰ “The domestic violence movement too often has [characterized] all women as middle class whites.”¹³¹ This serves to ignore the unique challenges arising from the diversity of race, culture, language, and resource deprivation, which characterize and distinguish low-income communities of color.¹³² “Professor James Ptacek’s [] research of social science journals found that just 4.7% of the articles concerning domestic violence refer to race.”¹³³

The question of whether a lawyer may effectively advocate for a client without regard to her race and/or ethnicity is a complex and central question of professional responsibility. Many assume that a willingness to advocate in a zealous manner as envisioned in the Preamble to the current Model Rules of Professional Responsibility is all that is required. This article argues, instead, that zealous advocacy is the threshold question and it is not the definitive or exclusive question of this debate. One only needs to view this as part of the larger debate rooted and informed by the ongoing complexities of an analysis of any issue involving race and ethnicity in this country.¹³⁴ Scholars have documented through comparative analysis the differences which occur in white and minority battering.¹³⁵ Understanding these differences is imperative to formulation and development of an effective representation strategy for victims of domestic violence. For example, simple awareness is not enough to adjust a strategy based on complexities that develop due to kinship ties, issues around everyday racism or the additional pressure these issues add to the decisions of victims.¹³⁶ Strategies developed without an eye toward these complexities may serve to undermine the client’s objectives to obtain safety and to do what may appear at time as a conflicting objective—to do minimum harm in order to preserve important support and kinship ties. The representation, although adequate from a technical skills or

¹²⁹ *Id.*

¹³⁰ Buel, *supra* note 10, at 237.

¹³¹ Margulies, *supra* note 72, at 1103.

¹³² *Id.*

¹³³ Buel, *supra* note 10, at 237.

¹³⁴ See generally PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM: AN INTERDISCIPLINARY THEORY, (Sage, 1991).

¹³⁵ JANICE JOSEPH, WOMAN BATTERING. A COMPARATIVE ANALYSIS OF BLACK AND WHITE WOMEN IN AND OUT OF THE DARKNESS: COMPARATIVE PERSPECTIVES ON FAMILY VIOLENCE 161-69 (Glenda K. Kantor & Jana L. Jasinski eds., Thousand Oaks, 1997).

¹³⁶ See J.W.B. Scott, *Deep Structures of African-American Family Life: Female and Male Kin Networks*, THE WESTERN JOURNAL OF BLACK STUDIES, 13, 17-24 (1989).

competence assessment, may not serve the client's best interest and is then inadequate from an outcome assessment.¹³⁷ Raising the minimum level of representation for these clients requires an equal or greater fidelity to understanding the special demands of these cases. If one understands adequate representation to mean client-centered, then meeting the test of technical competence is unremarkable.

Perhaps with positive intentions, many lawyers tend to take a colorblind approach when dealing with clients.¹³⁸ However, when representing battered women, lawyers must understand that race is a significant factor in the establishment of the requisite trust and mutual respect for a successful relationship. In other words, race is a pivotal variable in how whites interact with people of color in personal and professional spheres. Persons providing legal assistance to women of color need to remain cognizant of some essential statistical realities and their importance.¹³⁹

African-American women experience domestic violence more often than either white women or women of other races. Native American women experience all forms of violence, including domestic violence, at twice the rates of white women. One study found that domestic violence occurred in 15.5% of Indian marriages, with 7.2% reporting severe violence (as opposed to 14.8% and 5.3% of white couples).¹⁴⁰

“Consequently, policies addressing domestic violence disproportionately affect these women.”¹⁴¹ The impact of such policies and the systems used to implement them should be carefully scrutinized to insure that they have a fair and impartial impact on women of color. In addition, there should be an examination of the particular experiences of women of color to ascertain whether the policies and systems need to be amended in light of their unique issues and concerns.¹⁴²

¹³⁷ Cris M. Sullivan and Maureen H. Rumpitz, *Adjustment and Needs of African-American Women Who Utilized a Domestic Violence Shelter*, 9 VIOLENCE AND VICTIMS 275 (1994).

