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Suzanne J. Schmitz

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# WHAT'S THE HARM?: RETHINKING THE ROLE OF DOMESTIC VIOLENCE ADVOCATES AND THE UNAUTHORIZED PRACTICE OF LAW

SUZANNE J. SCHMITZ\*

Imagine that a victim of domestic violence, while in dread of the batterer, finally decides to seek help. She somehow obtains a copy of the petition for a protective order,<sup>1</sup> but it overwhelms her. She calls a lawyer's office and is told, "we don't do that work here." She musters the courage to call a second office, where she is told to "bring \$500 and we'll see you." Desperate, finally she calls a domestic violence agency where she is welcomed and offered help by a domestic violence advocate. Shortly thereafter, the victim learns that the domestic violence advocate can only give her general information, not information specific to her case. The advocate cannot tell her how to fill out the petition form, and cannot help her prepare for the hearing. Now imagine a very frustrated victim.<sup>2</sup>

The remedies available to victims of domestic violence are meaningless if victims cannot access the legal system. In situations where the bar seems unable to meet the legal needs of domestic violence victims,<sup>3</sup> lay advocates, trained in the law and sensitive to victims, are ready and able to serve them. Perhaps, the greatest barrier to the effectiveness of lay domestic violence advocates is the fear of being accused of the unauthorized practice of law. It is time for the bench and bar to work with the domestic violence advocacy

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\* Associate Clinical Professor, Southern Illinois University School of Law. Thanks to numerous colleagues who offered comments and special thanks to Curtis Isabell, J.D. candidate 2003, Southern Illinois University School of Law, for research and editorial assistance to Jennifer Goodey, J.D. candidate 2002, Southern Illinois University School of Law, for editorial assistance.

1. A protective order is typically a civil remedy that enjoins a batterer from contact with the victim, and may grant the victim possession of the residence and other property, and may award temporary custody and visitation of children. Temporary protective orders can be awarded on an expedited, *ex parte* basis for a limited time, followed by notice and a hearing at which time a second, 'permanent' protective order may issue. PETER FINN & SARAH COLSON, U.S. DEPT OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 2 (1990); Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 165 (1993).

2. For a fuller account of the difficulties faced by victims, see generally Margaret F. Brown, Note, *Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law*, 34 COLUM. J. L. & SOC. PROBS. 279 (2001).

3. See Kinports & Fischer, *supra* note 1, at 174 (many petitioners cannot afford to hire private counsel and pro bono assistance is unavailable in many counties).

community to endorse the use of competent, lay advocates to assist domestic violence victims.

Parts I and II discuss the need for victims assistance in accessing the legal system and the ability of domestic violence advocates to meet that need. Parts III and IV discuss advocates' fears concerning the unauthorized practice of law, and the implications of the American Bar Association's ("ABA") recent recommendations.<sup>4</sup> Part V analyzes the unsatisfactory results caused by restricting advocate activities. Part VI uses a harms analysis to discuss regulation of domestic violence advocates. Part VII suggests ways to minimize potential harms that could be caused by lay advocates. Finally, Part VIII proposes an agenda of tasks to be implemented in order to minimize these harms.

### I. VICTIMS OF DOMESTIC VIOLENCE NEED ASSISTANCE IN OBTAINING PROTECTIVE ORDERS

Victims of domestic violence<sup>5</sup> need legal assistance if they are to be effective in accessing the protections of the legal system. One of the protections available to victims of domestic violence is a protective order. Victims of domestic violence who are not represented by counsel are generally unsuccessful in obtaining protective orders.<sup>6</sup> However, when orders do issue to unrepresented

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4. See TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, ABA, CHALLENGE STATEMENT: MODEL DEFINITION OF THE PRACTICE OF LAW available at [http://www.abanet.org/cpr/model\\_def\\_challenge.html](http://www.abanet.org/cpr/model_def_challenge.html) (last visited Feb. 23, 2004) [hereinafter ABA, CHALLENGE STATEMENT].

5. There were 691,710 nonfatal violent assaults on domestic violence victims in 2001; 1,247 women and 440 men were killed by an intimate partner in 2000. See CALLIE M. RENNISON, U.S. DEPT OF JUSTICE, REP. NO. NCJ-197838, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> at 1 (2003). Nearly 25 percent of women and 7.6 percent of men who participated in the National Violence Against Women (NVAW) survey reported being a victim of domestic violence at some time in their lives. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT OF JUSTICE, REP. NO. 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii (2000). Between 22 and 35 percent of women who visit an emergency room are there due to domestic violence-related injuries. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3,8 (1999) (citing Terri Randall, Domestic Violence Intervention Calls for More than Treating Injuries, 264 JAMA 939, 939 (1990)). "More women seek medical attention because of harm inflicted by a spouse than from auto accidents, rapes, and muggings combined." *Id.* (citing RITA THAEMERT, NATIONAL CENTER FOR STATE LEGISLATURES, TIL VIOLENCE DO US PART 26 (Mar. 1993)).

6. See Kinports & Fischer, *supra* note 1, at 175-76 (explaining that victim representation is especially vital when the batterer is represented by counsel). But see FINN & COLSON, *supra* note 1, at 19 ("Many judges report that even with a simplified petitioning procedure and energetic lay assistance to victims, those victims who are not represented by counsel are

victims, the orders are less likely to provide for all the protections necessary or available.<sup>7</sup>

Several studies report that most victims are not aware of their legal rights or the protections available to them under the law.<sup>8</sup> Rather, they are likely to hold distorted views of the law, often views they have been led to believe by their batterers.<sup>9</sup> Even if they understand the protections available under the law, many victims are not sufficiently skilled at advocacy to obtain the relief needed;<sup>10</sup> nor do most victims understand the implications of the process of obtaining a protective order on other matters such as divorce or criminal proceedings.<sup>11</sup> Indeed, the legal process can be confusing and intimidating to any citizen, and more so, to one in emotional crisis whose personal safety is at risk.<sup>12</sup> Difficulties in accessing the legal system and obtaining relief are even greater for those who face a language barrier,<sup>13</sup> or for those who, because of culture, distrust the system.<sup>14</sup>

Guidance and support of the victim throughout the petitioning process is a key to successfully obtaining the desired relief and understanding the effect of that relief. Such assistance can be provided by a lawyer or non-lawyer.<sup>15</sup> Despite the many programs that provide legal assistance to victims of domestic violence, many victims do not receive aid.<sup>16</sup> Legal services programs, overwhelmed with requests from victims, are often underfunded and thus, unable

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less likely to get protection orders.") *Id.*

7. See FINN & COLSON, *supra* note 1, at 19.

8. See generally Arlene N. Weisz, *Legal Advocacy for Domestic Violence Survivors: The Power of an Informative Relationship*, 80 *FAMILIES IN SOC'Y: THE J. OF CONTEMP. HUM. SERVICES* 143, 143 (1999); Kinports & Fischer, *supra* note 1 at 169.

9. See, e.g., Weisz, *supra* note 8, at 143 (explaining situations where batterers may tell victims that if the victims leave the home with the children, the police will charge the victims with kidnapping). See also Epstein, *supra* note 5, at 35.

