

Lawyer's Working Group

Introduction

The focus of the Lawyers' Working Group¹ was to prepare best practice guidelines for family law lawyers in woman abuse cases. We participated in a visioning exercise to identify gaps in the legal system and in services available to woman abuse survivors and their lawyers. We determined the need for reform of family law legislation and procedural court rules to squarely address domestic violence issues. We reviewed the recommendations in the May/Illes report.² We met with focus group participants and victim/witness service providers. We had the benefit of feedback and input of a Justice of the Superior Court Justice, Family Court branch. We also participated as a part of a focus group to provide feedback to a provincial government committee's review of restraining orders. The following is a summary of the work that forms the report of this working group:

- There is an urgent need to reform provincial and federal family law legislation to provide an analytical framework for domestic violence cases.
- Ontario's Family Law Rules require immediate amendment. These procedural court rules are a step backward for women fleeing abuse as they restrict a woman's access to the court.
- We designed best practice guidelines for lawyers acting for women in domestic violence cases.
- We created innovative best practice guidelines for lawyers who represent the abuser. We highlighted the need for increased funding of legal aid for family law.
- We summarized the next steps for this working group to improve upon the work completed to date, and to address issues we were unable to complete.

The Urgent Need to Reform Provincial and Federal Family Law Legislation To Address Domestic Violence Issues

The *Canadian Charter of Rights and Freedoms*³ accords every individual the right to life, liberty and security of the person:

"Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

A woman who experiences abuse by her intimate partner cannot exercise her right to life, liberty and security of the person, nor can her children. The intimate abusive partner controls their lives.

A seamless⁴ public response is necessary to provide the resources and the means to guarantee this woman and her children the right to life, liberty and security when they break free of the abuse.

What happens for the woman today is exactly the opposite. In a time of crisis, and often immobilized by fear, a woman must fend for herself and her children to secure the basic necessities of life. First and foremost, she must secure physical safety for herself and her children. The woman must obtain financial security and supportive counselling, access legal aid funding if available to her, find a qualified lawyer, access the civil justice system for family law issues, and access the criminal justice system for criminal charges. At each point of contact, the woman must explain her situation, try to find appropriate resources, usually encounter a lack of understanding of the urgency and severity of the issues that face her and still struggle to meet her objective of maintaining safety for herself and her children and living free of the abuse. During this time of extreme crisis, the woman must somehow maintain a sense of personal stability and continue to carry out her child-rearing responsibilities and function at her place of employment or at school.

The struggle to break free can be a life-threatening struggle. That the struggle may end with the death of women and children is a fact of life in Canada. Women separated from their spouses are approximately five times more likely to be killed by their intimate partners than are other women.⁵ Despite the known safety risks to women and children and despite the compelling body of knowledge about the long-term impact of domestic violence on children, we have no comprehensive legislation in Canada to protect women and children in the centre of this storm.⁶

It can be argued, and should be explored further,⁷ that a constitutional challenge should be launched on the basis that provincial and federal legislation fails to protect the constitutional rights of abused women and their children to life, liberty and security of the person.

A gaping deficiency in the existing family law legislation is the failure to provide speedy access to the courts to obtain an early hearing to assess the risk of harm to women and children fleeing violence and to make appropriate court orders at the outset. A comparison can be made to the development of the criminal law and the availability of swift access to a judicial interim release hearing where a judicial official determines whether the accused's detention in jail pending trial is necessary, for among other considerations, "the protection or safety of the public".⁸ Abused women do not have speedy access to justice, nor do they have the benefit of a legislative direction to judges to assess the extent of the safety risks.

The Supreme Court of Canada acknowledged the existence of the "battered woman syndrome" and determined its impact in a woman's plea of self-defence to her murder of her abusive partner. On the one hand, then, the highest court in this country determined that the battered woman's syndrome is so compelling that it can be a complete defence to murder of an abusive partner.⁹ On the other hand, we have no family law legislation that prioritizes the safety issues of women and children attempting to break free of the violence and abuse.

The primary reason why Canadian woman abuse survivors and their children experience injustice in the manner in which custody and access issues are resolved is that provincial and federal governments have failed to enact legislation to give judges the tools they need to make appropriate decisions. The current legislation is not accountable to the needs of women and children fleeing domestic violence.

Canada lags far behind other countries in its development of legislation that protects victims of domestic violence. In the U.S. for instance, the National Council of Juvenile and Family Court Judges developed a Model Code on Domestic and Family Violence which has been adapted and modified throughout the United States. By 1995, forty-four states had enacted custody and access legislation that contains specific provisions concerning domestic violence.¹⁰

In child abuse cases, legislation¹¹ enables judges to make findings about whether or not a child is in need of protection and if such a finding is made, a judge has a range of court orders he or she can make to protect the child. However, in domestic violence cases, we have no legislative framework to enable a judge to make a finding of domestic violence, and then to make appropriate court orders that flow from that finding.

At the present time, custody and access cases are determined, generally speaking, in accordance with the broadly defined "best interests of the child"¹² test. Such a test does not provide a methodology for making decisions in the best interests of children in woman abuse cases. Dr. Peter Jaffe, an internationally respected Canadian expert on domestic violence, has identified the special issues that must be addressed in these cases.¹³ We need to utilize the existing expertise such as Dr. Jaffe's to create Canadian domestic violence legislation. We fully support Professor Nicholas Bala's recommendations for reform¹⁴ in this area.

We put the following "risk assessment" analytical framework forward for future debate and consideration on family law reform:¹⁵

Proposed analytical framework:

1. The **primary objective**¹⁶ of family law legislation, (as well as laws that pertain to child protection, criminal, and mental health) and any system's intervention, **must be the safety of the victims and the accountability and rehabilitation of the abuser.**
2. Legislation must have a comprehensive **definition of domestic violence.**¹⁷
3. To give effect to the primary objective, legislation must mandate judges to:
 - a) Analyze cases based upon accepted **screening tools**¹⁸ to determine whether indicators of physical or emotional abuse are present.
 - b) If indicators of abuse are present, courts **must suspend the traditional no-fault analysis.** At the outset of each case, the court must err on the side of caution to promote the primary objective. Decisions for the longer-term are made after hearing the results of the assessments referred to below.
 - c) Make a **presumption that it is detrimental to the child and not in the child's best interests to be placed in the custody** or joint custody of the perpetrator of abuse.¹⁹
 - d) Grant **automatic restraining orders** to protect women and children where indicators of physical or emotional abuse are present.
 - e) Require that **mandatory comprehensive risk assessments**²⁰ be conducted by woman abuse experts. The judge must have the responsibility to expedite the opinion of the assessor as to what level of contact, including no contact, is in the best interests of the woman and children. The court must also have a mandated responsibility to accept the opinion of the expert assessor.
 - f) Order a **mental health assessment** of the abuser if indicators of mental health issues, particularly depression, are present. The assessor must have expert knowledge of woman-abuse dynamics.
 - g) **Where the abuser poses a safety risk** to his spouse, children, or to himself, and where necessary to promote the primary objective, detain the abuser in custody or in a treatment facility pending the results of assessments and rehabilitation programs.
 - h) Order the abuser to **attend a specialized program** including counselling, information sessions, and long-term therapy geared at rehabilitation.
 - i) **Access to children should be structured** in a manner that promotes the primary objective in each case: i.e. restricted access, supervised access, or a prohibition against access where necessary pending the report of the assessor(s) and the results of treatment programs.
 - j) Provide effective and immediate responses where a **breach of restraining order occurs.** Clear consequences for breaches, and ultimate detention in custody or a treatment facility should occur if the abuser poses a threat to the safety of the women and children.
 - k) Legislation must require **publicly-funded resources** to enable trained professionals to provide the necessary mental health and risk assessments to the court.