¹³⁸ Buel, *supra* note 10, at 237.

¹³⁹ *Id.* at 238.

¹⁴⁰ Goodmark, *supra* note 128, at 35.

¹⁴¹ *Id.* at 36.

¹⁴² *Id.*

Lawyers must recognize that African-American women do not benefit at the same level as white women from interaction with the judicial system, in part due to racism and its discriminatory results.¹⁴³

Whether she is a plaintiff, defendant, or witness, the African-American woman in the courtroom faces numerous obstacles to being considered a believable and reasonable person Documented juror and judicial attitudes concerning the veracity of African-American women . . . inhibit not only the African-American female victim at trial . . . but African-American women in all walks of life.¹⁴⁴

For an attorney representing a client of color, this means maintaining a heightened awareness of race and racial dynamics with all client interaction and case decisions.¹⁴⁵ From “investigating the case to choosing expert witnesses,” as well as “instructing the jury, counsel must ensure that she is not producing the delivery of less competent representation to clients of color” due to the racism of others.¹⁴⁶

2. Intersectionality of Race, Gender, Culture and Domestic Violence

A second crucial intersection occurs between race and culture. Consequently, attorneys representing battered defendants should consistently view their cases through the lens of race and culture. “Feminist scholars of color have explained that the politics of racial identity in America cause some victims of color to feel they must choose between their race and gender.”¹⁴⁷ Race customarily prevails over gender as the more decisive and powerful force in shaping a victim’s cultural identity.¹⁴⁸

For many victims of color, family and community take precedence as a means of addressing domestic violence concerns, because “the legal system has proven itself unreliable.”¹⁴⁹ The criminal justice system’s racial bias has discouraged many battered women of color and made them reluctant to call the police for help. Overall, a history of judicial unresponsiveness and racial bias has generated a deep-seated general distrust of the justice

¹⁴³ Crystal Bennett & Marilyn Yarbrough, *Cassandra and the "Sistahs": The Peculiar Treatment of African-American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 647 (2000).

¹⁴⁴ *Id.*

¹⁴⁵ Buel, *supra* note 10, at 238.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

system by people of color.¹⁵⁰ This sentiment is exacerbated by the history of hostility and “lack of intervention by police in many communities of color.”¹⁵¹ “[I]t is not surprising that even desperate victims find it difficult to view the criminal justice system as a viable option for safety.”¹⁵²

Despite changes that have taken place over the past half a century, statistics indicate a disturbing increase of African-American and other people of color in the prison system. Statistically, African-American males are the most severely affected demographic group within the criminal justice system.¹⁵³ However, other minorities are also disproportionately affected.¹⁵⁴ African-Americans comprise 49% of the prison inmates while they are only 13% of the population.¹⁵⁵ An African-American male born in 1991 has almost a 30% chance of spending time in prison at some point in his adult life, compared to 4% for white males and 16% for Hispanic males.¹⁵⁶ Hispanics now constitute 17% of the prison population and only 10% of the nation’s population.¹⁵⁷

“With people of color and the poor disproportionately arrested, prosecuted, and sentenced more harshly” than others, lawyers should re-examine and appropriately seek an expansion in traditional legal representation approaches and strategies in domestic violence matters.¹⁵⁸ Counsels should diligently familiarize themselves with recent case law regarding the parameters of juries’ racial compositions. They “should be prepared to challenge a venire not representative of their clients’ ethnicities.”¹⁵⁹

The pressure to succeed, to maintain that success and a fear of less than impartial treatment in the criminal justice system for many ethnic minorities provides a complex web of decision-making for any victim of domestic violence. This is further exaggerated with family

¹⁵⁰ Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 51 (1998).

¹⁵¹ Buel, *supra* note 10, at 240.

