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Robert H. Aronson

University of Washington School of Law

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WHAT ABOUT THE CHILDREN? ARE FAMILY
LAWYERS THE SAME (ETHICALLY)
AS CRIMINAL LAWYERS?
A MORALITY PLAY

*Robert H. Aronson**

ACT ONE

SCENE: *Small law office of Michelle Jones, a sole practitioner. Ms. Jones is 38 years old, but has only been in practice for three years. She raised a family and held a number of jobs before deciding to attend law school. She is five feet, eight inches tall, with light brown, shoulder-length hair. She is attractive but not beautiful — in fact, she looks a lot like Anne Kelsey.*

Her office “suite” contains three rooms — a reception area, where her one employee, Audrey Burke, serves as receptionist, secretary, paralegal, confidante and friend. Audrey is a five foot, six inch, 45-year-old African-American. She bears a perpetual expression that is part skeptical and part inquisitive, as if she is not willing to accept any person or statement without substantial explanation. In fact, one might wonder whether it is she who is the lawyer.

In addition to Michelle’s office and the reception area, there is a very small law library — just large enough to contain those volumes essential to Michelle’s practice: sets of the state statutes and regional law reporters; a few hornbooks and treatises on family law; notebooks and articles picked up at continuing education programs; and several shelves of assorted course texts from her law school classes. [Even though she had no use for them, nobody else wanted the books, and she couldn’t bear to throw them away after spending so much to purchase them. Besides, they did look impressive, and added variety to her collection.]

In law school, Michelle could not bring herself to join the hordes of students seeking jobs in large commercial law firms. She had signed up for a few interviews, but started having dreams of herself and her colleagues rushing Lemming-like over a precipice. Even working for Legal

* Professor at University of Washington School of Law.

Aid or the Public Defender — jobs that more suited her personal and political beliefs — did not seem attractive to her. She had always worked best on her own, without someone else telling her what to do and how to do it. She knew that the first few years of a solo practice would be difficult, both personally and financially; but, in the end, that appeared to be the only way she could practice law the way she wanted.

Michelle lost money the first year, broke even the second, and now, in her third year, she had finally established a practice that seemed likely to assure her a decent, albeit not lavish, life style. She had originally handled virtually any legal matter she could obtain: trusts and estates, consumer complaints, and uncomplicated contract, personal injury and family law issues. She had a particular aptitude for family law cases, however, and for about a year now, her practice had become increasingly devoted to divorces, adoptions, guardianships, and other family law matters. Having raised three children, and with a natural ability to listen to and empathize with clients, both men and women, of all ages, ethnicities and backgrounds, her practice had begun to thrive.

Just when everything seemed to be coming together the way she had envisioned when she started her practice, however, she became embroiled in the “Joanne Doe Matter.” Joanne had found Michelle’s name in the Yellow Pages, attracted by the “motto” contained in Michelle’s advertisement: “I’m good, and I listen.” [After some consideration as to whether “I’m good” was a qualitative claim that could not be objectively substantiated, the local bar attorney had decided to let it go.] Joanne was seeking a divorce from John, her husband of seven years. The case seemed pretty straightforward — what few assets they had were all marital property, and John and Joanne appeared to be in agreement that they should have joint custody of their five-year-old daughter, Jill.

But a few days ago John had filed a motion to obtain sole custody of Jill on the ground that Joanne was living with a young man who was a “bad influence” on Jill. After questioning Joanne and conducting a brief investigation, Michelle believed that Joanne’s “live-in”, Sam, although a bit hot-tempered, was not such a bad influence as to overcome the very strong legal presumption in the state that the mother should have at least equal custody. But something about Joanne’s reticence to discuss Sam or his relationship with Jill troubled Michelle. She had urged Joanne to tell her “everything”, even if it was difficult to discuss, assuring Joanne that nothing she said would ever be revealed unless authorized by Joanne.

Early this morning, Joanne had called and seemed very distraught. She insisted that she speak with Michelle right away. ACT ONE opens with Audrey showing Joanne into Michelle's office.

MICHELLE: Joanne, come in. What seems to be the problem?

JOANNE: I'm worried about that motion John filed to keep Jill from living with me.

MICHELLE: I told you that you didn't need to worry about that.