In conclusion, all custody and access issues for separated families must not be resolved under the loose umbrella of the "best interests of the child" test using the typical "no-fault" analysis. There must be a mandatory process to address the unique safety and security issues in cases involving allegations of domestic violence. A gap in our existing law is that while expert knowledge and an appropriate analytical framework exists to make safe and secure decisions for women and children, it has not been translated into legislation.

Only when domestic violence legislation is enacted, and a co-ordinated seamless public response exists, will a woman and her children begin a new life, with liberty and security of the person intact. Until then, the work of this project and others must continue in order to work towards improvements in the law, and expansion of community services, to achieve this goal.

If the work of this project helps to speed up the reform of family law legislation, we will have accomplished a great deal.

Immediate Amendments Required To Ontario's Family Law Rules:

The Family Law Rules, proclaimed in force in Ontario November, 1999, apply to any federal or provincial proceeding in which a woman is seeking a separation from her partner, married or unmarried. These procedural court rules apply whenever the woman wishes to invoke statutory remedies to secure court orders, the most common of which pertain to custody, access, support, divorce, property division and protection by way of restraining orders.

What follows is a summary of the Family Law Rules and then an explanation of how the implementation of the Family Law Rules results in further obstacles for women to obtain court orders that are required.

1. To start a Court action, the woman must file and serve on all parties an Application²¹ and a Continuing Record.²²
2. If the woman needs orders regarding custody of or access to a child, the case must proceed in the municipality where the child ordinarily resides with certain serious exceptions.²³
3. If the Application contains a claim for support or property, the woman must file a Financial Statement.²⁴
4. If the woman has been to Court previously, then in addition to preparing and filing her Application, she may need to include a Summary of Court cases.²⁵
5. If there is no claim made for a divorce or property, the woman is given a first appearance Court date and the case is considered "a fast track case".²⁶
6. On the first fast track Court date, which is usually anywhere from one or two months forward, the matter is returnable before a Clerk and not a Judge.

The Clerk has certain duties on that first date, i.e.:

- a. confirm all necessary documents have been served and filed;
 - b. refer the parties to sources of information about the Court process, alternatives to Court (including mediation), the effects of separation and divorce on children and community resources that may help the parties and their children;
 - c. if no Answer has been filed in response to an Application, or if an Affidavit has been filed in response to a Motion to Change a Final Order or Agreement, confirm that the case is ready for a Hearing, Case Conference or Settlement Conference and schedule it accordingly.²⁷
7. If there is a claim for divorce or property, the case is considered a "standard track" case,²⁸ and no Court date is set.²⁹
 8. There is a duty on the court to apply the primary objective³⁰ which is to enable the court to deal with cases justly³¹ and:
 - a. ensuring that the procedure is fair to all parties;
 - b. saving expense and time;
 - c. dealing with the case in ways that are appropriate to its importance and complexity; and,
 - d. giving appropriate court resources to the case while taking account of the need to give resources to other cases.³²

If the woman's case involves abuse:

9. Rule 14 provides for Motions for a temporary Order for a claim made in an Application.³³

10. Rule 14 (4) however states that:

"Before a Case Conference has been held, no notice of motion or supporting evidence may be served and no motion may be heard, ***except in a situation of urgency or hardship or for some other reason in the interests of justice***".

11. A Motion without notice is available under Rule 14(12) but only if,

- a. the nature or circumstances of the Motion make notice unnecessary or not reasonably possible;
- b. there is an immediate danger of a child's removal from Ontario, and the delay involved in serving a Notice or Motion would probably have serious consequences;
- c. ***there is an immediate danger to the health or safety of a child or of the party making the Motion, and the delay involved in serving a Notice of Motion would probably have serious consequences; or,***
- d. service of a Notice of Motion would probably have serious consequences.

The difficulties for an abused woman can be summarized as follows:

Prior to the implementation of the Family Law Rules, there were no restrictions on bringing an immediate Motion, i.e., same day and appearing before Judge. This is no longer available except in the most extreme of cases.

The second issue is the interpretation of the two sub rules that permit an emergency Motion, either on notice or without notice:

Motion on Notice "*except in a situation of urgency or hardship or for some other reason in the interests of justice*" and

Motion Without Notice "there is an immediate danger to the health or safety of a child of the party making the motion and the delay involved in serving a notice of motion would probably have serious consequences."

Cases in which the police become involved and a criminal act has occurred in which criminal charges may be laid against the abuser, resolve themselves almost immediately by the removal of the abuser; any abusive behaviour which falls short of the criminal standard of behaviour, and which is more onerous to prove, especially in situations where the abuse is escalating while documents are being prepared, is much more difficult to ensure the woman's safety.

It is also difficult to advise a woman in this situation to leave the home with her children. The choices that are available to her in a situation which falls short of criminal charges being laid are as follows:

1. The woman may commence an Application seeking the necessary relief but at the same time, remove herself and the children from their home and hope that the Court will not entertain an emergency Motion from the abuser to obtain a court order for the woman to return the children.

This option requires the woman to impose on family or friends and this surreptitious and quick move is not necessarily in the best interests of the children and must be weighed against staying in familiar surroundings albeit with a parent acting in an abusive manner.

The woman can also move with the children to a shelter but most women in the non-criminal abusive situations choose not to disrupt their children in this manner unless they are assured this will be very short term. Lawyers cannot give this assurance under the current interpretation of the Rules.

2. As indicated above, the first appearance before a Judge who may actually make an Order may not occur for a period of two to four months and the woman and children can be displaced for this length of time or remain in an abusive and possibly dangerous environment for this length of time.

Conclusion

The Family Law Rules provide a hurdle that a woman must overcome in order to get into court to obtain the relief set out in the Family Law Act and Children's Law Reform Act. Both the FLA and the CLRA provide for restraining orders presumably when similar criminal bail orders are not available; and also when one of the criteria for interim exclusive possession is violence in the home.³⁴ The statutory legislation for such court orders could not have intended the procedural Family Law Rules to delay implementing these substantive rights.

The Rules themselves are not quite so problematic in so-called "normal" custody/access disputes under the "no-fault" analysis. However, the point here is that the Rules conflict with the primary objective of safety and security for women and children fleeing domestic violence. Process, procedure and alternatives to court are given higher priority than access to the court. Before being able to obtain urgent court orders (either with or without notice) a lawyer must convince a judge that the language of "urgency, hardship, and interests of justice" can be met or persuade the court that "there is an immediate danger to the health or safety of a child or the party making the Motion, and the delay involved in serving a Notice of Motion would probably have serious consequences". Without the analytical framework to help judges identify domestic violence cases, judges are left without tools to identify "urgency, hardship and interests of justice" and "immediate danger to health and safety" in abuse cases. The result is that a woman fleeing abuse is denied access to the court because she will not be allowed to have a motion heard without notice, or she may not be allowed to have a motion heard early on in the proceeding.

We agree with the recommendations of the Judges Orders Working Group with respect to the amendments that are required to the Family Law Rules.