10. FINN & COLSON, *supra* note 1, at 19; Kinports & Fischer, *supra* note 1, at 204.

11. FINN & COLSON, *supra* note 1, at 19.

12. See *id.*; see also Kinports & Fischer, *supra* note 1, at 170-72; Hon. Hollis L. Webster, *Enforcement in Domestic Violence Cases*, 26 *LOY. U. CHI. L.J.* 663, 667; Weisz, *supra* note 8, at 142-44.

13. Kinports & Fischer, *supra* note 1, at 186-87.

14. Epstein, *supra* note 5, at 17-18.

15. FINN & COLSON, *supra* note 1, at 24, 26.

16. See *id.* at 24. See also Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 *GEO. J. LEGAL ETHICS* 209, 229 (1990) [hereinafter Rhode, *Delivery*]. As early as 1990, Professor Rhode identified divorce work, a field related to domestic violence where legal needs are often unmet and lay practitioners are active. *Id.*

to meet the demand.<sup>17</sup> Many victims earn too much money to qualify for free legal services, but do not earn enough to afford a private attorney.<sup>18</sup>

In situations where a victim can afford to retain a lawyer, few lawyers are experienced in domestic violence matters.<sup>19</sup> In some cases the presence of a lawyer may not improve the process of obtaining a protective order.<sup>20</sup> Attorneys may delay the process when domestic violence victims, typically *pro bono* cases, take a lesser priority than their paying clients.<sup>21</sup> In Kinport and Fischer's study, a significant number of victims reported dissatisfaction with their attorneys' performance in assisting them with protective orders.<sup>22</sup> Some victims complained that attorneys were unwilling to work with them, made decisions without consultation, did not request desired remedies, or pressured them into unfavorable settlements.<sup>23</sup>

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17. FINN & COLSON, *supra* note 1, at 24; Kinports & Fischer, *supra* note 1, at 175.

18. FINN & COLSON, *supra* note 1, at 24. Numerous studies have examined the gap between the legal needs of the poor and moderate income households and the availability of resources. For further discussion, see Kinports & Fischer, *supra* note 1, at 174-77 (finding two-thirds of advocates surveyed reported that financial costs were a significant constraint to obtaining legal assistance for victims; yet only about eleven percent of the advocates nationwide reported the existence of *pro bono* programs for victims); see also ABA COMMISSION ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 75-80 (1995) [hereinafter ABA, NONLAWYER ACTIVITY].

19. Brown, *supra* note 2, at 282; ABA, NONLAWYER ACTIVITY, *supra* note 18, at 81 (finding that in many communities, few if any lawyers are experienced in certain types of cases, including those of battered women seeking protective orders). See also Kinports & Fischer, *supra* note 1, at 174.

20. See Kinports & Fischer, *supra* note 1, at 176-77; see also Rhode, *Delivery*, *supra* note 16, at 230 ("attorneys who lack experience in substantive area may be less able to provide cost-effective routine services than experienced legal technicians.").

21. See *id.* at 176; Brown, *supra* note 2, at 282.

22. Kinports & Fischer, *supra* note 1, at 176-77 (Thirty percent of respondents were dissatisfied with their attorney, twenty-six percent were ambivalent).

23. See *id.* at 176; see also Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, at 1059 (1993); see also ABA, REPORT BY THE ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW 7 (2003) at [http://www.abanet.org/cpr/modeldef/taskforce\\_rpt\\_803.pdf](http://www.abanet.org/cpr/modeldef/taskforce_rpt_803.pdf) [hereinafter ABA, REPORT] ("there are nonlawyers whose specialized knowledge and experience may make them as competent as many lawyers in certain areas related to the law.").

## II. DOMESTIC VIOLENCE ADVOCATES MEET THE NEED FOR VICTIM ASSISTANCE

One means of offering legal assistance to victims of domestic violence is the use of lay advocates.<sup>24</sup> Often called domestic violence advocates, these nonlawyers educate victims about the legal protections available to them,<sup>25</sup> assist victims in preparing petitions for orders of protection and various court proceedings,<sup>26</sup> and provide emotional support throughout the process.<sup>27</sup> In some cases, advocates sit at the counsel table with victims<sup>28</sup> and may accompany them to hearings, meetings, depositions, and other proceedings.<sup>29</sup> In certain circumstances, advocates address the court.<sup>30</sup>

In fact, judges in many jurisdictions depend on lay advocates to assist in providing for efficient and orderly hearings by ensuring that victims meet the eligibility requirements, seeing that forms are properly completed, and ensuring that the victim and witness are adequately prepared for the hearing.<sup>31</sup> Lay advocates also help to ensure that victims return for permanent hearings and help to

24. See generally FINN & COLSON, *supra* note 1, at 24; Kinports & Fischer, *supra* note 1, at 184; Klein & Orloff, *supra* note 23, at 1060.

25. See, e.g., *In re Domestic Abuse Advocates*, No. C2-87-1089, 1991 Minn. LEXIS 34 (Minn. Feb. 5, 1991)(Outlining permissible advocate activities).

26. See, e.g., Illinois Domestic Violence Act of 1986, 750 ILL. COMP. STAT. 60/205(b)(3) (2003)(“Court administrators shall allow domestic abuse advocates to assist victims of domestic violence in the preparation of petitions for orders of protection”); N.D. SUP. CT. ADMIN. R. 34 § 4(a) (2003) (“a Certified Domestic Violence Advocate may: (a) assist the petitioner in completing printed forms for proceedings. . .”); see also *In re Domestic Abuse Advocates*, No. C2-87-1089, 1991 Minn. LEXIS 34 (“Court administrators shall allow domestic abuse advocates to assist victims of domestic violence in the preparation of petitions for protection orders.”).

27. See Weisz, *supra* note 8, at 142-44; FINN & COLSON, *supra* note 1, at 24; Kinports & Fischer, *supra* note 1, at 173-74, 216; Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415, 422 (1996).

28. See, e.g., 750 ILL. COMP. STAT. 60/205(b)(1) (2003) (“In all circuit court proceedings under this Act, domestic abuse advocates shall be allowed to attend and sit at counsel table and confer with the victim, unless otherwise directed by the court.”); *In re Domestic Abuse Advocates*, No. C2-87-1089, 1991 Minn. LEXIS 34 (“domestic abuse advocates shall be allowed to attend and sit at counsel table, confer with the victim. . .”). But see WIS. STAT. § 895.73(2)(2003) (“The service representative may not sit at counsel table during a jury trial.”).

29. See, e.g., WIS. STAT. § 895.73(2) (2003) (“A service representative selected by a complainant has the right to be present at every hearing, deposition and court proceeding and all interviews and meetings related to those hearings, depositions and court proceedings that the complainant is required or authorized to attend. . .”).

30. See, e.g., *id.* (“The service representative may address the court if permitted to do so by the court.”); N.D. SUP. CT. ADMIN. R. 34(2)(2003)(“a Certified Domestic Violence Advocate may: (c) at the judge’s discretion, make written or oral statements to the court”); *In re Domestic Abuse Advocates*, No. C2-87-1089, 1991 Minn. LEXIS 34 (“[D]omestic abuse advocates shall be allowed to . . . at the judge’s discretion, address the court.”).