JOANNE: But I *have* been living with Sam, and he *does* have a temper.

MICHELLE: Under State law, the fact that you are living with somebody following a legal separation does not warrant taking away custody of your daughter. But I'm concerned about Sam's "temper." Is it in any way harmful to Jill?

JOANNE: Well, Sam likes things neat. If the house isn't cleaned up, he can get pretty angry. It doesn't happen very often, but sometimes, particularly after he has had a couple of beers, he has thrown things around.

MICHELLE: Has he ever hit you or Jill?

JOANNE: Does that matter?

MICHELLE: Of course it matters! He has no right to hit you and you shouldn't put up with it. And Jill's only five.

JOANNE: I mean, can John take Jill away if Sam has hit me or Jill?

MICHELLE: It's possible, particularly if Sam is abusing Jill.

JOANNE: I didn't say he was *abusing* Jill; it's just that he gets upset sometimes. It's my fault for not keeping things neater and not making sure that Jill puts away her toys and stuff.

MICHELLE: Joanne, she's only five; and if Sam likes things neat, why doesn't *he* clean up? In any event, I need to know more about these violent episodes. How many times has he hit Jill, and how severe were the beatings?

JOANNE: I don't want to talk about this anymore. I shouldn't have come. I can deal with Sam, so forget I said anything about this. If John can't take Jill away just because I'm living with Sam, then let's leave it at that. John doesn't know anything about Sam's temper, and I know Jill won't say anything.

MICHELLE: Joanne, this is too important to ignore. I am worried about Jill's safety — and yours. I can't represent you properly if you don't tell me *everything*. You can trust me.

JOANNE: Okay . . . [starting to cry] Sam's usually alright to live with. But, when he gets in one of his "moods," it can get pretty unpleasant. He has hit me on a number of occasions, and has hit Jill three times. Each of those times, I was able to stop him before Jill was seriously hurt, but I worry what might have happened if I hadn't been there. I've begged

Sam to see someone — a doctor or therapist. But he won't go. He *has* promised never to do it again.

MICHELLE: We need to do something about this. Sam needs to get counseling or move out. Or else I'm going to have to report Sam's abuse.

JOANNE: [Very agitated] But you said you would never tell anyone what I told you! I trusted you. They'll take Jill away from me.

MICHELLE: Not if Sam moves out, or maybe if he gets counseling. But if it is reasonably likely that he will kill or inflict substantial bodily injury on Jill, I have an ethical duty to reveal that information to the appropriate tribunal.¹

JOANNE: What? Sam's not going to kill Jill. And he said he wouldn't even hit her again. You *can't* tell anyone. I know I never should have told you. I'm leaving. . . .

MICHELLE: Joanne, wait. Let me review the law, find out what options we have, and see if we can't find a way out of this without risking harm to your or Jill — and without causing them to take away Jill. Give me a couple of days, okay?

JOANNE: Alright . . . but don't tell anyone about Sam.

MICHELLE: And, until I get back to you, don't leave Jill alone with Sam. [*Joanne leaves office. Michelle drops her head into her hands. Lights fade to black.*]

ACT TWO

SCENE: *Office of Fred Roman, a professor in a metropolitan law school. Professor Roman is in his mid-fifties, tall, thin, aristocratic, dressed in a navy three-piece suit. He is a nationally acclaimed authority on legal ethics and he was Michelle Jones' ethics professor in law school. Professor Roman is seated in a high-backed, ornate chair,*

1. See ABA RULES OF PROFESSIONAL CONDUCT (RPC) 1.6(b)(1). Although disclosure is only permissive in the ABA RPC, a number of states have made such disclosure mandatory. *Cf., e.g.,* N.J. Sup. Ct. Advisory Comm. on Professional Ethics, Op. 280 Supp. (1974), 97 N.J. L.J. 753 (1974) ("where an attorney for a parent has facts that demonstrate a propensity of that parent to engage in child abuse . . . the attorney-client privilege does not apply and the information must be provided to the Children's Bureau"); Wis. Bar Assn. Comm. on Prof. Ethics, Op. E-88-11 (lawyer *must* report knowledge of a client's child abuse to appropriate authorities if the lawyer "reasonably believes" the abuse will continue in spite of efforts to encourage client to desist and seek appropriate counseling), with Indianapolis Bar Assn. Legal Ethics Comm., Op. 1-1986 (April 29, 1986) (attorney *permitted* to report under similar reasoning); Mass. Bar Assn. Ethics Comm., Op. 1990-2 (Lawyer who discovers that former client he represented on indecent assault charges is working as counselor at camp for abused children *may* reveal information about former client's past to camp officials if lawyer believes that the client is "reasonably likely" to be driven by compulsion to commit a similar crime). See generally Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEG. ETHICS 243, 253-254 (1987).