Increase Legal Aid Resources and State-Paid Legal Representation In Domestic Violence Cases

In the Region of Durham, and as we suspect in other areas, women with legal aid certificates face roadblocks in their attempts to retain experienced family law lawyers. Women who depend upon legal aid certificates are routinely unable to find an experienced family law lawyer to accept their certificate. Legal aid funding must increase the time, resources and compensation to family law lawyers to take these complicated, time-intensive cases.

In *New Brunswick (Minister of Health and Community Services)v. G.(J.)* [1999] 3 S.C.R. 47 (S.C.C.), the Supreme Court of Canada decided that to protect an indigent mother's constitutional rights to "security of the person", the government must provide legal representation for the mother at a child protection hearing. Although we do not have the time or the scope to delve into this issue, we wish to highlight the following from Lamer, C.J.'s judgment:

"... the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration". (p. 79)

"A child custody application is an example of state action which directly engages the justice system and its administration. The Family Services Act provides that a judicial hearing must be held in order to determine whether a parent should be relieved of custody of his or her child." (p. 80)

"While relieving a parent of custody of his or her child restricts the parents' right of security of the person, this restriction may nevertheless be in accordance with the principles of fundamental justice." (p.80)

"The seriousness and complexity of a hearing and the capacities of the parent will vary from case to case. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent." (p. 87)

Professor Nicholas Bala, in his review of an earlier version of our report, advises that "the issue of a Charter based claim to a right to counsel for a woman in a domestic violence case involving custody issues is interesting and complex". In his paper "The Charter of Rights & Family Law in Canada: A New Era",³⁵ Professor Bala argues that section 7 of the Charter can be used by a woman in a custody or access case involving domestic violence. We look forward to further debate and discussion on this issue.



Best Practice Guidelines For Family Law Lawyers Representing Women in Domestic Violence Cases

Introduction

There is no family law case more complicated than a case in which safety issues are present and the abuser uses the legal system to continue to harm and harass. These cases are both challenging and time-consuming. This type of representation is among the most important that a lawyer can provide; it can change and even save lives. Meeting the challenge can be very stressful and, at times, dangerous. Lawyers are threatened, and even killed by their client's abusive spouses.

The clients themselves can be highly demanding of your time and attention. In some cases, at least initially and before they have therapy and support, clients may be very anxious and indecisive.

Best practice guidelines are designed to assist lawyers in providing quality, effective, and responsive legal services to women leaving abusive intimate partners, and to women considering this option. This is a first step in the process of identifying best practice guidelines and is put forward as a starting point for future discussions and work on this subject. We know that our work is controversial. Debate and discussion on this issue will result in improvements to best practice guidelines. The result will be improved safety and legal protection for women seeking freedom from abuse for themselves and their children.

We hope that the best practice guidelines provide useful information to those lawyers who do not have the expertise in woman abuse cases, but wish to develop the expertise, albeit, we suggest, under the supervision of a lawyer with such experience.

Best Practice Guideline #1: The Lawyer's Competence to Take the Case

Woman abuse cases require the expertise of a lawyer knowledgeable about abuse issues and the impact of domestic violence on children and, who has the experience necessary to take on these specialized cases. If the lawyer lacks an understanding of these issues, or lacks appropriate experience, the lawyer should not take on the case unless he or she works under the supervision of a lawyer who has these skills.

The Code of Professional Conduct³⁶ provides a set of rules or principles for lawyers. Rule 2 of the Code deals with Competence and Quality of Service and states:

"(a) The lawyer owes the client a duty to be competent to perform any legal services undertaken on the client's behalf.

"(b) The lawyer should serve the client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation."

On the issue of whether the lawyer has the requisite degree of knowledge and skill in a particular case,

"...relevant factors will include the complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question".³⁷

A lawyer without knowledge of woman abuse cannot serve his or her client effectively as the lawyer lacks an understanding of the very issue for which the client requires his or her services. Additionally, these cases are often highly litigious and contentious and for this reason, the lawyer must possess a certain level of experience as a litigator.³⁸

There should be mandatory training for family law lawyers on woman abuse. Even with such training, in our view, a lawyer with less than five years in practice must determine whether he or she has sufficient litigation experience to take the case and if this is lacking, the lawyer should work under the mentoring or supervision of a lawyer with such experience.

Best Practice Guideline #2: Screen for Woman Abuse, Apply Intake Tools, and Refer Client to a Professional to Conduct a Comprehensive Risk Assessment³⁹

From the first telephone contact with the client and in the initial consultation, the lawyer must screen the client to determine whether or not the lawyer is dealing with a woman abuse case. The importance of this point cannot be overstated. The risks to a woman's safety, and that of her children, when she leaves an abusive partner are well known. Her first contact with your office is a critical step. Her life may be in danger.

Once abuse is identified, refer the client to a professional with expertise in domestic violence to conduct a comprehensive risk assessment.

Telephone Intake: All lawyers and staff who take an initial call from a woman must screen for woman abuse. If woman abuse exists, steps must be taken so that the client receives immediate advice on her options, and, most importantly, the woman must be referred to resources that will assist her in developing a safety plan. Initial appointments will have to be moved up, if necessary, or the woman must be referred to another lawyer to assist as quickly as possible.

Initial Consultation: Apply an intake screening tool⁴⁰ to determine if woman abuse exists. If abuse is evident, refer the client to a professional trained to administer a comprehensive risk assessment tool.⁴¹

Best Practice Guideline #3: Encourage the Client to Seek Counselling and Medical Assistance for Herself

Recommend that your client consult a counsellor to assist her in coping with the personal and legal issues arising out of her separation. Assistance from the family doctor may also be helpful. Your client's counsellor should have expertise in domestic violence. The counsellor could prepare a report for use in evidence on the woman's behalf.

The counsellor's role is instrumental in helping the client to cope with her situation. A lawyer cannot and should not assume the role of a counsellor. Only a counsellor/advocate has the skills necessary to perform this key function.

Best Practice Guideline #4: Recommend that the Children Receive Treatment and Support from a Therapist with Domestic Violence Expertise

Children need treatment and support to assist them in coping with the domestic violence and to assist them, as well, in the process of being part of a separated family. Ensure that the therapy provided is from a counsellor with domestic violence expertise. This point cannot be overstated. The counsellor must understand the dynamics of domestic violence in order to assist the child. If your client has the child see any professional, be it a social worker, therapist, psychologist, or psychiatrist who does not have this expertise, the child may receive inadequate or inappropriate therapy. When therapy should begin to occur depends upon the particular needs of the child.

Best Practice Guideline #5: Obtain Appropriate Support Systems for Yourself and Secure the Resources You Need for the Case

These cases can be extremely contentious and complex. Take steps to ensure that you have adequate personal and professional resources to assist you in coping personally and professionally with the demands of the case. Be sure to have peer support either in the form of other lawyers or other professionals. Monitor whether you have enough resources within your office to take on and to maintain the case. Set a limit as to the number of highly contentious cases you take on at a time. If the demands of a case increase beyond the limits of your office or cause personal distress, get the help that you need. Contact LINK, the Law Society's assistance program, or your local bar association to seek assistance. Assist your client in finding the services of another lawyer, if necessary.