¹⁵² *Id.*

¹⁵³ MARC MAUER, THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM 3, April 1999, *available at*

http://www.sentencingproject.org/Admin/Documents/publications/rd_crisisoftheyoung.pdf.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Buel, *supra* note 10, at 240.

¹⁵⁹ *Id.* at 241.

and community expectations. A review of the difficulties confronting minorities in obtaining employment and the additional obstacles encountered if they have a criminal record have been well documented. For example, African-American males with convictions in the criminal justice systems face insurmountable odds when trying to obtain employment when compared to whites.¹⁶⁰ “White men coming out of prison get more than double the number of job offers that African American ex-convicts receive, and about the same number as African American men with no previous prison record.”¹⁶¹ A disturbing pattern became evident in studies that sent white, African-American and Latino men “posing as ex-convicts to apply for thousands of job interviews in New York City.”¹⁶² “The study found that for every ten [African American] men without criminal convictions who receive a job offer or callback, only three with convictions got positive responses.”¹⁶³ In addition, African-Americans without a criminal record were hired less often, even in relation to white applicants recently released from prison.¹⁶⁴ The results here point to the striking persistence of race in the allocation of employment opportunities. “This compares to seven out of ten white men. Nationwide, one in three [African-American] men with only a high school diploma will go to prison before turning forty.” Other statistics indicate that African-American males and a growing number of Hispanic and Latino males face incarceration at alarming rates when compared to their proportional representation of the nations population.¹⁶⁵ For many, facing these types of statistics could motivate a victim to underreport or attempt to withdraw a needed prosecution on a domestic violence charge.

It is also essential for attorneys to recognize and address the influential nexus between a domestic violence victim’s culture and her response to a domestic violence incident. Cultural knowledge and insight are figural to developing a legal and advocacy strategy for a case. It is important for lawyers to work in a collaborative and consultative manner with clients. This will facilitate the development of plans that pursue desired outcomes in ways acceptable to the client’s culture.

¹⁶⁰ See, e.g., Pacifica’s Democracy Now!, Racial Disparity Found in Male Ex-Offender Job Opportunities, June 20, 2005, <http://www.democracynow.org/2005/6/20/headlines> (summarizing DEVAH PAGER & BRUCE WESTERN, RACE AT WORK: REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET, available at http://www.princeton.edu/~pager/race_at_work.pdf).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

For instance, many African-American women are motivated to stay in abusive relationships to ‘present a united front.’¹⁶⁶ This is in part a counter reaction to the national media and politicians that have historically assaulted the black family as denigrating in a ‘tangle of pathology.’¹⁶⁷ Strategically, “many African-American women feel the need to stay in their relationships, keep their families together, and be unified against outside oppressions and stereotypic representations.”¹⁶⁸ As an additional complexity to their dilemma, “African-Americans are disproportionately represented among the poor.”¹⁶⁹ Breaking up the family can further erode an already deficit amount of resources for mere survival.¹⁷⁰ Additionally, one can expect the family to be reserved or even reluctant to engage in acts that reinforce disparaging racial stereotypes especially when these stereotypes characterize the African-American male as inherently violent.¹⁷¹

Moreover, Asian cultural values may affect the way in which battered Asian women respond to domestic violence. In the group-oriented Asian cultures, the family is the most important social unit.¹⁷² To the extent that individualism does matter in Asian cultures, “male individuals are valued over females.”¹⁷³ In many Asian cultures, “keeping face” is an inviolate core cultural value.¹⁷⁴ “The pressure to ‘keep face’ prevents many battered Asian-American women from seeking” outside intervention.¹⁷⁵ As a result, the violence remains hidden within the family construct.¹⁷⁶ Not shaming the family is often more important to an Asian client than his or her own safety. In the Asian community, there is the rationalization that men beat their wives as an emotional outlet for the numerous stresses they confront, such as work and “inadequate English language skills.”¹⁷⁷ An additional rationalization attributes domestic

¹⁶⁶ Fenton, *supra* note 150, at 49.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 50.