31. See FINN & COLSON, *supra* note 1, at 26, 30.

identify cases where attorney representation is essential.<sup>32</sup> Lay advocates also assist victims with safety planning and refer victims to shelters or other sources of emergency services.<sup>33</sup>

Because of their "understanding of the emotional and social impact of domestic violence" and their training in communication, lay advocates often communicate better with victims than others in the legal system.<sup>34</sup> Although their qualifications vary by jurisdiction, domestic violence advocates are frequently affiliated with nonprofit agencies such as counseling programs, battered women's shelters or courts.<sup>35</sup> Some work under the auspices of a criminal prosecutorial office or other law enforcement agency.<sup>36</sup>

There are limitations on what lay advocates can do. Lay advocates are unlikely to be effective advocates in hearings where the respondent is represented by counsel.<sup>37</sup> Further, lay advocates may not appreciate the impact of the petition for a protective order on other matters such as divorce or custody proceedings.<sup>38</sup> Nor can lay advocates represent the victim in other related legal matters such as divorce proceedings, paternity and child support enforcement proceedings, or applications for benefits.<sup>39</sup>

32. *See id.* at 26.

33. *Id.* at 26; *see also* Brown, *supra* note 2, at 281 (citing Rachel Callanan, *My Lips are Sealed: The Need for a Testimonial Privilege and Confidentiality for Victim Advocates*, 18 HAMLINE J. PUB. L. & POL'Y 225, 226-27 (1996)).

34. FINN & COLSON, *supra* note 1, at 26; *see also* Kinports & Fischer, *supra* note 1, at 173. Empirical evidence from victims supports the belief that advocates are helpful to them. *See, e.g.,* Weisz, *supra* note 8, at 142-44. Studies of lay advocates in other fields also indicates that there is high public satisfaction with lay advocates. *See* Rhode, *Delivery*, *supra* note 16, at 230-31. (outlining growth and developments in the lay 'practice of law'). Several studies suggest that nonlawyers perform well in providing limited services. *See, e.g.,* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998) (examining lawyer and non-lawyer advocates in the unemployment compensation field); *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976) (discussing clerical assistance and personal advice by lay divorce businesses and feminist organizations in the unemployment compensation field).

35. *See, e.g.,* N.D. SUP. CT. ADMIN. R. 34 (2003):

A Certified Domestic Violence Advocate is defined as a person who: (a) is certified by the North Dakota Council on Abused Women's Services as a Certified Domestic Violence Advocate to provide direct support services to alleged victims of domestic violence; (b) is affiliated with a domestic violence program which is a member of the North Dakota Council on Abused Women's Services

*Id.*; GA. CODE ANN. § 19-13-3(d) (2003) ("Family violence shelter or social service agency staff members designated by the court. . ."); HAW. REV. STAT. § 586-3 (d) (2003) ("The family court shall designate an employee or appropriate nonjudicial agency to assist the person in completing the petition"); FINN & COLSON, *supra* note 1, at 24-26.

36. *See* FINN & COLSON, *supra* note 1, at 24-26.

37. *See id.* at 26.

38. *See id.* at 19.

39. *Id.* at 26 (noting that Massachusetts is unique in allowing lay advocates to assist

### III. FEAR OF ACCUSATIONS OF THE UNAUTHORIZED PRACTICE OF LAW PRESENTS AN OBSTACLE TO EFFECTIVE DOMESTIC VIOLENCE ADVOCACY

Because of the nebulous definition of the 'practice of law,' advocates fear that they may inadvertently cross the line between permissible and impermissible activity.<sup>40</sup> Until recently, it was hard to determine whether this fear was well-founded; there are few reported appellate cases in which advocates have been charged.<sup>41</sup> Despite the fact that the unauthorized practice of law is criminal in some states, there is little agreement on what activities constitute 'practice of law.'<sup>42</sup> In fact, the comment to the Model Rules of Professional Conduct does not attempt to define the practice of law stating, "[T]he definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."<sup>43</sup> The situation was such that in 1988, a state bar committee in California concluded that the concept of unauthorized practice of law was "incapable of meaningful definition and therefore unenforceable. . . ."<sup>44</sup>

There is also some debate as to whose responsibility it is to define the practice of law. Generally, supervision of attorneys is a judicial function.<sup>45</sup> However, some state legislatures have acted to make unauthorized practice a crime.<sup>46</sup> Further, some legislatures have carved out exceptions, such as those described *infra*

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battered women in cases other than protective order hearings such as child custody or child abuse cases).

40. See Trubek, *supra* note 27, at 427; see also ABA, REPORT, *supra* note 23.

41. See STANDING COMMITTEE ON LAWYER'S RESPONSIBILITY FOR CLIENT PROTECTION 1995-1996, ABA, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE (1996) (survey and analysis of unauthorized practice of law in the fifty states) [hereinafter 1994 SURVEY ON UNAUTHORIZED PRACTICE]. The survey and related materials revealed only one case involving domestic violence advocates, *Selland v. Selland*, 519 N.W.2d 21 (N.D. 1994) (third-party complaint against a lay advocate filed as part of a divorce proceeding by an accused batterer).

42. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000).

43. MODEL RULES OF PROF'L CONDUCT R. 5.5. cmt. (2002).

44. ABA, NONLAWYER ACTIVITY, *supra* note 18, at 30.

45. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §15.1.3 at 834 (1986) (describing that courts in many jurisdictions claim authority to regulate and define unauthorized practice of law).

46. See *id.* at 834-35 (citing e.g., *Merco Constr. Eng'rs, Inc. v. Municipal Court* 21 Cal.3d 724 (1978); *Idaho State Bar Ass'n v. Idaho Pub. Utilities Comm'n*, 637 P.2d 1168 (1981)) (some courts have struck down legislative attempts to modify rules regarding unauthorized practice).



for domestic violence advocates, and have stated that when acting within these prescribed limits, they are not considered to be 'practicing law.'<sup>47</sup> In some cases, the executive branch may undertake prosecutions.<sup>48</sup> Thus, all three branches of government have some responsibility for determining what constitutes the practice of law, but it is the courts that must act on criminal prosecutions and petitions to hold someone in contempt for unauthorized practice, or to discipline lawyers for assisting in the unauthorized practice of law.<sup>49</sup>

It was this inconsistency concerning what constitutes the practice of law that likely led the ABA to establish a task force to attempt to define the practice of law.<sup>50</sup> The ABA Task Force on the Model Definition of the Practice of Law calls on states to define the practice of law.<sup>51</sup> A concern is that states, in doing so, may rely on traditional common law tests to develop a model definition, tests that have been unhelpful in the past.

In determining what constitutes the practice of law, courts have generally utilized unsatisfactory tests, characterized by Wolfram as the "professional judgement test," "traditional areas of law test," and the "incidental legal services test."<sup>52</sup> The professional judgement test, which asks "whether the activity in question is one in which a lawyer's presumed special training and skills are relevant,"<sup>53</sup> is too broad.<sup>54</sup> The "traditional areas of law" approach, that certain activities customarily performed or commonly understood to be performed by lawyers constitute the practice of law,<sup>55</sup> is similarly defective. Both tests overlook the fact that "some legal skill and knowledge can be readily attained and deployed effectively by nonlawyers."<sup>56</sup> Additionally, "[b]ecause lawyers perform almost every function known in the commercial and governmental realm,

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47. See, e.g., 750 ILL. COMP. STAT. 60/205 (1999); WASH. REV. CODE § 26.50.030(3) (1993), GA. CODE ANN. § 19-13-3(d) (1991); NEV. REV. STAT. § 33.050(3) (1986).