behind a large oak desk. The office contains floor to ceiling bookshelves, all filled to overflowing with books, both new and old, labeled and unlabeled notebooks, assorted magazines, law review volumes and reprints, and loose papers sticking out from on top of the books in the shelves. Papers, pleadings, deposition transcripts and law briefs are stacked in piles of various heights on tables shoved up against the bookshelves. Obviously, this is the office of a great and busy man.

Seated in one of the two side-chairs is Louise Terry, another law professor. Professor Terry is in her mid-thirties, about five feet, five inches tall, thin, dressed in gray wool slacks and a purple sweater. Her hair is black, curly, shoulder-length. Her large, wire-rimmed glasses, give her a studious air. Professor Terry is considered an "up and coming" ethics scholar, whose work is less traditional than that of Professor Roman, and incorporates philosophical, literary and feminist analysis and methodology. Several of her articles have been written as narratives or parables. Michelle did not take Legal Ethics from Professor Terry, but did take her class in Family Law.

Michelle is seated in the other side-chair. She has asked the two professors to meet with her, in the hope of finding an ethical way out of her dilemma. She knows that she will get different perspectives from these two highly regarded faculty members. It is clear that Michelle has already described her dilemma.²

PROFESSOR ROMAN: Fortunately, Michelle, I don't think you have done anything unethical . . . yet. I'm concerned that you threatened to reveal your client's confidences without an adequate basis, but since you have not yet disclosed her live-in's past conduct, I believe you are still on safe ground. I know it is difficult for you, but unless you have clear evidence³ that he is likely to inflict substantial bodily injury on the daughter

2. Some liberty has been taken with the applicable ethical rules. Since Joanne told Michelle not to "tell anyone about Sam," that instruction would overcome the usual presumption that a lawyer may reveal client confidences to those necessary to assist in representing the client. See ABA Comment to Model RPC 1.6. As law professors, Fred Roman and Louise Terry could be expected to understand their duty to maintain Joanne's confidences disclosed to them by Michelle. It might also be assumed that Michelle was consulting the professors as *her* legal advisers, so that the confidences were hers, rather than Michelle's. Under that reasoning, however, Michelle would have an obligation to discuss the issue in hypothetical terms so that Michelle's confidences would not be disclosed. For purposes of the story, the reader may assume that (1) Michelle obtained Joanne's consent to seek the advice of the professors, (2) stated her dilemma in hypothetical form, or (3) poetic license has been taken with at least some of the applicable ethical rules in the fine tradition of "L.A. Law."

3. See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (CPR) DR 4-101(C)(3), n.16 (citing ABA Comm. on Professional Ethics, Formal Op. 314 (1965) (attorney *must* disclose the client's confidences if the facts show "beyond a reasonable doubt that the client intends to commit a crime."))

in the future, you have no choice but to oppose the husband's motion on the basis that State law makes her living arrangement irrelevant to the custody issue or to withdraw from the representation.⁴ There is nothing more sacred than a lawyer's assurance of confidentiality to a client.⁵

MICHELLE: But what about protecting Jill? If I oppose the motion on the ground that Joanne's living arrangement is irrelevant to custody, aren't I at least implying that the living arrangement is not harmful to Jill? If Sam harms Jill, how will I live with myself?

PROFESSOR ROMAN: You know, Michelle, that we have an adversary system, and each of us has a specific role to fulfill. It is your role to represent your client zealously and to maintain her confidences. It is the role of the husband's attorney to discover facts and argue positions that are in his client's best interests. And it is the role of the judge to determine what is right or just, based on the opposing presentations and arguments of counsel. Of course, you cannot lie to or mislead the court.⁶ You should not permit your client or her live-in to state that he has *not* hit the child, or maybe even that he is a good parent surrogate. But, so long as the only basis for the husband's motion is the mere fact of your client's living with someone, you can in good conscience oppose that motion under State law. And you certainly cannot reveal your client's confidences.