¹⁷¹ *Id.* at 52.

¹⁷² Wang, *supra* note 57, at 168-169.

¹⁷³ *Id.* at 169.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 170.

¹⁷⁶ *Id.*

¹⁷⁷ Nimish R. Ganatra, *The Cultural Dynamic in Domestic Violence: Understanding the Additional Burdens Battered Immigrant Women of Color Face in the United States*, 2 J.L. SOC’Y, 109, 123 (2001). The author states that identity for the individual does not occur by separation from the group, as it does in the Western concept of individualization. For the individual Asian, identity means belonging to a group.

violence to “alcoholism or nagging wives who push their husbands” to the point of emotional and violent explosions.¹⁷⁸ Because of such rationalizations, “the Asian community [mistakenly] views abusive men as victims rather than perpetrators.”¹⁷⁹

Similarly, Hispanic women may feel constraining pressure to not report incidents of domestic violence based on their cultural beliefs. In the Hispanic community, core “cultural values of respect, machismo (code of behavior that underscores maleness and virility), and marianismo (code of behavior that underscores the spiritual superiority of women over men) may affect their decision to disclose the abuse to others.”¹⁸⁰ Another influential core cultural value is, “simpatia (the avoidance of personal conflict)” may affect their decision to seek help.¹⁸¹

3. Poverty and Domestic Violence

Another reason to afford the plight of battered women heightened consideration is that they are often indigent.¹⁸²

While domestic violence [exists] in all segments of society, women living in poverty are more likely to be victims of [domestic violence]. The Bureau of Justice Statistics reports that women in families with annual incomes below \$10,000 are four times more likely to be violently attacked, often by an intimate partner, than are women in higher income households.¹⁸³

Lawyers must recognize that poverty exacerbates domestic violence. Statistics show that domestic violence is a substantial problem in poor communities.¹⁸⁴ “The more impoverished a woman is, the greater the risk for violence by an [intimate] partner.”¹⁸⁵

For Asians, the family is the most important social unit and a person is regarded as an extension of the family and is expected to subjugate individual needs to family interest.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 124.

¹⁸⁰ Marianne R. Yoshioika, Louisa Gilbert, Nabila El-Bassel, & Malahat Baig-Amin, *Social Support and Disclosure of Abuse: Comparing South Asian, African American, and Hispanic Battered Women*, 18 J. FAM. VIOLENCE, 172, (2003).

¹⁸¹ *Id.*

¹⁸² Buel, *supra* note 7, at 324.

¹⁸³ Patricia Cole & Sarah M. Buel, *Safety and Financial Security for Battered Women: Necessary Steps for Transitioning from Welfare to Work*, 7 GEO. J. ON POVERTY LAW. & POL’Y 307, 312 (2000).

¹⁸⁴ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN L. REV. 1241, 1252-59 (1991).

¹⁸⁵ Buel, *supra* note 10, at 242.

In addition to its physical and emotional danger, domestic violence abuse often decreases a woman's economic well being "through interference with work, education, and training."¹⁸⁶ "Abuse often increases dependence on welfare, sabotages birth control efforts, and causes substance abuse."¹⁸⁷ Not only are these impediments to emotional and physical well being, these are all barriers to securing and maintaining employment. Those receiving welfare experience considerably higher levels of abuse.¹⁸⁸ Domestic violence makes it more difficult for women living in poverty to leave welfare for a job. Women who experience partner violence are more likely to be entangled in a discouraging welfare system making it difficult to stay off welfare as they are in need of extended and repeated financial assistance.¹⁸⁹ The loss of employment can "result in greater hardship for victims of color because they may not be able to rely on members of their community if financial troubles occur."¹⁹⁰ A study of predominately African-American and Hispanic victims of abuse found that the long-term effects of domestic violence could also negatively affect victim's ability to participate in the labor market over time.¹⁹¹