48. 1994 SURVEY ON UNAUTHORIZED PRACTICE, *supra* note 41, at 2 (State Attorney Generals and county or local prosecutors prosecute unauthorized practice of law charges). Note also that many administrative agencies permit lay advocates to practice before them. See Rhode, *Delivery*, *supra* note 16, at 215-6.

49. WOLFRAM, *supra* note 45, at 834-36.

50. ABA, CHALLENGE STATEMENT, *supra* note 4.

51. *Id.*; ABA, REPORT, *supra* note 23, at 12.

52. WOLFRAM, *supra* note 45, at 836.

53. See *Agran v. Shapiro*, 127 Cal.App.2d Supp. 807 (1954); *Gardner v. Conway* 48 N.W. 2d 788, 795-96 (1951) cited in WOLFRAM, *supra* note 45, at 836.

54. See WOLFRAM, *supra* note 45, at 836. (courts apply this test either on a case-by-case basis or to categories of activities).

55. See *id.*

56. *Id.* at 836; See ABA, REPORT, *supra* note 23, at 7.

such a definition would obviously be too global to be workable . . . [and] would also impose [intolerable] costs . . .”<sup>57</sup> In fact, in the field of domestic violence, advocates may possess greater legal skill and knowledge coupled with better understanding of the victims than many lawyers.<sup>58</sup> The “incidental legal services test” actually identifies permissible exceptions to the practice of law, rather than defining unauthorized practice.<sup>59</sup> This test permits parties to perform certain tasks that may constitute the practice of law if considered independently, but are incidental to their business or commercial work.<sup>60</sup>

These approaches to the unauthorized practice of law have produced inconsistent results.<sup>61</sup> Each of these tests has been rejected by the courts and criticized by consumers and government agencies.<sup>62</sup> Despite these flaws, these tests are still currently employed. Applied to domestic violence advocates, they can result in banning or restricting their activities.

An additional complicating factor is that challenges to the practice of law are often conducted privately. Rather than filing a formal charge of unauthorized practice, it is more likely that bar associations will issue cease and desist letters to lay advocates or send letters threatening prosecution.<sup>63</sup> Advocates receiving a warning letter from the bar are more likely to terminate their work rather than challenge or test the bar’s theory that they are practicing law.<sup>64</sup> In addition to complaints filed with the relevant state bar

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57. *Id.*

58. FINN & COLSON, *supra* note 1, at 26.

59. See WOLFRAM, *supra* note 45, at 836.

60. See *id.* (for example, a realtor who completes forms in closing is not engaging in unauthorized practice if the forms are incidental to his or her sale).

61. ABA, NONLAWYER ACTIVITY, *supra* note 18, at 20-22.

62. See *id.* at 22. See also Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 47, 49, 53, 62 (1981) [hereinafter Rhode, *Policing*]. These tests have been challenged by courts and critics over the years. The most common criticisms are that the standards violate due process by being too vague and the First Amendment by being overbroad. Additional objections are that these standards restrain trade and violate the antitrust statutes. See also RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS §4 cmt. c (2000).

63. Rhode, *Delivery*, *supra* note 16, at 57 (citing activities of the Virginia Bar Committee in particular).

64. Rhode, *Policing*, *supra* note 62 (detailing bar committees’ broad powers to enjoining lay advocates). Those engaged in the unauthorized practice of law face serious penalties, including conviction of a crime or sanctions for contempt; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. a (2000). See Brown, *supra* note 2 at 284-85 (citing Natalie P. McNeal, *Suit: Woman Acted as Lawyer*, RALEIGH NEWS & OBSERVER, Aug. 7, 1999, at B1; Natalie P. McNeal, *State Bar Votes to Caution Advocate*, RALEIGH NEWS & OBSERVER, Oct. 7, 1999, at B4) (Attorney for the batterer filed a complaint with the North Carolina State Bar Association against Gruelle who held an *ex parte* conference with a judge to amend a

associations, disgruntled respondents accused of domestic violence sometimes challenge advocate activities by bringing legal action.<sup>65</sup> One agency discontinued assistance to a victim because it could not afford to defend the repeated lawsuits waged against it by the alleged abuser.<sup>66</sup> Despite the small volume of these suits, defending against charges diverts financial resources from helping victims.<sup>67</sup>

To protect domestic violence advocates from unauthorized practice of law charges and to encourage advocacy activities, several states rely on statutes and rules decreeing that domestic violence advocates who perform certain specified services are not engaged in the unauthorized practice of law.<sup>68</sup> Although well-intentioned, this approach has limited value because the exceptions are seldom clearly defined.<sup>69</sup> Further, the exceptions are too narrow to permit the advocate to meet the needs of victims; for example, the statute might provide that the advocate may assist the victim in completing the form, with the restriction that the advocate may not *explain* the meaning of the form.<sup>70</sup> Assistance without education is of little use to the typical victim:

to require that lay practitioners sit sphinx-like in the face of even rudimentary inquiries, and type up forms which they know to incorporate errors or omissions, is a rather perverse means of "protect[ing] the public." The net effect is that the "customer gets lousy service and the courts get lousy papers."<sup>71</sup>

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wrongly-worded protective order. Unauthorized practice of law is a misdemeanor, but a district attorney would have to pursue the charge, not the bar committee).

65. See *Selland*, 519 N.W.2d., at 21; Brown, *supra* note 2, at 283. In *Selland*, a husband brought suit charging the unauthorized practice of law against the domestic violence advocates who assisted his wife in an earlier proceeding.

66. Brown, *supra* note 2, at 283 (citing Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19 n.7 (1999)).

67. See, e.g., *id.* (The *Selland* case demonstrates the potential costs, financial and otherwise, to domestic violence programs if they are sued. The domestic violence advocates in *Selland* were in litigation for over eighteen months.)

68. See 750 ILL. COMP. STAT. 60/205 (2003); N.D. SUP. CT. ADMIN. R. 34 (2003); WIS. STAT. § 895.73 (2003); *In re Domestic Abuse Advocates*, C2-87-1089, 1991 Minn. LEXIS 34.

69. For further clarity, the Maryland Attorney General issued an opinion distinguishing between activities advocates may and may not do and expressly listing a number of activities in which they may not engage. See *Unauthorized Practice of Law – Activities of Lay Advocates*, 80 Op. MD Att'y Gen. No. 95-056, 138 (1995) [hereinafter 80 Op. MD Att'y Gen. No. 95-056].

70. *Id.*; Rhode, *Policing*, *supra* note 62, at 84.

71. Rhode, *Policing*, *supra* note 62, at 84.

#### IV. THE CONTINUING THREAT OF A CHARGE OF UNAUTHORIZED PRACTICE

Since the ABA Commission on Nonlawyer Practice's endorsement of lay advocates in 1995 in areas such as domestic violence, the ABA House of Delegates recommended in 2003 that every state adopt a definition of the practice of law.<sup>72</sup> Rather than adopting a detailed, standardized definition of the practice of law, the ABA House of Delegates recommended the definitions to be adopted include the basic premise that "the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person."<sup>73</sup> The ABA Task Force's report recognizes that nonlawyers may engage in conduct considered to be the practice of law.<sup>74</sup> It recommends that each state weigh which "nonlawyers, and under what circumstances, may provide a great benefit and which may create harm."<sup>75</sup>

If states follow the recommendation of the ABA to adopt a definition of the practice of law, they will face the task that has been so difficult to date. In undertaking this task, the States may rely on the discredited tests discussed *supra*, in Part III, the presumptions considered by the ABA Task Force in 2002, or may conduct the weighing of benefits and harms suggested by the final 2003 ABA Recommendation.