Best Practice Guideline #6: Provide Realistic Options and Support

A woman fleeing an abusive relationship requires the following from her lawyer:

- ☐ a non-judgmental, supportive lawyer
- ☐ a realistic summary of her legal options
- ☐ direction from you as to which way she should proceed on various issues
- ☐ freedom to make the final decision as to the direction of her case
- ☐ sufficient physical safety and economic security to allow the client the opportunity to review choices and make decisions -- the failure to provide these critical pieces may mean that the woman returns to her partner as a result of a lack of options
- ☐ a willingness to work with existing community services that are providing ongoing assistance to your client

Your client needs accurate information and a realistic assessment of the various legal options. Propose a legal strategy for the file and seek your client's instructions as to the strategy acceptable to your client. Obtain assistance from community services or counsellors if your client needs help in making decisions about the file strategy.

Best Practice Guideline #7: Develop and Review Safety Plans

Devise a safety plan initially and review the safety plan at each stage in the process. Use the safety plan included in the May/Illes report⁴² as a guide

Work with your client, and her counsellor, to create the most appropriate safety plan. Each case is different. Some women are safer in hiding. Other women are safer in their own homes as they have neighbours and other support systems working for them. Your client can attempt to secure a panic alarm from the police and a cell phone with immediate police access. Discuss the obvious risks of remaining in the home where the ex-partner can find her. The ultimate decision rests with the woman after a thorough examination of the pros and cons of various plans. Note that court orders for exclusive possession can be enforced by penalty under the Family Law Act. Review safety plans from time to time throughout the course of the file.⁴³

Best Practice Guideline #8: Gathering the Evidence

It is difficult for the woman to prove the nature and extent of the abuse since it usually occurs behind closed doors in the absence of witnesses. The abuser inevitably denies the allegations. It is important to gather evidence to establish physical abuse as well as behaviours of intimidation, power and control that fall short of a crime under the Criminal Code of Canada. The purpose of gathering such evidence is to prove the existence of behaviours, and the impact of those behaviours, to the extent that they are relevant to the issues of a restraining order, exclusive possession of the home, custody and access, etc. A list of methods of gathering such evidence is included in the section entitled "Gathering the Evidence" at the end of the Best Practice Guidelines.

Best Practice Guideline #9: Special Issues Pertaining to Records

If criminal charges are pending and your client's medical or counselling records are filed in Family Court, the accused will have access to those records for the purpose of the criminal proceeding. Determine whether this result is in your client's best interests before filing the documents in Family Court. Consult a lawyer experienced with records issues if necessary. In Ontario lawyers with specialized training are authorized to take legal aid certificates to deal with records issues.

Best Practice Guideline #10: Recommend that Client Pursue Criminal Charges

Where grounds for a criminal charge exist:

1. Recommend that a police charge be laid (not a private charge).
2. Refer the woman to community victim services programs for further information about the criminal justice system to assist her in deciding whether to request that the police lay charges. If such services do not exist, provide an overview of the criminal justice system and the advantages and disadvantages of criminal charges.
3. After a charge is laid, arrange for your client to meet a victim/witness worker and the Crown Attorney's office to ensure that your client has appropriate support throughout the court process, and to facilitate a flow of information relating to the case.

A directive from the Solicitor General's office to police officers requires the police to lay charges where a crime has occurred within the context of domestic violence. Police are not supposed to ask a woman if she wishes to lay charges. Despite the existence of the Directive, charges are not always laid at the scene. If charges have not been laid by the police when the crime was disclosed to them, or if your client has not yet disclosed the crime to the police, the client should be advised to contact the police to require that police charges be laid.

The benefits of police charges are as follows:

1. Criminal charges provide an additional layer of protection for the safety of the woman and children as a result of bail conditions contained in a recognizance of bail. If the abuser breaches bail conditions, he can be charged with breaching his

recognizance and then returned to bail court on a reverse onus whereby he then has the onus of establishing why he should not be detained in jail pending his trial. Police are more knowledgeable about breach of recognizances and know the procedures necessary to lay charges.

2. Statistics indicate that the incidence of physical assaults decrease once criminal charges are laid. Even if the woman later reconciles with her partner, the laying of the criminal charges will assist her during the reconciliation as the man is less likely to commit a criminal act when he knows that charges will be laid.

3. Police charges provide a strategic advantage to the woman in establishing the evidentiary onus usually required at the outset of the family law case to obtain the first series of court orders such as a restraining order, an order for interim exclusive possession of the matrimonial home, and appropriate custody and access orders. Where facts are pleaded in the family law case that a crime was committed, and a charge is not laid, it is our experience that judges are more skeptical about the veracity of the allegation. If police charges are laid, the police have determined that reasonable and probable grounds exist for the laying of the charge. If the Crown Attorney proceeds with the charge, then the Crown Attorney has determined that a reasonable prospect of conviction exists. The involvement of the police and Crown provide further probative support to the woman's allegation that a crime occurred. It is our experience that judges do not often appreciate why a woman would not want the police to lay charges. The woman, although wanting to flee the violence, still may have an emotional attachment to the abuser and may not want to see him jailed. Alternately, the woman may not want her husband to have a criminal record, which may impact upon his employment or ability to travel outside the country. A criminal conviction may mean a loss of employment or a further strain on financial resources since the abuser must incur significant legal expenses to answer the charges.

When you advise the laying of police charges, provide a realistic overview of the court process involved in the criminal justice system, the range of sentences that may be imposed, and the diversion measures available through domestic violence programs in certain circumstances. It is important to explain to the woman that in laying charges she is fulfilling her duty as a citizen, taking additional steps to protect the safety of herself and her children, and preventing the chances of recurrence.

When criminal charges are laid, the abuser may then lay counter-charges, in which he alleges that the woman assaulted him. The counter-charges are often laid by the abuser privately, not by the police. Provide a summary or a report to the Crown Attorney's office which has a clear analysis of the violence and abuse within the relationship and the power imbalances between the couple. The Crown Attorney has the discretion to intervene to withdraw the private charges laid by the abuser and are more likely to do so if they have a good understanding of the pattern of domestic violence and abuse within the relationship.

Best Practice Guideline #11: Start A Court Application

In most woman abuse cases, court intervention is required to protect your client's rights. A woman requires the protection of the court because of the safety issues that are present and because a fair out-of-court settlement rarely occurs. Even if an out-of-court resolution is reached, it should be incorporated into a court order to ensure the terms can be enforced.

Your client may not always act on your advice to start the court case. While the woman may instruct you not to proceed with a court application and instead instructs you to attempt to reach a negotiated settlement, it is likely that as time goes by, it

will become evident to your client that her former partner is not putting forward fair settlement proposals. Time and expense devoted to unsuccessful negotiations is not in your client's best interests. As a result, if your client instructs you to start off with out-of-court negotiations, work with your client to set time limits on the negotiations so that if a negotiated settlement will not likely be reached within a specified time, then a court proceeding will be launched.

While mediation is generally thought to be an ineffective tool in woman abuse cases, it is possible to consider mediation in exceptional circumstances. Mediation may be appropriate with a mediator trained in domestic violence who has completed a thorough risk assessment and has the full support of the woman.

Best Practice Guideline #12: Provide Advice About Claims for Compensation

Advise your client concerning a civil action against the abuser for damages for assault and battery and other torts.⁴⁴ If criminal charges are laid, advise your client to make an application for compensation to the Criminal Injuries Compensation Board.