Effective representation mandates a keen recognition of the hazardous employment complications that domestic violence can cause victims. In an effort to better protect victims, counsel should contact a battered client's employer to explain the situation. Ideally this will cultivate a more empathetic and supportive attitude in the employer and thereby safeguard the victim's employment.¹⁹²

IV. STRATEGIES FOR MORE EFFECTIVELY REPRESENTING BATTERED WOMEN IN DOMESTIC VIOLENCE CASES AND ADDRESSING SPECIAL ETHICAL CONCERNS

Domestic violence matters have been relegated to a secondary status by some members of the judiciary and the bar. A lawyer's conduct can be influenced by the devalued legal status that domestic violence claims have been subordinated to by the courts.¹⁹³ The marginalization of domestic violence cases can affect attorneys' approach, preparation, and ultimate representation

¹⁸⁶ *Id.* at 244.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Cole & Buel, *supra* note 183, at 312.

¹⁹⁰ Buel, *supra* note 10, at 245.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Weissman, *supra* note 17, at 1129.

actions in their work.¹⁹⁴ As an illustrative example, “attorneys may decide to waive opening or closing statements or limit the number of witnesses in an effort to fit the case within the “five minutes and forty-five seconds” allotted to the entire proceeding.”¹⁹⁵ “Attorneys also withhold requests for certain forms of relief for fear of angering judges. Judicial indications regarding the low importance and significance of these cases create disincentives for writing briefs.”¹⁹⁶ “Without opening or closing arguments, without facts or legal theories, the court is given little to interpret” or seriously consider in these matters.¹⁹⁷

These deterrents serve to preempt lawyers from practicing the kind of law in domestic relations cases that would serve to elevate the status of these cases.¹⁹⁸ In the end domestic violence cases become symbolized by second class lawyering. The opportunity for domestic violence clients to receive effective representation on par with other cases becomes a dream painfully deferred.¹⁹⁹ Building upon the opening discussion on ethical duties that surface when representing victims of domestic violence, the forthcoming section suggests representational strategies to offer battered women effective representation and thereby means for appropriately fulfilling ethical duties.

1. Competency

Because counsel plays a central role in domestic violence cases, it is imperative for counsel to educate themselves on domestic violence issues.²⁰⁰ According to the Model Rules of Professional Conduct, a lawyer shall provide competent representation to a client.²⁰¹ Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.²⁰² However, too frequently, with minimal knowledge of domestic violence issues, lawyers steer domestic violence clients towards approaches and strategies without thoroughly assessing whether and how they will meet the client's needs. In the

¹⁹⁴ *Id.* at 1129-30.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1130.

¹⁹⁹ *Id.*

²⁰⁰ *See* Buel, *supra* note 10, at 334. .

²⁰¹ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

²⁰² *Id.*

same manner, insufficient attention is given to counseling clients on the risks that are entailed in suggested legal strategies.

In light of these potential pitfalls, counsel may find it helpful to form collaborative attorney-advocate partnerships to better represent battered women.²⁰³ For example, “several public defender offices have created such collaborative partnerships, sometimes with the assistance of social workers and counselors.”²⁰⁴ Domestic violence advocates are available to provide assistance in most communities. Small firm and pro bono practitioners can contact their local shelters to locate the advocates within their communities who may be able to assist with complex cases.²⁰⁵ Attorneys who are unfamiliar with the resources and initiatives focused on domestic violence in the community may fail to connect clients with those resources. By default they are likely to focus instead on the legal solutions they know best, which may not be responsive to the unique needs of domestic violence clients.²⁰⁶ Clients who depend on the lawyer to lead the representation may not raise their non-legal needs unless specifically asked to do so.²⁰⁷ Believing that an attorney thinks expansively and “would certainly provide advice as to all available options, the client may take the attorney's failure to address these issues as evidence that no other options exist.”²⁰⁸