In attempting to define the practice of law, states will find that advocates engage in the very activities that would have been presumptively restricted to lawyers under the 2002 proposed model definition.<sup>76</sup> Advocates inform victims of the relief available to them under the domestic violence statutes and the means to obtain it.<sup>77</sup> Advocates assist victims in completing petitions for protective

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72. ABA, REPORT, *supra* note 23. There is no evidence to suggest that this Task Force proposal was drafted to challenge domestic violence advocates.

73. See *id.* at 13; see also ABA CENTER OF PROFESSIONAL RESPONSIBILITY, RECOMMENDATION, at <http://www.abanet.org/cpr/mdprecom10f.html> (last visited Feb. 23, 2004) [hereinafter ABA, RECOMMENDATION].

74. See ABA, REPORT, *supra* note 23, at 5.

75. *Id.* This recommendation, though fraught with some difficulties discussed *infra*, is considerably more supportive of lay advocates than the 2002 proposed definition, which would have created the presumption that certain activities constitute the practice of law: giving advice or counsel as to legal rights or responsibilities; selecting, drafting or completing legal documents; representing a person before an adjudicative body; or negotiating legal rights or responsibilities on behalf of another. ABA Task Force on the Model Definition of the Practice of Law (Proposed Draft Sept. 18, 2002) at [http://www.abanet.org/cpr/model\\_def\\_definition.html](http://www.abanet.org/cpr/model_def_definition.html) (last visited Feb. 23, 2004).

76. See *id.*

77. Brown, *supra* note 2, at 281.

orders.<sup>78</sup> Advocates sometimes represent victims in court and often accompany them and sit with them at counsel table.<sup>79</sup> Thus, some of the activities typically performed by domestic violence advocates, and sanctioned by many courts, may run afoul of any definitions of the practice of law that follow the earlier recommendations of the ABA's model definition. There are two better approaches. One is for the supreme court of each state to create a rule expressly permitting advocates to engage in these activities. The other is for the states to carefully engage in the weighing of harms and benefits.

#### V. THE ADVOCATES' QUANDARY: BE SAFE OR MEET THE NEED

Advocates receive mixed signals about what they may, or may not do to assist victims. Many judges depend on them to be more active in screening cases, preparing victims and witnesses, and drafting orders.<sup>80</sup> This type of cooperation between the courts and advocates assists victims while permitting the court to maintain its traditional neutrality.<sup>81</sup> Yet, other judges curtail the role of advocates, reinforcing their fear that they will be accused of the unauthorized practice of law.<sup>82</sup>

A recent Maryland Attorney General's opinion<sup>83</sup> typifies the dilemma. The Attorney General endorsed the use of domestic violence advocates and urged the legislature to authorize advocates to engage in additional activities.<sup>84</sup> At the same time, however, he concluded that advocates must narrowly limit their activities, relying on case law to define the practice of law.<sup>85</sup> The Maryland Attorney General's Office has determined that so long as advocates

78. See discussion *supra* Section II.

79. *Id.*

80. Webster, *supra* note 12, at 667-68; FINN & COLSON, *supra* note 1, at 26; Brown, *supra* note 2, at 288.

81. Brown, *supra* note 2, at 288.

82. FINN & COLSON, *supra* note 1, at 26; Kinports & Fischer, *supra* note 1, at 217.

83. See 80 Op. MD Att'y Gen. No. 95-056, *supra* note 69, at 138.

84. *Id.*

[Lay advocates] provide assistance to women who need to escape violence quickly and who often lack the means to obtain other help. Indeed, the ABA report makes specific reference to the vital function of the lay advocate in the domestic violence context. In our view, the General Assembly should consider authorizing lay advocates to provide much-needed help that may not be permissible now.

*Id.* at 145-46.

85. See, e.g., *Public Service Comm'n v. Hahn Transportation, Inc.*, 253 Md. 571, 583 (1969). cited in 80 Op. MD Att'y Gen. No. 95-056, *supra* note 69, at 140-41 (explaining that what constitutes the practice of law is generally for the courts to decide. It is an "inevitably imprecise definition, leaving construction on a case-by-case basis to the courts").

carefully "limit their activity to the unadorned conveyance of information about what rights and remedies exist," they will not be deemed to have engaged in unauthorized practice.<sup>86</sup> Yet, explaining "the legal help available to the victim, the relief she can ask for, and the limitations of an order" is exactly the sort of assistance victims need.<sup>87</sup> The opinion further warns that assistance must be limited to defining terms in the instructions, pointing out where to fill in information, and filling in the form only for those who are illiterate and only if limited to using the victim's own words.<sup>88</sup>

Comprehensive assistance by the advocate is sometimes necessary when victims have difficulty understanding the 'simplified' forms often used for protective orders.<sup>89</sup> Even when the form's instructions are clear, a victim may not appreciate the significance of the language chosen to describe the incident, even when a batterer's behavior in reality offended the statute.<sup>90</sup> For example, a victim who stated that she was hit "upside the head" had her petition denied because the judge did not understand the allegation.<sup>91</sup> Another petitioner was prohibited from testifying about any incidents of abuse other than the one occasion listed on the emergency petition.<sup>92</sup>

To avoid unauthorized practice of law allegations, advocates have been advised that they may inform victims about "purely nonlegal, basic matters such as appropriate attire, where to sit, and . . . a general orientation or overview about the kind of proceeding involved."<sup>93</sup> Advocates may not "provide information about the legal aspects of judicial proceedings, such as how to present a case, call witnesses, introduce evidence, and the like."<sup>94</sup> Yet victims find the

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86. See 80 Op. MD Att'y Gen. No. 95-056, *supra* note 69, at 142. The Maryland opinion is adopted and discussed in an Ohio practitioners' handbook. See RONALD B. ADRINE & ALEXANDRIA M. RUDEN, BALDWIN'S OHIO HANDBOOK SERIES: OHIO DOMESTIC VIOLENCE LAW §16:1 (2002).

87. FINN & COLSON, *supra* note 1, at 24.

88. 80 Op. MD Att'y Gen. No. 95-056, *supra* note 69, at 142-44. *But see* ATTORNEY GEN.'S & LT. GOVERNOR'S FAMILY VIOLENCE COUNCIL, STOPPING FAMILY VIOLENCE: THE COMMUNITY RESPONDS 1,72 (2001) [hereinafter STOPPING FAMILY VIOLENCE] (contrasting the need for lay advocates with the fear that they will inadvertently break the law by engaging in advocacy activities).

89. See, e.g., Kinports & Fischer, *supra* note 1, at 170-71. (Currently, the standard form used in Illinois to petition the court for an order of protection is nine pages in length, with two additional pages of definitions).

90. See *id.* at 170-71.

91. See Epstein, *supra* note 5, at 43.

92. FINN & COLSON, *supra* note 1, at 19.

93. 80 Op. MD Att'y Gen. No. 95-056, *supra* note 69, at 143.