MICHELLE: What about the fact that Sam has beaten both Joanne and Jill? If he beat her before, he will likely do it again. A five-year-old girl is not going to keep everything neat all of the time, and Sam has refused to seek counseling for his inability to control his temper.⁷

4. See RPC 1.16 and Comment (attorney may withdraw if client insists on pursuing objectives or means the attorney believes to be morally unacceptable, so long as the client will not be adversely affected and permission, when required, is granted by the court).

5. See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 5, 8 (1975) (citing ABA Comm. on Professional Ethics, Formal Op. 150 (1936); M. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 87 (1990)).

6. See RPC 3.3(a) (2)&(4). It is at least arguable that, if failure to reveal Sam's abuse would be considered fraudulent or misleading in conjunction with opposition to John's custody motion on the basis that Sam's relationship with Joanne is not harmful, Michelle might have a duty to reveal the abuse under RPC 3.3(b), despite the otherwise privileged nature of the information.

7. Could Joanne rely on the compulsive and repetitive nature of the abuse to justify a "reasonable belief" that there was an imminent threat to Jill? Cf., e.g., N.J. Sup. Ct. Advisory Comm. on Professional Ethics, Op. 280 Supp. (1974), 97 N.J. L.J. 753 (1974) ("where an attorney for a parent has facts that demonstrate a propensity of that parent to engage in child abuse . . . the attorney-client privilege does not apply and the information must be provided to the Children's Bureau"); with Indianapolis Bar Assn. Legal Ethics Comm., Op. 1-1986 (April 29, 1986) (attorney permitted to report under similar reasoning). See generally Stuart, *Child Abuse Reporting*, *supra* at 253-254.

PROFESSOR ROMAN: That's not good enough, unless you believe that revealing your client's confidences is necessary to prevent *imminent* death or substantial bodily harm. Normally, that would require a believable threat to a specific individual.⁸ The mere fact that the live-in has hit your client's daughter in the past would be insufficient, particularly when there is no indication she suffered substantial bodily injury and the live-in has promised not to do it again. You will just have to trust the system to come out with the right result. The judge can appoint a guardian ad litem for the child⁹; your client may decide to permit you to reveal the information; or the husband's lawyer may discover evidence of the abuse.

Your situation is substantially the same as that of a criminal defense lawyer whose client tells her he has killed seven people, but wants to plead innocent. The attorney knows that, if she is successful in obtaining an acquittal, her client is likely to kill again. As tempting as it may be to tell the world your client is guilty, our adversary system assumes that, in the long run, there will be greater justice to more people if the attorney is not permitted to reveal the information. The system will break down if individual attorneys decide that they can violate their sacred duty of confidentiality in individual cases.

MICHELLE: I understand all of that. And, for the most part, I agree with it — in *criminal* cases. But it seems like the rules were developed as if *all* cases were criminal cases. In criminal cases, the constitutional protections of the right to counsel and privilege against self-incrimination, along with the presumption of innocence, justify the result you suggest. In addition, all of the resources of the police and prosecutor's office can be marshaled to prove the defendant's guilt. And, I can accept the principle that we would rather that ten guilty persons go free than that one innocent person is convicted. Aren't there entirely different considerations involved in family law cases? There is no privilege against self-incrimination or presumption of innocence. Isn't it in society's interest to resolve marital disputes fairly? And isn't the entire system geared to

8. See *Hawkins v. King County Dept. of Rehab. Serv.*, 24 Wn.App. 338, 602 P.2d 361 (1979) ("the obligation to warn, when confidentiality would be compromised to the client's detriment, must be permissive at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person"). Cf. *McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500 (1979) (duty of therapist to warn only upon showing that patient threatened an identifiable third person). See also Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982).

9. Of course, in those jurisdictions where appointment of a guardian is discretionary absent evidence of abuse, it is questionable whether Michelle could suggest the need for appointment since that would constitute conduct adverse to Joanne's interests and based on confidential information.

toward the best interests of children? Why do the ethical rules have to apply across-the-board, to all cases, no matter what the issues or goals of the system?