It may be professional negligence to fail to advise a client about a potential tort claim. Increasingly, courts are more likely to award damages for assault and battery and other torts within the context of a family law case. Review the advantages and disadvantages of making such claims with your client. If a criminal charge has been laid, an application to the Criminal Injuries Compensation Board should be made. Among other things, the Board can make awards that provide your client with money to pay for counselling services for your client and the children.

Best Practice Guideline #13: Obtain a Restraining Order

Seek an immediate restraining order on specified terms tailored to protect your client and her children. If necessary, obtain an order first without notice so that it can be served along with the originating court documents.

Even if criminal charges have been laid and a recognizance of bail has been made which includes specific bail conditions restricting contact between the abuser and your client, you should still seek an immediate restraining order pursuant to the Family Law Act and/or Children's Law Reform Act. The reasons for this are twofold:

1. The restraining order will be tailored to the specific needs of your client and her children. All aspects of custody and access exchange must, as far as possible, be dealt with in the restraining order so that breaches of these provisions also constitute a breach of a restraining order. The police can then enforce breaches of the restraining order by the laying of charges.
2. Restraining orders under the Family Law Act and Children's Law Reform Act are permanent. Recognizances of bail, terms of probation imposed upon conviction, and peace bonds under section 810 of the Criminal Code of Canada are not.

In our view, which is also addressed elsewhere in this report, the current legislation that provides for restraining orders, and the mechanism to enforce restraining orders are inadequate to protect the safety of women and children. However, we put forward these guidelines on the basis that we must work within the system that currently exists.

Best Practice Guideline #14: Steps if Exclusive Possession of Home is Required

If the safety plan indicates that an order for exclusive possession of the home should be sought, obtain cogent evidence of the abuse and the impact of the abuse on your client and her children when preparing your court documents. If both parties are still living together in the home, and the husband is abusive, it is very difficult to obtain an order for interim exclusive possession of the home. In referring to the difficulty in obtaining a court order to remove a violent male from the home, Jeffery Wilson notes that the legal system:

"... appears at times to be more reluctant to deprive a male person of his possessory rights to his house than a female person of her children.⁴⁴ Accordingly, the threshold of evidence required to force the violent male partner out of the house is often too great to achieve in the course of interim proceedings that are premised usually on the exchanging of affidavits and transcripts of cross-examinations rather than direct observation of pathology. This is so even though the wording of the Family Law Act isolates "violence" as a factor separate and apart from the children's best interests."⁴⁵

Ensure that you have adequately prepared your materials so that you have cogent evidence with which to persuade a judge that an order for exclusive possession of the home is appropriate. Not only is it difficult to obtain such orders, it is now, with the new Family Law Rules, difficult to obtain a judge's permission to set a court date to argue such issues. Refer to the discussion under the heading Amendments Required to Family Law Rules.

Best Practice Guideline #15: Seek Sole Custody of the Children

Throughout the case from start to finish maintain that your client must have sole custody of the children. Do not recommend that your client agree to joint custody.

Joint custody is wholly unsuitable in abuse. Contact with the children is used by the man to intimidate the children who are often considered possessions or pawns to be used to control the separated spouse. Joint-decision making on issues pertaining to the children is an unattainable goal as a result of the abuse dynamic. A joint custody order perpetuates a toxic environment for the children as power and control issues continue long after the separation. If safety issues for the children become more prevalent, it is more difficult to protect them in the face of a joint custody order.

In 1979 the Ontario Court of Appeal determined that joint custody shall not be awarded in situations where it is clear that the parents lack the requisite level of co-operation and ability to co-parent.⁴⁶ Later trial decisions that impose joint custody without the consent of the spouses can be distinguished on the basis that those cases did not involve domestic violence.⁴⁷

Some assessors or mediators may recommend joint custody⁴⁸ even in abuse cases as long as there is a detailed structure to the custody and access arrangements, sometimes referred to as a "parenting plan". The arguments used in favour of such an approach can be one or more of the following: First, although the man abused the woman, the man is not likely to abuse the child. Secondly, as long as there is enough structure in the agreement, it will reduce conflict for the child, which is the ultimate goal. Thirdly, although not directly stated, another part to ending conflict for the child is ending the litigation. A detailed parenting plan is thought to end the litigation as the abuser will not stop litigation until he has "won" joint custody. The arguments for joint custody, stated above, confuse resolution of high-conflict cases, with domestic violence cases and to this extent are ill-conceived. We have learned from experience that this resolution-driven approach can be contrary to the best interests of children. Abuse issues continue long after separation, both for the woman and the children. Sole custody is the best method of protecting the children and your client in the long run

Best Practice Guideline #16: Seek a Custody and Access Assessment, or the involvement of the Office of the Children's Lawyer

The three usual routes to provide neutral third-party intervention to promote a child-focused resolution are: custody and access assessments, social work investigations through the Office of the Children's Lawyer, or the appointment of a legal representative for the child through the Office of the Children's Lawyer (OCL). A custody and access assessment can be obtained by order of the court, or without a court order if both parties consent. The involvement of the OCL or a custody and access assessment not on consent can only be obtained by court order.

The Critical Element Common to Intervention: Domestic Violence Expertise

One critical element is common to all three potential interventions. You must ensure that the assessor (custody and access assessment), social worker (social work investigation through the OCL) or the lawyer appointed for the child and the social worker assisting that lawyer (through the OCL) has expertise in domestic violence. This point cannot be overstated. There is a distinction to be made between resolving custody and access issues in high conflict cases, as compared to domestic violence cases. Professionals without domestic violence expertise apply a model for resolving high conflict cases and not domestic violence cases. As Dr. Jaffe's summary indicates⁴⁹ the issues in domestic violence cases are separate and distinct. Safety and security issues are the primary focus.

The Saskatchewan Court of Appeal in *Haider v. Malach*⁵⁰ overturned a trial judge's decision on custody of a child, in part, because the trial judge relied on an assessment conducted by a social worker who lacked expertise in domestic violence. The social worker had not followed the Model Standards of Practice for Child Custody Evaluations which requires that in cases in which domestic violence is alleged or a pattern of domestic violence exists, personnel with expertise in domestic violence must be consulted if the social worker conducting the assessment lacks this specialized training.

It is important to be aware that a child exposed to domestic violence may have developed a traumatic attachment to the abusive parent and may have aligned with that parent. Additionally, an abusive spouse may manipulate the child to remain with him. A child's wish "to live with an abusive parent should have less weight in cases where there has been spousal abuse, than in other contexts".⁵¹

Custody and Access Assessments

Custody and access assessments⁵² may be conducted by social workers or psychologists, either through a clinic connected to the Court or through his or her own private practice. The assessor conducts interviews with the child and the parents and makes other collateral contacts (i.e. teachers, physicians, significant others within the family) and reports and makes a recommendation to the court.

Social Work Investigation through the Office of the Children's Lawyer

In Ontario, the Children's Lawyer conducts a social work investigation⁵³ and serves and files a report, usually with recommendations, in court. The Children's Lawyer does not conduct a custody and access assessment. While an order can be made requesting a social work investigation, the Children's Lawyer ultimately determines whether it is an appropriate case for a social work investigation.

Counsel for the Child through the Office of the Children's Lawyer

In Ontario, the Children's Lawyer provides independent legal representation to children.⁵⁴ In many jurisdictions in Canada, however, there is no government program for legal representation for children in divorce proceedings.⁵⁵

A social worker may become involved to assist the lawyer appointed for the child to ascertain the child's wishes and to provide contextual information about the child. It is important to note that the Children's Lawyer provides the children's views and preferences to the court, and contextual information bearing on those views and preferences. The children's views and preferences are one of many factors considered by the judge in deciding which custody and access arrangement is in the child's "best interests". It is essential that the lawyer and social worker have expertise in domestic violence to ensure there is an understanding of the unique dynamics of such complex cases and to ensure that safety issues for the children are identified and addressed.