94. *Id.* at 139; see also ADRINE & RUDEN, *supra* note 86, at §16.2. *But see* STOPPING FAMILY VIOLENCE, *supra* note 88, at 72.

courtroom experience sufficiently intimidating that it is difficult to describe what has happened to them or what they need.<sup>95</sup> Furthermore, experience teaches that advocates' assistance in preparing victims to testify will minimize emotional, confused, soft-spoken, vague, or nervous testimony that is easily discredited – resulting in the victim being denied relief.<sup>96</sup>

In light of the ABA Task Force's call for states to define the practice of law, if states follow the analysis of the Maryland Attorney General's Office and conclude that many advocate activities constitute the unauthorized practice of law, the work of advocates may become severely restricted. If this happens, victims will not obtain the protections they need. Harms analysis is a preferable framework.

## VI. HARMS ANALYSIS: A BETTER ANALYTICAL APPROACH TO REGULATING ADVOCATES

Banning or limiting lay advocate activities under the guise of unauthorized practice of law will not meet the great need of legal assistance for domestic violence victims. It is time to find a new approach to the issue. Indeed, there are other, less restrictive means of providing the necessary degree of regulation or supervision of domestic advocates. Such an approach has been offered by the ABA Commission on Nonlawyer Activity ("The Commission").<sup>97</sup> The Commission envisioned an advocate who advises and assists a client in filing a complaint, seeks police action based on the complaint or judicial action by obtaining an immediate hearing, prepares petitions to seek a protective order, files the petition and other documents, prepares testimony, and presents the case in court.<sup>98</sup>

The Commission utilized a harms analysis to illustrate how a state can approach "law-related non-lawyer activities" in determining what regulations, if any, are appropriate and effective.<sup>99</sup> There are sound policies for limiting those who can practice law.<sup>100</sup> "Protect[ing] the public from the consequences of inexperienced legal services"<sup>101</sup> has long been the primary rationale cited for limiting the practice of law to licensed attorneys. This article adopts the Commission's suggested

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95. See Kinports & Fischer, *supra* note 1, at 204.

96. Kinports & Fischer, *supra* note 1, at 204.

97. ABA, NONLAWYER ACTIVITY, *supra* note 18, at 155-56.

98. *Id.*

99. *Id.* at 150-51; see ABA, REPORT, *supra* note 23, at 5-6.

100. See e.g. ABA, NONLAWYER ACTIVITY, *supra* note 18, at 26; WOLFRAM, *supra* note 45, at 829-31 (1986); RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS §4 cmt. b (2000).

101. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-4 (1986).

analytical framework and applies it to the particular circumstances of domestic violence advocate services, weighing the serious potential harms to victims against the likelihood of serious injury to victims if advocate services are *not* available to them (i.e. the benefits of lay practice).

In order to determine if regulation of domestic violence advocates is needed, this harms analysis will be helpful. It follows three broad elements suggested by The Commission: first, whether the activities of domestic violence advocates pose a serious risk to the client's life, health, safety or economic well-being.<sup>102</sup> Second, whether potential clients have the knowledge to properly evaluate the qualifications of the lay advocate.<sup>103</sup> If so, little or no regulation may be needed. The third inquiry is reached, only upon concluding that the harms caused by lay domestic violence advocates warrant regulation – whether the actual benefits of regulation outweigh any negative consequences of regulation.

#### *A. Potential Harm to Clients posed by Lay Domestic Violence Advocate Activities*

In general, the greatest harm confronting victims of domestic violence is “[u]nique to this situation [–] the substantial risk of harm that comes from no advice being available. . . .”<sup>104</sup> Such victims will continue to endure physical and emotional violence from batterers with the very serious risk of death. Potential benefits of allowing lay practice must be balanced against the very real harm likely to befall the victim if services are not rendered.

The potential betrayal of trust by an advocate's disclosure of a victim's identity, circumstances, or location is another serious harm to be considered. Indeed, it has been observed that the principal concern of victims is “trust: that the program keeps the secrets it is given; that the victim be protected by the program against further violence; that it be possible to rely on the program and get help; and that the helper be someone whom the client can feel safe

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102. ABA, *NONLAWYER ACTIVITY*, *supra* note 18, at 136-37. Wolfram also identifies three harms for consideration: to the legal system, to the system of professional discipline, and to attorneys. *See* WOLFRAM, *supra* note 45, at 829. Harm to the legal system is discussed *infra*. Harm to the system of professional discipline is that disbarred or suspended attorneys may seek to practice as domestic violence advocates. *Id.* Certainly, disciplinary authorities can craft orders and rules that prevent that possibility. The harm to attorneys from competition, does not apply in this situation as most attorneys do not presently service the needs of domestic violence victims.

103. ABA, *NONLAWYER ACTIVITY*, *supra* note 18, at 137.

104. *Id.* at 156.



talking openly.”<sup>105</sup> Advocates must appreciate the need to respect client confidences and secrets. Respect for client confidences is characteristic of many helping professions and is not unique to lawyers.<sup>106</sup> At least one state has a statute that creates a privilege for domestic violence advocates and penalizes any advocate who discloses confidential information.<sup>107</sup>

Studies suggest that lawyers are not particularly well trained to engender the trust required of domestic violence victims, presumably because they do not have the understanding of domestic violence and the interpersonal skills to communicate with victims.<sup>108</sup> The Commission recognized that qualifications such as a law license do not build trust, but that clients can adequately assess the trustworthiness of the advocate.<sup>109</sup> Thus, this potential harm to the client is minimal.

Clients may mistake advocates for attorneys and assume that the same level of confidentiality found in the attorney-client relationship applies to the victim-advocate relationship.<sup>110</sup> Believing the advocate to be an attorney, clients may expect services that the advocate cannot perform.<sup>111</sup> A disclosure requirement can minimize this risk.

There are no cases or studies that document advocate errors. In fact, very few complaints have been received about lay advocates in other areas of practice.<sup>112</sup> Nevertheless, to fully explore potential harm to clients, some anticipated harms are discussed. It is possible that clients could be harmed by poorly-provided services due to incompetent advocates. For example, advocates might fail to identify a victim in need of services, fail to provide for a safety plan or referrals, insufficiently prepare the client to complete the petition for a protective order, or inadequately prepare the victim to testify,

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105. *Id.*

106. See e.g., NATIONAL ASSOCIATION OF SOCIAL WORKERS, CODE OF ETHICS, § 1.07 (1999) available at <https://www.socialworkers.org/pubs/code/code.asp>.

107. See e.g., 750 ILL. COMP. STAT. 60/227(c) (2003) (specifying that disclosure of any confidential communication is a Class A misdemeanor). In Illinois, the confidentiality privilege is limited to advocates who are associated with certain domestic violence organizations and who meet certain training requirements. See 750 ILL. COMP. STAT. 60/227(a)(2).

108. See FINN & COLSON, *supra* note 1, at 26.

109. See ABA, NONLAWYER ACTIVITY, *supra* note 18, at 156.

110. Brown, *supra* note 2, at 290-291 (citing MODEL CODE OF PROF'L CONDUCT EC 3-4 (1981) ("A person who seeks legal services is often not in a position to judge whether he or she will receive proper professional attention")).