PROFESSOR ROMAN: I understand your concern. But the attorney-client privilege *does* apply to all cases. It is just as important to effective representation in family matters and other civil cases for the client to confide even the most embarrassing, or even criminal, events. Unless the client is assured that *she* controls whether the information will be revealed by her attorney, she will not reveal the information. In the long run, lawyers will be better able to assist clients in doing the right thing if they have all of relevant information.¹⁰

PROFESSOR TERRY: [*Unable to contain herself any longer*] Is this a private tutorial, or may I jump in? I have at least three problems with your analysis, Fred. First, you assume that an inflexible systemic approach to ethical matters is essential. Many respected ethicists believe that your approach is too categorical.¹¹ They believe that, although a formalized system of rules is necessary, lawyers should exercise judgment and discretion within those formal rules. As suggested by Michelle, one of the factors affecting that discretion and judgment is whether the case is civil or criminal. Although the Rules of Professional Conduct are an improvement over the Code of Professional Responsibility, too many rules are still premised on a criminal law vision of lawyers' roles and obligations. What justification, other than historical continuity, is there for applying the same ethics rules to lawyers representing parents in custody disputes as are applied to lawyers representing criminal defendants?

More and more commentators have begun to suggest that the effort of the drafters of the Rules of Professional Conduct to state rules applicable to lawyers in all fields of practice has resulted in rules that, in some cases are irrelevant, and in others are contrary to, certain highly specialized practice areas.¹² In the family law area, for example, the American Academy of Matrimonial Lawyers' *Bounds of Advocacy* elaborate upon,

10. See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 4-5 (1975); M. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 87-88, 98 (1990).

11. See, e.g., Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

12. See, e.g., Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEG. ETHICS 149 (1993); Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993); Donaldson, *Ethical Considerations in Advising and Representing the Elderly*, C658 ALI-ABA 1 (1991); Pecheresky, *Representing General Partnerships and Close Corporations: A Situational Analysis of Professional Responsibility*, 73 TEX. L. REV. 919, 919-927, 955 (1995). *But see* France, *Unhappy Pioneers: S&L Lawyers Discover a*

and occasionally modify, the Rules of Professional Conduct.¹³ Thus, Standard 2.23 provides: "In representing a parent, an attorney should consider the welfare of children." Standard 2.26 is more specific: "An attorney should disclose evidence of a substantial risk of physical or sexual abuse of a child by the attorney's client."

Second, your analysis is premised on a client-oriented, libertarian — might I say "hired gun" — approach. Certainly, that has been the historical approach to legal ethics.¹⁴ But it is not the *only* reasonable approach. If you emphasize the lawyer's obligation to justice and the public interest, rather than the client's interests, no matter how much

"New World" of Liability, 7 GEO. J. LEG. ETHICS 725 (1994) (response to Sporkin); Aultman, *Cracking Codes*, 7 GEO. J. LEG. ETHICS 735 (1994) (response to Sporkin).

13. *The Bounds of Advocacy: American Academy of Matrimonial Lawyers' Standards of Conduct* was adopted in 1991, following several years of drafting and debate. Various rationales were stated for adoption of a code of conduct specifically for matrimonial lawyers. First, the Scope section of the RPC states that the Rules do not "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." One of the primary purposes of AAML Standards of Conduct is to provide some guidance concerning moral and ethical considerations of particular relevance to family law practitioners, i.e., to help establish the proper bounds of advocacy.

In recent years, an increasing number of individual lawyers and bar associations have observed that a substantial gap exists between the minimum level of ethical conduct mandated by the RPC, and the much greater level of professionalism to which all attorneys should aspire. It has been noted that some attorneys have ignored the Preamble's caution that the Rules do not "exhaust the moral and ethical considerations" relevant to the practice of law at the highest level. Local and state bar associations, along with a number of state and federal courts, have adopted codes of professionalism in an attempt to establish a level of ethical practice well above the minimum necessary to avoid discipline.