Best Practice Guideline #17: Structure Access Around the Needs of the Child in a Way that Promotes the Safety of the Woman and her Children

A comprehensive risk assessment conducted by a woman abuse expert, or a custody and access assessor with domestic violence expertise will assess the extent to which your client and her children are at risk of physical and/or emotional harm. Follow the results of the assessment and seek orders that structure access arrangements in a way that preserves the physical and emotional safety of your client and her children.

A brief summary of the impact of domestic violence and abuse on children⁵⁶

Children who witness their mothers being abused experience the same psychological difficulties as children who themselves have been victims of abuse.⁵⁷ The impact of domestic violence on children is well documented in the social science literature.⁵⁸ Children raised in an atmosphere of domestic violence have different needs viz a viz access arrangements than do children from non-violent homes. Children may be further traumatized by being forced to have access, or to have inappropriate access, with an abusive parent.

A compelling summary of the impact of domestic violence on children was set forth by the New York State Legislature in 1996:

"The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse."

"Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties. Therefore, ...great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family.⁵⁹

Access considerations in domestic violence cases

Reference should be had to Appendix C and the identification of the special issues in domestic violence cases developed by Dr. Peter Jaffe as well as the papers noted in footnote 58 herein.

Access arrangements in domestic violence cases depend upon a thorough analysis of the range and severity of the violence and the use of power and control, and are structured in order to provide safety and security. The spectrum of access arrangements can be summarized generally as follows: No access, supervised access at a structured community facility, supervised access by a professional or other third party, supervised access exchanges, unsupervised access. Aside from an analysis of the abuse itself, other factors are relevant, including, but not limited to, the extent to which the abuser has taken responsibility for his behaviour, the abuser's ongoing therapy and progress in treatment, the strength of the relationship between the father and child, and the needs of the particular child.

If supervised access is appropriate, ensure that the facility is sufficiently secure and is adequately staffed to ensure safety for the children and strict supervision of each visit. Your client should meet with the staff members ahead of time to ensure that they are thoroughly versed in the concerns that she has and the necessity of supervising every single aspect of the visit.

Best Practice Guideline #18: Specify the Details of Access Exchange

Ensure that all aspects of access exchange are defined in precise detail in the court order and that breaches of access exchange are considered breaches of the restraining order and therefore subject to enforcement under the Family Law Act and the Children's Law Reform Act.

Eliminate contact between your client and the abuser as much as possible during access exchange. Statistics clearly demonstrate that women can be at high risk of physical, verbal and emotional abuse during access exchange. The abuser may also use these interactions as a method of creating conflict and/or to encourage the woman to reconcile with him. Children are at risk of either being physically abused, or certainly emotionally impacted, by any conflict witnessed during access exchange.

Best Practice Guideline #19: Seek Court Orders to Preserve Property

Ensure that the standard preservation orders, together with specific non-depletion orders are made pursuant to the Family Law Act to prevent disposition of assets. While this is standard practice in any litigation, it is even more important in these cases as the abuser may deplete assets in an effort to retaliate or extend control

Best Practice Guideline #20: Pursue Claims for Costs

Recovery of legal expenses (referred to as "costs") in a family law case will be an important consideration for your client, who, more often than not, will have to expend considerable financial resources in litigation. For an excellent summary of the considerations on an award of costs in family law matters, refer to the decision of Rosenberg, J.A. for a unanimous court, in *Tauber v. Tauber* (2000), 48 O.R. (3d) 577 (C.A.). Also consider claiming costs based upon the bad faith⁶⁰ of the abuser, if the abuser maintains a pattern of denial and blame which has the effect of prolonging the litigation, and thus increasing the costs to your client. If it is clear that the lawyer acting for the abuser has not carried out his or her professional obligation to ascertain the validity of his or her client's denials and counter-allegations, consider making a claim for costs that impacts upon the lawyer acting for the abuser.⁶¹

Best Practice Guideline #21: What to do if your Client Reconciles with her Partner

Remain supportive of her decision even if you don't agree with it. The statistics show that women leave their abusive partners several times before they make a final break. Understand that this is a process the woman is going through. The woman will make the final break when she is ready to do so. It is necessary for your health and hers that you not become over-invested in her decisions about her life.

Your involvement may be one in a series of steps the woman takes over a lengthy period of time before she becomes able to leave her abusive partner once and for all. Do not jeopardize her chances of seeking help in the future by being judgmental about her decision to reconcile with her abusive partner. Remaining an ally in her life regardless of her choices is an effective intervention that will ultimately promote her safety for the long term.

Gathering the Evidence⁶²

It is difficult to gather proof of abuse that occurs primarily behind closed doors in the absence of witnesses. The methods of gathering evidence set out below provide suggestions on how to gather evidence of abuse, particularly when physical assaults have occurred and criminal charges are pending. However, other examples are also relevant where the case primarily consists of emotional and/or verbal abuse.

1. **Interview your client carefully** to obtain all of the background. Obtain a full and complete description of the history and anything that may, at a later date, be used to try to discredit the woman's story.
2. Obtain a copy of the results of any **risk assessment tool** administered by the police or other assessors.
3. **Gather medical reports** showing injuries, or notes or statement from a physician/nurse to whom the woman may have discussed the incident or how she sustained injuries, if any. Sexual assault centres and hospitals often provide support to a woman, and documenting the present and past incidents along with photographing injuries. Health-related issues, such as miscarriages, may also be useful in showing there was abuse.
4. **Interview independent witnesses to the incident(s)**. Question people as soon after the incident as possible. If your client believes her partner admitted to family or friends what he did, interview them.
5. Interview independent witnesses who know about the **pattern of mistreatment** throughout the relationship. These individuals may have observed certain behaviour in which the abuser exerted power and control over your client (i.e. isolated her from family and friends, restricted her access to money, etc.).
6. **If your client told others** how she sustained the injuries, or if others saw the injuries, obtain their statements.
7. Advise the client to document her ongoing experiences of abuse, and ask others to document what they heard and saw as well. **Any notes must include dates, times and details written in ink a short time after the incident and be dated and signed by the author.** Notes should be concise and eliminate derogatory or personal sentiments/emotions, unless comments are helpful to describe reactions at the time, or responses to the abuse. The notes must not be altered after they are made. These notes can assist when drafting affidavits, and may potentially be used to assist witnesses in refreshing their memories when they testify at a trial.
8. **Gather items that were damaged** during the incident (personal property like clothing or jewellery, furniture, etc.) and any witness who saw the items prior to the incident/date in question, and as soon afterward as possible.

9. **Take photographs** (taken shortly after the incident with an independent person present) of the injuries or damaged property, if any.

10. Advise the client to **make a police report** as soon after a reportable incident as possible. Advise your client that the police may be less likely to lay a charge if there is a delay in reporting.
11. **Request police reports, 911 tapes and SOCO (Scene of Crime Officer) photos.** Note that there are time limits as to how long they are kept. Usually, it is easiest to subpoena the information, or the Officer in Charge, but sometimes, for a fee, an application can be made to the police department's Freedom of Information and Privacy official re: obtaining her statement and supplementary incident reports from past incidents where police were called. After a charge is completed, it would be easier to have those records made available in Family Court. If the woman gave a videotaped statement to the police, secure a copy of the videotape.