111. See *id.* at 291.

112. According to one study, only two percent of the complaints about law advocates are filed by consumers and less than two percent of these complaints allege that the lay advocate was incompetent. Rhode, *Policing*, *supra* note 62, at 85.

resulting in the failure to obtain a protective order. Steps must be taken to reduce the potential harm to clients from incompetent advocates. A solution to the occasional incompetent advocate is not to eliminate their role, but to improve the quality of advocates.<sup>113</sup>

Lay advocates may lack the ability to recognize the interrelationship of issues or to appreciate the occasional unusual situation that requires careful legal attention.<sup>114</sup> Victims of domestic violence often have related issues that are beyond the scope of advocate assistance – divorce, custody and visitation of children, or the need for benefits, that may be affected by Court decisions in regard to emergency protective orders.<sup>115</sup> As noted above, there are no reported instances of such instances by law advocates. It is possible, though, that an advocate who does not appreciate the complexity of the situation may create inadvertent traps for the victim in later and related proceedings. For example, during a hearing on the protective order, a client might request an amount of child support that is less than is permitted by statute. That request, and any resulting order, could be used against the client in a later divorce proceeding.<sup>116</sup> Advocates need to have a means of referring complicated cases to attorneys.<sup>117</sup>

Victims may be harmed if advocates fail to govern themselves by the 'core values' that are central to an attorney-client relationship. These have been described in a recent recommendation by the ABA Center for Professional Responsibility as the duties of undivided loyalty, independent judgment, confidentiality, avoidance of conflicts of interest, maintenance of a single profession of law, and the promotion of access to justice.<sup>118</sup>

Victims will suffer harm if advocates feel divided loyalties, torn between loyalty to the victim and loyalty to their employer who may view the case differently than the victim. Lay advocates, like many other professionals, must address and resolve potential conflicts.<sup>119</sup> Solid training will help advocates realize that they must serve the

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113. Brown, *supra* note 2, at 292; See also discussion *infra*, Section VIII.

114. Weisz, *supra* note 8, at 144.

115. FINN & COLSON, *supra* note 1, at 19; see also Rhode, *Policing*, *supra* note 62, at 95.

116. FINN & COLSON, *supra* note 1, at 19.

117. Klein & Orloff, *supra* note 23, at 1061.

118. ABA, RECOMMENDATION, *supra* note 73; see also WOLFRAM, *supra* note 45, at 829-32 (discussing harms caused by incompetence, discussed *supra*; impairment of professional independence, discussed *infra*; and excessive fees, which are not an issue in this context because most domestic violence advocacy programs charge no fees).

119. See e.g., NATIONAL ASSOCIATION OF SOCIAL WORKERS, *supra* note 106, at § 1.02 (domestic violence advocates often encounter similar relationship dynamics as social workers who counsel and assist domestic situations).

victim's interests, not those of their employers.<sup>120</sup> Advocates, like lawyers, must take care to avoid conflicts of interest because of past relationships with an opposing party.<sup>121</sup> It is unlikely that advocates will be tempted by fees or financial gain from other clients that would create potential conflicts as most domestic violence services serve only victims, offering services at no cost.<sup>122</sup>

Finally, victims suffer when access to justice is denied. Because victims' needs are not sufficiently met by lawyers, victims require the assistance of lay advocates if they are to access justice.<sup>123</sup> Further, victims are more likely to cooperate with the legal system in prosecuting batterers where they are assisted by advocates.<sup>124</sup>

### *B. Potential Harm to the Legal System Posed by Lay Domestic Violence Advocate Activities*

While the primary focus in the harms analysis is on harm to the client, there is also the potential for harm to the legal system caused by the filing of unnecessary or frivolous pleadings and unnecessary hearings. Although there have been no reports of frivolous or unnecessary pleadings by lay domestic advocates, should this occur, it would burden not only on judges but on supporting court personnel, law enforcement, prosecuting and defense attorneys, and the respondents. Law enforcement may be overwhelmed by frivolous calls or filings of reports and orders that should not have been issued. Courts and law enforcement agencies are already equipped to handle these types of errors committed by attorneys, complainants, and witnesses.<sup>125</sup> Although there is potential for increased burden from occasional advocate errors, this burden would be less than the burden imposed by unassisted victims.<sup>126</sup>

120. See e.g., *id.* at §§ 1.01, 3.09 (d).

121. It is conceivable that a past batterer or respondent could later become a victim, seeking services from the lay advocate.

122. See NONLAWYER PRACTICE, *supra* note 17, at 156.

123. *Id.* at 156-57.

124. Webster, *supra* note 12, at 667; Weisz, *supra* note 8, at 145.

125. For example, courts have the power under court rules, contempt power, and perjury statutes, to sanction parties and their representatives for frivolous filings, harassing pleadings or procedures, perjury, or other improper conduct. Likewise, police and law enforcement officials may file perjury, obstruction of justice or other similar charges.

126. FINN & COLSON, *supra* note 1, at 19-27.

*C. Whether Clients Have the Knowledge to Properly Evaluate the Qualifications of Lay Advocates*

While there are serious potential harms to victims caused by lay advocate services, these harms must be balanced against the likelihood of serious injury to victims in the complete absence of assistance. Nevertheless, assuming there is serious harm, the next relevant question is whether the client can evaluate the qualifications of the provider.<sup>127</sup>

In a legal system that is historically unreceptive,<sup>128</sup> domestic violence victims are more likely to respond to anyone willing to help than to make an objective analysis of the qualifications of those offering to help.<sup>129</sup> Thus, at first glance, victims may appear to be unsophisticated consumers of advocacy services. Clients are, however, better able to assess whether the helper is worthy of trust than are regulatory systems.<sup>130</sup> Finally, the reputation of the agency with which advocates are affiliated may assist the client in determining the qualifications of the advocates.<sup>131</sup>

## VII. MINIMIZE THE RISK OF HARMS

*Whether Actual Benefits of Regulation Outweigh Any Negative Consequences of Regulation.*

The final question to be addressed is the extent of regulation needed. Clearly, the provision of services by lay domestic violence advocates are beneficial to victims and should not be banned, but rather regulated. The Commission notes several arguments against extensive regulation: "the pressing need for someone to provide immediate help," the nonprofit nature of the services provided, and the costs to these agencies of meeting regulations.<sup>132</sup> It also suggests several means of oversight: court oversight, reputation of the affiliated agency, lawyer training and lawyer referral services.<sup>133</sup> Additional means of regulating advocates include intensive training programs and continuing education requirements, written manuals

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127. ABA, NONLAWYER ACTIVITY, *supra* note 18, at 156.

128. *Id.* at 156.

129. Weisz, *supra* note 8, at 143.

130. *See* ABA, NONLAWYER ACTIVITY, *supra* note 18, at 156.

131. *Id.* at 156.

132. *See id.*

133. *See id.*

for advocates, prepared materials for victims, licensing or registration of advocates,<sup>134</sup> grievance procedures, and regular meetings of personnel.<sup>135</sup>

The challenge then is not to ban the advocate but to find ways to minimize the harms that can arise. A number of means to oversee and regulate lay advocates are already in place: the advocates' own self-discipline, the courts and law enforcement agencies, and the agencies with which advocates affiliate. Each of these, along with suggestions discussed *infra* will provide effective oversight of advocates.