In addition, of necessity, the RPC are addressed to all lawyers, regardless of the nature of their practice. Although some Rules deal with specific issues relating to criminal defense lawyers or prosecutors or other government attorneys, the general applicability to all lawyers requires that issues relevant only to a specific area of practice cannot be dealt with in detail, or cannot be addressed at all. Family law attorneys have noted instances of insufficient guidance or apparently undesirable balancing of the attorney's responsibilities in commonly encountered situations. It was therefore determined that the Standards should address issues specifically relevant to family law attorneys and provide guidance in resolving some of the most difficult conflicts between attorneys' obligations to their clients, other persons affected by family law disputes, and their own desire to see that justice is achieved.

In many ways, family law practice is unlike any other area of legal representation. Family law disputes often result in a volatile and emotional atmosphere. It is extremely difficult for family law attorneys to adequately represent the interests of their clients without addressing the interests of other members of the clients' families. Unlike most other disputes in which the parties may harbor a substantial amount of animosity, resentment or unresolved personal issues, the parties in matrimonial disputes may be required to interact for years to come. In addition, many matrimonial lawyers believe that there should be greater recognition of their obligation to consider the best interests of children, regardless of which family member they may represent in a particular case. A survey of Academy Fellows indicated that the harm done to children in an acrimonious family dispute was seen as the most significant problem for which there is insufficient guidance in the RPC.

14. See Simon, *supra* note 11 at 1085-86; Zacharias, *supra* note 11 at 360-64.

against the public interest (so long as they are *legal*), very different conduct would be expected of the lawyer. As Michelle said, the *family law* system, unlike the criminal justice system, is premised on the best interests of the child. I don't believe that client autonomy, the adversary nature of our system, or notions of the right to counsel are sufficient to justify assisting the client in conduct that threatens the physical welfare of children. Although the *client* is entitled to take any action that is not illegal, no essential principle of ethics requires that the client have the assistance of a *lawyer* in that action. If the client is charged with abusing a child, your system-oriented approach may well justify withholding information disclosed by the client. But that does not necessarily justify withholding the information when that client seeks custody of a five-year-old child.

Third, your approach is a typically male, "morality of justice" approach. As Carol Gilligan and others have demonstrated, many women (and a lesser number of men) embrace a "morality of care."¹⁵ The morality of justice is a rule-oriented morality, in which adherence to one's role in the system is essential. Your frequent references to what will result in justice "*in the long run*," suggest a willingness to permit injustice in the short run. The morality of care is much less dependent on rigid adherence to rules.¹⁶ If an injustice can be avoided or corrected in an individual case, then a modification of the rules might be in order.¹⁷

MICHELLE: I have found this ethical discussion very interesting, but I don't think I have any better idea what to do about Joanne and my obligations concerning the information about Sam. If I understand Professor Roman correctly, I can try to convince Joanne to move out if Sam won't seek counseling. But, unless I obtain information indicating that Sam is a specific threat to the future safety of Jill, I cannot reveal the information, even if my prior experience leads me to believe that Sam will undoubtedly hit her again.

PROFESSOR ROMAN: You can also withdraw from representing Joanne.

MICHELLE: True, but that won't help Jill.

15. See C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 5-23 (1982) (rights perspective is characteristically a male trait); Gilligan, *Reply on "In a Different Voice: An Interdisciplinary Forum,"* 11 Signs: J. of Women in Culture & Society 330 (care perspective is characteristically "a female phenomenon"). See also R. Jack and D. Jack.

16. GILLIGAN, IN A DIFFERENT VOICE, *supra* note 15, at 18-23 (methods associated with males of analyzing and resolving moral dilemmas involve abstract, objective, rule-based decisions supported by autonomy, individual rights, the separation of self from others, equality and fairness; methods associated with females of analyzing and resolving moral dilemmas focus on particular contexts of the problems, relationships, caring, equity and responsibility).

17. R. Jack and D. Jack, *supra*, note 15, at —.

PROFESSOR ROMAN: The threat of withdrawal might cause Joanne to take a more active role in assuring Jill's safety.

MICHELLE: I'm not as sure what Professor Terry is recommending. I understand that because this is a family law rather than a criminal matter, you believe I should have greater discretion concerning disclosure. I also understand that under the morality of care, I can attempt to do justice in this case even if that means acting contrary to the role normally expected of attorneys in general. But what is "just" in this case? Joanne doesn't seem to be worried about Sam, and she *is* Jill's mother. Who am I to substitute my judgment for Joanne's? Who is to say that *my* morality of care is better than hers?