12. **Subpoena relevant medical or other related reports of the abuser.** Unlike in criminal court, records and holders of records may be subpoenaed more readily into family court. The abuser's medical or mental health records and/or reports from counsellors or priests may be useful.

13. **Obtain reports from counsellors or others your client consulted with respect to the abuse.**

14. **Subpoena CAS workers or other professionals involved with the child.** Were children present? Was CAS involved? If so, the CAS worker could possibly be subpoenaed. If the children are in counselling or their school staff notice things that indicate violence in the home, their testimony may be useful.

15. Instruct your client to keep a **separate record (see item 7 about how to record notes) of any important changes she observes in her children's behaviours and ask the teacher and other professionals involved with the child to do the same.** These include, reduction in school performance or concentration, bed-wetting, thumb sucking, reduction in appetite, regressive behaviours, nightmares (record what they are about), deterioration in appropriate behaviours, acting out, becoming aggressive, etc. Record the dates and times especially as they related to access. A summary of these events as they occurred during the marriage would also be useful.

16. **Recommend that your client document harassing phone calls.** If your client receives harassing phone calls, whether they are hang ups or not, advise your client to take the following steps:
 - Dial *69. This will record the number she is being called from, the time and the date. Sometimes the number is blocked. Write down the time, date and anything that was said. Then dial *57. The information from this record will not be available to her but the police can obtain it through a warrant, which may be used in court.

17. Advise client to keep **tapes of telephone conversations** with the abuser in which threats or other abusive conduct is evident.

18. Advise your client to **record (see item 7 about how to record notes) details** and include the dates, time and place as to the following:
 - a. any time she feels she is being **followed or watched** or she fears for her safety
 - b. any **difficulties with access**
 - c. any occasions when the **abuser threatens suicide or harm to himself**



19. **Obtain a copy of the abuser's criminal record.** If it is suspected that the abusive man has a previous related criminal record, it can be brought to the judge's attention. If the abuser refuses to give consent to have his record checked, the judge can order that the consent be provided.
20. **Gather proof of excessive control over finances** if there was also financial abuse. Banking or other records may be useful, as well as the statements of anyone who observed the behaviour
21. **Prepare your client for trial.** When preparing your client for trial, attempt to ensure that the woman does not minimize the abuse.
22. **Maintain contact with the Crown Attorney's Office,** if criminal charges are laid. Facilitate a flow of information with the Crown Attorney's office so that they have all of the facts pertaining to the case.
23. **Obtain reports re the abuser's behaviour in prison and while on probation or parole.** If the abuser has been convicted and jailed, secure information from the jail and probation and parole records. For example, what was his behaviour like when in jail? Did he abuse drugs or alcohol? Was he violent? A risk assessment may be completed through probation services prior to his release from jail (Spousal Abuse Risk Assessment Tool or "SARA"). If so, obtain a copy.

Best Practice Guidelines for Lawyers Representing the Abuser

Introduction⁶³

Counsel should be aware that men with a history of spousal abuse can be very manipulative clients and may present themselves as "victims" of false allegations put forward by vindictive or alienating mothers. It is not uncommon for these men to use the legal system to continue to harass and control their former partners. Abusive men not infrequently choose to represent themselves. If they have counsel they can be very demanding clients. If the outcome does not meet their expectations, they are likely to blame their lawyers, refusing to pay their accounts, and perhaps making unjustified complaints to the law society about the lawyers involved in the case.

If a client denies the truth of allegations of domestic violence, counsel for the accused parent has a professional obligation to ascertain the validity of the allegations.

False denials and minimization of abuse by male abusers are much more common than false allegations or exaggeration by women. If the allegations appear to be unfounded or substantially exaggerated, counsel for the father has a duty to advance this position. However, more commonly it is the father who is falsely denying or minimizing his abusive behaviour. In the long run, the best service to the father and his children may be to confront the abuser with the evidence of his conduct. Often men who are abusive have a history of having themselves been abused as children; their conduct is unacceptable, but if they deal with their problems they may still have a positive relationship with their children. The courts will ultimately be more receptive to the claims of a father with a history of having abused his spouse if he acknowledges his conduct and addresses these concerns through counselling and therapy.

Best Practice Guideline #1: Ensure Your Competence to Take the Case

The discussion under this Guideline for lawyers acting for women equally applies here (refer to previous section on guidelines for lawyers acting for women).

A lawyer without expertise in domestic violence does a disservice to the man accused of abuse by failing to assist him in the recognition of his abusive behaviour and in his rehabilitation. A failure to identify the issues in domestic violence leads to an abuser using the legal system, and your professional integrity, to extend the abuse which undoubtedly encourages public disrespect for the administration of justice. Most importantly the lack of understanding of the dynamics of domestic violence results in a deterioration rather than a mending of parent/child relationships, and, at worst, results in additional safety risks for women and children by failing to focus on safety and security issues above all others.

Best Practice Guideline #2: Understand the Dynamic of Denial and Blame

The basic premise for a lawyer acting for an individual alleged to be abusive, is that the client's categorical denial of most, if not all, of the allegations, and the casting of blame is a signal in and of itself that the allegations are likely true. The transference of blame and the complete non-acceptance of any responsibility for improper conduct are typical in these cases. By way of analogy, the denial is not unlike that of an alcoholic who refuses to acknowledge his dependency on alcohol.

Just as many abused women may be difficult clients, it may be more challenging and demanding to represent the abuser when he hides his abusive side with the lawyer, and even experienced lawyers in the area of domestic violence can unwittingly be manipulated.

As indicated in the introduction, it is rarely the case that an abusive personality will admit to abusive behaviour. The tendency is to deny vehemently such abusive behaviour and to actually cast blame and attempt to discredit the woman. It is also most unlikely that a woman will make up false allegations of abuse. In the majority of cases in which domestic violence is present, the male is the principal (or sole) perpetrator of violence and any use of force by the woman is reactive or in self-defence. Therefore, in most cases it is safe to assume that there is an element of truth with respect to the description of the abusive behaviour. In fact, if there is any deviation from the truth, it will likely be in the direction of minimization of the abuse.

Best Practice Guideline #3: Meet Your Professional Obligation to Check the Facts

It goes without saying that a lawyer should test the client's allegations in the course of gathering evidence in support of the client's position. Your client may be in such denial that he refuses to accept the facts. Just as the lawyer for the wife gathers evidence in support of the wife's position, so too should you make collateral contacts to check against your client's position.

For example, if the husband says that the wife is alienating the children from him and uses as an example the fact that the wife terminated counselling sessions for the child, contact the counsellor to determine whether or not this is the case. Relatives and friends should be contacted. They may or may not support your client's position.

Be aware that a failure to check the veracity of your client's allegations, may result in an award of costs against your client, and perhaps against you as his lawyer, for advancing a case which consists of such denials. The Family Law Rules enable the court to make an order of costs where the court finds that a party acted in bad faith. The Court can also make an order that prevents the lawyer from charging the client a fee for his or her services.⁶⁴

Best Practice Guideline #4: Present Your Client With The Facts, Recommend Counselling and Provide Educational Material

After you have conducted your own investigation of the facts and have determined that your client may be, or is, in denial and that the allegations made by the woman may be true confront your client about the case. Advise him that the judge may find that there has been a pattern of abusive behaviour, and that there are grounds for the children's feelings viz a viz his conduct towards them. It is important to provide him with literature on this issue and recommend him to a counsellor with expertise in the area.