2. Ensuring the Safety of Battered Clients

In providing legal representation on domestic violence issues, lawyers need to realistically acknowledge that the legal system can sometimes create more problems than it solves. The lawyer should appropriately counsel clients on this potential dilemma in a manner that is instructive and encouraging. In reality, battered clients often place themselves in greater danger by consulting an attorney.²⁰⁹ Therefore, it is important that attorneys consider the safety of their clients. “Part of competent representation includes adequately warning a victim of impending danger from her batterer.”²¹⁰ On the individual client level, the most urgent need may be to establish a trusting and mutually respectful relationship that facilitates effective client

²⁰³ Buel, *supra* note 10, at 256.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Goodmark, *supra* note 128, at 40.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 40-41.

²⁰⁹ See Buel, *supra* note 7, at 344.

²¹⁰ Buel, *supra* note 10, at 259.

counseling. In short, the client is seeking an empowerment opportunity to give voice to her concerns and be listened to in an attentive and empathetic manner.²¹¹ “Rushing to litigation deprives clients of the counseling that is an oft neglected part of the lawyer's job.”²¹² According to the Model Rules of Professional Responsibility, lawyers are required to render candid advice, which “may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”²¹³ “Lawyers for battered women must educate [their] clients about the reality of the legal system – the good, the bad, and the dangerous – and let [the] clients make educated decisions about whether to engage with it.”²¹⁴

“Counsel will want to inquire about the incidence of separation violence.”²¹⁵ It is often believed that if the victim leaves the abuser the violence will cease.²¹⁶ However, there are occasions where fleeing may incite an escalation of the violence.²¹⁷ Lawyers need to be inquisitive and ask their clients exploratory questions such as:

- What triggers your partner's violence?
- Will using the legal system make you safer or endanger you?
- What has your experience with the criminal system been?
- What tactics is your partner likely to use in litigation?
- Will your abuser be able to use your past against you?
- Do you really need a civil protection order or custody order?
- Are there other supports that might keep you and your child safer?
- What are the consequences in your community if you use legal strategies?
- Can you afford-- economically and/or emotionally--to have your abuser jailed or deported?²¹⁸

To provide the most responsive representation in domestic violence cases, counsel must comprehensively consider both the "legal and non-legal dimensions of a client's problem."²¹⁹ The lawyer “must ask these questions without thinking about [his] own role – or lack thereof – in

²¹¹ Goodmark, *supra* note 128, at 46.

²¹² *Id.*

²¹³ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

²¹⁴ Goodmark, *supra* note, 128, at 46.

²¹⁵ Buel, *supra* note 10, at 258.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Goodmark, *supra* note 128, at 46-47.

²¹⁹ *Id.* at 47.

the strategy that the battered woman ultimately chooses.”²²⁰ Counsel must honor the choices that battered women make--even if those choices leave the lawyer without the preferred tools in working towards the client’s protection.²²¹ “Counseling must also include an honest assessment of the local legal system and the actors the battered woman may encounter.”²²²

A lawyer who learns that a client is in danger of domestic violence may also need to take steps beyond obtaining an order of protection or initiating some other legal proceedings. In this situation, the lawyer may need to assist the client in developing a dependable strategy for safety planning. Counsel should develop the safety plan with their clients to ensure that the clients do not remain or become entrapped in harm’s way.²²³ In preparing an individual safety plan, it is important for counsel to carefully inquire about the degree to which the battered client has been subjected to both sexual and physical abuse.²²⁴

3. Investigating and Documenting Abuse

Attorneys have a duty to investigate and document the history of abuse when representing domestic violence clients. A major stumbling block to providing effective representation can be the failure of attorneys to sufficiently investigate the history of abuse experienced by their clients.²²⁵ In the interest of effective representation it is counsel’s responsibility to compile a complete list of the abuse their clients have suffered at the hands of the batterers.²²⁶

“As each case presents its own individualized pattern of abuse, counsel must not presume that a batterer will fit a preconceived notion of behavior.”²²⁷ Counsel “must be prepared to obtain from the victim and present to the court a complete history of abuse.”²²⁸ “Documenting a complete history of abuse will help judges and juries understand [the batterer’s] state of mind at

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Buel, *supra* note 10, at 258.