PROFESSOR ROMAN: That's my point, exactly! If Professor Terry is willing to allow lawyers to substitute their own personal morality for that of their clients, then she must assume the risk that the lawyers' vision of "justice" might not be preferable to that of their clients.

PROFESSOR TERRY: I wasn't suggesting that lawyers look to their own personal morality as a general matter. In the overwhelming majority of cases, the Rules, founded on common notions of lawyer conduct, appropriately define the applicable standard. Under those rules, client autonomy and decision-making is appropriate. The bases for attorney-client confidentiality are generally valid and should be adhered to in most cases. However, if the lawyer is convinced that application of the rules in a specific case will clearly produce an unjust result, then I think the strong presumption in favor of the rules is overcome, and her decision not to follow the rules would be ethical.

In your situation, Michelle, I agree with the Comment to the AAML *Bounds of Advocacy's* Standard 2.26: "Notwithstanding the importance of the attorney-client privilege, the obligation of the matrimonial lawyer to consider the welfare of children, coupled with the client's lack of any legitimate interest in preventing his attorney from revealing information to protect the children from likely physical abuse, requires disclosure of a substantial risk of abuse and the information necessary to prevent it. If the client insists on seeking custody or unsupervised visitation, even without the attorney's assistance, the attorney should report specific knowledge of child abuse to the authorities for the protection of the child."

Under this standard, you should reveal the information you received from Joanne, even over her objections, if you believe that the three prior instances of Sam's hitting Jill amounted to "child abuse," and that there is a "substantial risk" of further abuse. I cannot resolve those issues for you, but I believe that your obligation is to attempt to resolve them,

rather than to avoid finding out so that you can finesse a difficult situation.

ACT THREE

SCENE: *Michelle's law office. Audrey ushers in Joanne. Michelle looks uncomfortable, but determined.*

JOANNE: What was so important? Do you have news about John's motion?

MICHELLE: No, I need to talk to you about Sam's hitting you and Jill. As a lawyer representing one of her parents, I feel that I have an obligation to do what is necessary to protect her. If there is a substantial risk that Sam will abuse her again, I would feel compelled to reveal that information to the court.

JOANNE: But you promised that you would never reveal anything I told you. What happened to that promise?

MICHELLE: I apologize if I unintentionally misled you. I do have an obligation not to reveal anything you tell me, but there are a very limited number of exceptions to that obligation. I know you are a caring parent, so I hope you will understand that the obligation to protect against the abuse of children is one of the few duties that takes precedence over the duty of confidentiality. Doctors, priests, and psychiatrists also have obligations not to reveal what they are told in confidence. And yet they are required to reveal even their *suspicion* of child abuse.¹⁸

JOANNE: Is there nothing I can do? If you tell the court about Sam, the judge will grant John's motion for sole custody.

MICHELLE: We have a number of options. If you can convince me that there is little likelihood of Sam abusing Jill, I won't feel compelled to reveal his prior abuse. Or, if Sam either seeks counseling or moves out, I'll consider the risk of future abuse to be sufficiently reduced that I won't have to reveal his prior abuse. But if he won't seek counseling or move out, and you can't convince me that the risk of abuse is minimal, I cannot in good conscience argue to the court that you should retain unsupervised custody of Jill. I know you want the best for Jill, so I hope

18. For a listing of child abuse reporting statutes, provisions abrogating various confidentiality privileges, and analysis of the relevant policy rationales, see Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987). Mitchell notes at 734 n.53: "The express retention of the attorney-client privilege [in most statutes] is noteworthy in light of the frequently conceded weakness of its rationale. See S. STONE & R. LIEBMAN, TESTIMONIAL PRIVILEGES § 1.01 (1983)."

you will be strong enough to do what is necessary to protect her from abuse.¹⁹ If you wish, I would be happy to help you in dealing with Sam.

19. See RPC 2.1: "In rendering advice, a lawyer may refer not only to law but to other consideration such as moral, economic, social and political factors, that may be relevant to the client's situation."