The most effective means of regulation is the self-discipline of advocates. Good training programs should impress advocates with the value of appropriate advocacy.<sup>136</sup> Despite solid training, there may be the occasional incompetent advocate. Because much of the work of advocacy is performed before judges in open court, judges and other court personnel are in an excellent position to monitor, and if necessary, report on, the performance of lay advocates.<sup>137</sup> Likewise, police and other law enforcement officials with whom advocates interact on a daily basis, can provide similar monitoring. Advocacy groups should work with courts and law enforcement to develop protocols that permit the court, including judges, court personnel, police, counselors, victims and others, to complain to the agency about advocates. Legitimate grievances should be heard and investigated and the reasons for those grievances corrected. A grievance protocol should balance the need to identify legitimate problems with the need to wield power with care.

Organizations with which advocates are affiliated can provide another means of oversight. Organizations such as law enforcement agencies or nonprofit social service organizations must appreciate the need for competence. Effective training programs and oversight by agencies should develop adherence to ethical norms such as confidentiality, client loyalty, and client-control. Finally, the sponsoring organization can help establish a protocol for reporting instances of inappropriate advocate behavior. Such instances can be investigated and corrections made, either through clarification of roles, further training, or discipline of advocates.

Training also can sensitize advocates to the interrelationship of legal issues and to the limits of their role as advocates.<sup>138</sup>

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134. See Brown, *supra* note 2, at 292.

135. FINN & COLSON, *supra* note 1, at 26

136. ABA, NONLAWYER ACTIVITY, *supra* note 18, at 48.

137. *Id.* at 156.

138. Brown, *supra* note 2, at 291.

Advocates will be less tempted to exceed their role if a source of legal assistance is available to which they can refer victims for any necessary legal problems.<sup>139</sup> By working with attorneys as part of their training, advocates will be able to identify and develop relationships with attorneys with whom they can consult on more difficult cases. They will be more willing to refer cases to attorneys they know and trust and who are familiar with domestic violence laws and issues.<sup>140</sup> Attorneys, judges, advocates, and others should work together to develop training materials for advocates to help them avoid errors, and other written materials for victims. Participation of the bench and bar should enhance the credibility of the training.

Advocates can be required to make written disclosures to victims that they are not attorneys, emphasizing that they do not enjoy the attorney-client privilege when talking with advocates.<sup>141</sup> Advocates should also fully describe the confidentiality protections that do exist.<sup>142</sup> Additionally, the disclosure should indicate that the advocate will refer the client to a lawyer for services that the advocate cannot perform.

Finally, some jurisdictions maintain a list of lay advocates approved for domestic violence assistance or other matters.<sup>143</sup> These lists give clients, courts and others some assurance that those on the list have been appropriately trained. Those advocates who appear on the list may be required to meet certain requirements and /or ascribe to certain ethical norms.<sup>144</sup>

Nothing in the draft model definition of the practice of law prohibits state courts from delineating certain further exceptions.<sup>145</sup> One exception that state supreme courts should adopt is the services offered by trained domestic violence advocates who meet certain criteria, such as those described here.

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139. FINN & COLSON, *supra* note 1, at 26.

140. Brown, *supra* note 2, at 292.

141. See NONLAWYER PRACTICE, *supra* note 17, at 155-56.

142. See e.g., 750 ILL. COMP. STAT. 60/227(a)(2) (A confidentiality privilege exists for advocates who are associated with certain domestic violence organizations and who meet certain training requirements).

143. See Brown, *supra* note 2, at 293.

144. ABA, NONLAWYER ACTIVITY, *supra* note 18, at 150.

145. See MODEL DEFINITION, *supra* note 77.

## VII. AN AGENDA FOR EFFECTIVE LAY DOMESTIC VIOLENCE ADVOCACY

If lay advocates are to be effective, the bench, bar, and domestic violence communities must work together on an agenda of tasks to be completed. First, they must endorse the use of lay advocates in the domestic violence arena. Court rules or statutes are needed to permit advocates to perform the tasks that have been found to be helpful to domestic violence victims, and to do so free from fear of unauthorized practice of law charges. Second, norms or standards of conduct for lay advocates must be developed, addressing such issues as competence, conflicts of interest, and client self-control. Judges, lawyers, and advocates must have a clear understanding of the role of the advocate in respecting the decision of the client. Those advocates associated with law enforcement agencies must be clear on their role relative to victims and their employers, and explain that role to victims.

Third, these communities must draft rules or statutes providing for confidentiality and clarifying the limits to confidentiality. Fourth, these three groups must cooperate on training and education materials for advocates and victims. They need to educate judges about the role of advocates. They should recommend that courts adopt simple petitions and other forms to be used by advocates. The simpler the form, the less likely there will be error. They also need to develop a referral list of attorneys willing and able to accept cases that advocates cannot handle.

Finally, these three groups must address the issue of remedies for harms that may occur. They need to establish a grievance mechanism. They should also determine a standard of care for advocates and a means to offer compensation to victims harmed by advocates who fail to meet that standard of care.<sup>146</sup>

An example of a reasonable and appropriate regulation of domestic advocates is that employed by the North Dakota Supreme Court. In North Dakota, advocates must be certified by the State Council on Abused Women's Services, affiliated with a domestic violence program approved by the state council, and have completed forty hours of training in an approved curriculum with a requirement of ten additional hours of training each year.<sup>147</sup> The

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146. See, e.g., WOLFRAM, *supra* note 45, at §5.6 (Clients who are harmed by attorneys who do not meet the standard of care expected of attorneys can seek compensation through malpractice suits); see also, WOLFRAM, *supra* note 45, at §4.8. (Some bar associations also maintain funds to compensate clients harmed by attorneys).

147. See N.D. SUP. CT. ADMIN. R. 34 (2002).

Attorney General, President of the State Bar Association, and State Health Officer approve the curriculum for the advocates.<sup>148</sup> The President of the State Bar assists in establishing the grievance procedure by which grievances are received and investigated.<sup>149</sup>

Every state need not follow the example of North Dakota. However, the elements of training, an approved curriculum, involvement of bench and bar, development of a means for handling grievances against lay advocates, and the affiliation with a state-approved program assure quality control of lay advocates.

### CONCLUSION

The American Bar Association took an important step in 1995 when its Commission on Nonlawyer Practice endorsed the use of lay advocates to provide legal services to those whose needs are not being met by the bar. Despite their best efforts, the bench and bar are not meeting the legal needs of domestic violence victims. Lay advocates can. It is time to support them.

This support cannot be unqualified. The challenge is to ensure quality work by lay advocates and to minimize the potential harm to the victim from incompetent or poorly trained advocates. The bench and bar must join the domestic violence community to develop rules that permit lay advocates, establish norms of practice, draft rules of confidentiality, train advocates and others, prepare educational materials, and establish grievance protocols and other means of addressing alleged harms.

The bench and bar, if called upon to define the practice of law, should appreciate the benefits that lay advocates provide to victims of domestic violence. That the risk of harm is small compared with the risks associated with an absence of advocate assistance to victims must be realized. The few steps discussed here will reduce the risk of harm and produce a more comprehensive service to the victims of domestic violence. These steps are necessary to relieve advocates of the fear that they will be accused of the unauthorized practice of law. When relieved of that fear, and when supported by the means discussed here, domestic violence advocates can offer domestic violence victims the help they so desperately need.

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148. *Id.* at §2(C).

149. *Id.* at §4(c).