²²⁴ *Id.*

²²⁵ *Id.* at 261.

²²⁶ *Id.*

²²⁷ *Id.* at 262.

²²⁸ *Id.*

the time of the offenses.”²²⁹ The judge and the jury would thereby be better positioned to render a fair decision in the case.

4. Educating the Court as to the Significance of Partner Abuse

Counsel must present evidence of the abuse and complement that evidence by describing “the coping mechanisms employed by the victim to protect herself over time.”²³⁰ Counsel should also inform the court of “the reasons the victim was unable to leave and her efforts to achieve safety.”²³¹ Educating the court will be necessary to insure that the impact of the interrelated variables of race and class are appropriately considered.²³² With that objective in mind, counsel must first question the client carefully and listen attentively to gain insights based on her life experience. This will enable counsel to more accurately “view the events through the lens of . . . race, culture, religion, sexual orientation and socio-economic status”²³³ That enlightenment should assist counsel in persuasively communicating the client’s issues and needs to the court.²³⁴

5. Presenting Relevant Evidence, Including Key Witnesses, to the Fact-Finder

Effective representation in domestic violence cases is dependent on presenting a full factual record for the court’s consideration. Nonetheless, attorneys often do not produce the full scope of available evidence including expert testimony, medical records, and the defendant’s own testimony.²³⁵ In pursuit of a favorable disposition of the case, counsel should bring to the court’s attention the bias or animus of any state witnesses against the victim.²³⁶ “In cases involving duress, counsel may need to explain [the victim’s] compliance with the abuser’s orders.”²³⁷ The history of abuse must be adequately presented to the fact-finder. For example, “the history of abuse is material to establishing that the degree of force employed by the victim was reasonable given the abuser’s actions.”²³⁸

²²⁹ *Id.*

²³⁰ *Id.* at 266.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 270.

²³⁶ *Id.* at 271.

²³⁷ *Id.* at 273.

²³⁸ *Id.*

6. Utilizing Expert Witnesses

The proper use of an expert witness by counsel is a companion responsibility in the course of providing effective representation.²³⁹ If used properly, “an expert can augment the [victim’s] testimony or enhance her credibility.”²⁴⁰ “An expert may interview the battered client to offer her opinion as to whether the domestic violence victim suffered from Battered Women’s Syndrome.”²⁴¹ In addition, the expert witness can “provide a generalized description of typical domestic violence relationships, their dynamics, and each party’s behavior.”²⁴² Additionally, an expert can explain why existing options were unavailable to a specific victim.²⁴³ “An expert might also explain the frequency, severity, and nature of the abuse suffered by the battered woman to the jury.”²⁴⁴ Moreover, expert testimony may be necessary to help the jury understand ways in which the victim’s race, ethnicity, religion, and culture have affected her decisions and behavior.²⁴⁵

7. Addressing Mental Health and Substance Abuse Issues

In the process of providing effective representation, counsel’s case strategy for battered women must address any substance abuse of the batterer.²⁴⁶ “Because the victim is at greater risk of serious injury if the batterer is chemically dependent, all safety planning must include screening for such behavior.”²⁴⁷ Facing this increased threat, seeking a protective order is the recommended course for a victim.²⁴⁸

Another instructive reality is that “[b]attered women are overrepresented among those suffering from depression.”²⁴⁹ Counsel should encourage her client to seek counseling or other interventions to mitigate the impact of depression. “Counsel should focus on tailoring the

²³⁹ *Id.* at 274-75.

²⁴⁰ *Id.* at 274.

²⁴¹ *Id.* at 278.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 278-9.

²⁴⁶ *Id.* at 283.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 284.

²⁴⁹ *Id.* at 285.

victim's therapeutic interventions to address any chronic mental illnesses that may interfere with the client living violence-free in the future."²⁵⁰

8. Avoiding Conflicts of Interest

As a fundamental tenet of effective representation, it is unethical for a lawyer to place his or her interests above those of his or her client.²⁵¹ Representing clients of domestic violence can raise conflict of interest issues when dealing with termination of parental rights and child neglect allegations. A battered woman may face removal of her children and ultimately termination of her parental rights if she cannot stop her abuser's violence. "Lawyers should ... be aware that it is an assumed conflict of interest to represent both parents in a termination of parental rights case."²⁵² Perhaps most difficult are cases in which a battered mother will not separate from the person harming her or her children.²⁵³ Counsel cannot represent both parties in the case, whether it is a termination of parental rights or a criminal matter.²⁵⁴

V. CONCLUSION

Domestic violence remains a prominent reality in our society. The courts, legal community, and society at large need to work collaboratively to ensure an opportunity for victims of domestic violence to give voice to their plight and seek appropriate redress. Although inappropriately relegated in some judicial areas to a second class status, domestic violence cases should be elevated and given knowledgeable "first class" attention by judges, juries, and lawyers.²⁵⁵ In doing so, the judiciary and the bar need to pay particular attention to the above-mentioned ethical considerations and representational strategies when handling cases for battered women. Establishing a specialization through continuing legal education and/or a required minimum number of years of experience for attorneys practicing in this area is a first step.

²⁵⁰ *Id.* at 286.

²⁵¹ *Id.* at 287.

²⁵² *Id.* at 288.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See* Weissman, *supra* note 17, at 1129.

Guidelines similar to those recommended by the American Bar Association for the appointment and performance of attorneys in death penalty cases should be promulgated.²⁵⁶

The range of ethical considerations demonstrates that there is often a misconception that domestic violence cases should be handled in the same manner as all other cases. To the contrary, the plight of domestic violence victims, including the real possibility of death, and the complexity of their cases require special consideration.²⁵⁷ It is the ethical responsibility of lawyers to educate themselves and judges on appropriate strategies and approaches for handling domestic violence issues. For lawyers this begins with strengthening their own emotional intelligence and overall interpersonal skills. These capabilities become the foundation for forging a trusting and respectful relationship with clients, which in turn become the foundation for effective representation.²⁵⁸ In addition, it is imperative for lawyers to candidly recognize and address the potent impact of the intersection of race and class in domestic violence cases.²⁵⁹ This is one example of the expansive and comprehensive approach that lawyers must take to ensure that a domestic violence case is fully developed and effective representation is provided.

Domestic violence issues are a prominent feature of our society, which demands collective attention. The judiciary, the bar, and the community must assume increased responsibility for dealing with domestic violence issues in a fair, sensitive, and decisive manner. A lawyer no longer has the option to successfully argue that he or she has neither a legal nor an ethical responsibility to understand domestic violence. Nor can a lawyer assert that he or she has no obligation to take reasonable precautions to minimize the potential harm to a client or others involved in such violence. As officers of the court, part of our professional responsibility is acting to improve the democratic society as a whole or to act in the public interest. For the problems that continue to plague society, our ethics as attorneys should dictate action distinct from and above our technical preparation and practice to litigate a case. Our role as counselor in these cases in some instances surmounts the role as attorney especially when the countervailing objectives of the client must be paramount. The vision is to work collaboratively, to treat the

²⁵⁶ See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003).

²⁵⁷ See Tsai, *supra* note 101, at 1293.

²⁵⁸ See Margulies, *supra* note 72, at 1094.

²⁵⁹ See Coker, *supra* note 122, at 1025-26.

client with respect, to listen and to really understand the client's needs and the case demands. Working to this end improves the effectiveness and the image of the justice system.