You will likely need the services of an individual with expertise in domestic violence to assist you in dealing with your client. It is difficult for the abuser to admit any fault. However, a skilled counsellor can work with your client to help him focus on the children, and to help him take responsibility for his part in reducing conflict for the children's sake.

It is our view that the abuser must attend a specialized program of counselling which is designed to address his misuse of power and control so that he understands the impact of his behaviour on his partner and the children with a view to effecting change in his behaviour.

Best Practice Guideline #5: Recommend an Assessment and a Plan of Contact with the Children Geared to the Children's Needs

Traditionally, lawyers representing clients accused of abuse would ask if any of the allegations were true and if they were denied by the abuser, the lawyer would prepare correspondence and/or documents denying the abuse, challenging the veracity of the woman's statements and seeking substantive relief such as custody or joint custody, division of property, reasons not to pay support, etc.

Following these directions by the client is actually providing a serious *disservice* to him. This type of response perpetuates the abusive behaviour but now within the confines of the legal system. Most importantly, children do not respond well to such tactics. Tactics of this sort do nothing to promote a positive future relationship with the children or to facilitate a co-operative parenting situation. In fact, they may solidify an already bad relationship the abuser may have with the children

The more appropriate course of action would be to firmly discuss with the client the need for an assessment to determine the needs of the children and a recommendation as to the most appropriate plan for contact between the children and the father. Where abuse is alleged, the father needs to be told to expect minimum or no contact or supervised contact initially until further investigation.

If the abuser is concerned about losing a relationship with the children, he needs to be assured that if he has a good relationship, the assessor will likely promote its continuation as being in the children's best interests. Most woman abuse survivors want their children to be involved with their fathers if it is a safe and constructive relationship for the children. If his relationship needed improvement, then the time away will provide a certain measure of safety for the children, which will relieve their anxieties about their father. If the mother requests that initial contact be under supervision and if such visits are carefully structured, it is possible that this may well promote an increased sense of safety and trust for the woman and children. Therefore, rather than having the negative effect that the abuser thinks may happen if he does not challenge the allegations of abuse, the opposite often occurs. The potential for a safer, more satisfying relationship with his children is maximized.

This client should be made aware that the Courts are more than willing to help a party who has behaved abusively to work towards changing his behaviour and promoting a happy and healthy relationship with his children and that the Courts are not looking to punish for past deeds but rather emphasize stabilizing the current situation and making it safe for everyone including the person accused of being abusive. Denial of each and every allegation takes up much legal time and expense and very little is gained at the end but increased distrust.

Although it may appear that representation of a client in this manner is not following instructions, counsel experienced in woman abuse issues are aware that in fact, in the long run, this kind of representation promotes and serves his interests, even though he will have extreme difficulty believing so initially, as his need will be to defend himself and save face.

The following was added as a result of feedback from a focus group participant:

It should be explained to the client that although he has legal rights, the court's primary concern is with the children's best interests and not with the position that either parent is taking. Most women will do everything the court requests in order for the children to have stability and continuity. Abusers, however, want to be in control and demand to have it their way with little or no consideration of the children's needs. In abusive relationships there has to be separation for all parties to

heal. The issue of whether the father and children can reunite depends upon the maturity of the child, the relationship the child had with the father prior to separation, the self-empowerment of the mother, and the willingness on the father's part to understand the impact of his abusive behaviour on his family and a willingness to make amends to them.

Next Steps

Listed below are "next steps", not all of which may be the subject of review by the Lawyers' Working Group.

1. Promote amendments to provincial and federal legislation geared to identification and appropriate early resolution of domestic violence cases. Promote amendments to the Family Law Rules.
2. Promote increases in legal aid funding for family law.
3. Seek input from key professionals knowledgeable about domestic violence issues to work towards continuous improvement of the Best Practice Guidelines.
4. Develop best practice guidelines in connection with child protection issues. We had insufficient time to deal with this issue.
5. Develop mandatory training for lawyers and judges on domestic violence.
6. Explore the need for judges with knowledge or specialized training in domestic violence to cases.
7. Identification of appropriate assessments to be conducted in custody and access cases and identify legislative reform needed to specify the need for assessments in domestic violence cases. Exploration of the need for a mental health assessment of the abuser. A review of the Diagnostic and Statistical Manual (DSM IV) and its implication for use in such mental health assessments.
8. Exploration of how to get children the counselling assistance they need within the context of a custody and access dispute. It is often difficult to get children the counselling they need because one parent will argue that the counsellor retained by the other parent is one-sided and will demand a new counsellor. The woman may not have the means to pay for a counsellor. Specialized services for children are needed with professionals with the necessary expertise and who can, perhaps, proceed with an assessment.
9. Identification of need for access to information about child's school functioning viz a viz abuse issues to facilitate flow of information relating to the child.

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Final Note: While we thank all of the contributors and those who provided feedback, we acknowledge that the final product is our own for which we are solely responsible.

1 Refer to "Acknowledgements" at the end of this section. The Lawyers' Working Group provided their time and resources on a volunteer basis. The authors of this report are: Donna C. Babbs, B.A., LL.B.: (Introduction, The Urgent Need to Reform Provincial and Federal Family Law Legislation to Address Domestic Violence Issues, Increase Legal Aid Resources and State-Paid Legal Representation in Domestic Violence Cases, Best Practice Guidelines for Family Law Lawyers Representing Women in Domestic Violence Cases) Helen E. Brooks, LL.B.: (Amendments Required to Family Law Rules, Best Practice Guidelines for Lawyers Representing the Abuser)

2 The May/Illes Report of the Joint Committee on Domestic Violence: Working Toward a Seamless Community and Justice Response to Domestic Violence: A Five Year Plan for Ontario. A Report to the Attorney General of Ontario, August, 1999.

3 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, enacted by the Canada Act 1982 (U.K.) c. 11; proclaimed in force April 17, 1982, as amended.

4 The term "seamless" is borrowed from the May/Illes report referred to in footnote 2.

5 Crawford, M. and Gartner, R., Women Killing: Intimate Femicide in Ontario, 1974 - 1990, a report Prepared for the Women We Honour Action Committee, April, 1992, page 52.

6 The Report of the federal government's Parliamentary Special Joint Committee on Child Custody and Access was disturbing in its treatment of domestic violence. Fortunately, the later response of the Minister of Justice (May, 1999) was more sensitive to domestic violence issues, concluding that there was a need for further consultation on this issue. For further reading in connection with the Special Joint Committee see Professor Nicholas Bala's report, A Report from Canada's 'Gender War Zone': Reforming the Child-Related Provisions of the Divorce Act (1999), Can. J. Fam. L. 163 and Bonnie Diamond, The Special Joint Committee on Custody and Access: A Threat to Women's Equality Rights" (York University, June, 1999), Vol. 19 Canadian Women's Studies 183.

7 We acknowledge that the issue of the application of sections 7 and 15 of the Charter is complex and is the subject of a separate paper. For further reading see "The Charter of Rights and Family Law in Canada: A New Era" by Professor Nicholas Bala. A paper presented at the National Family Law Program, St. John's Newfoundland, July 10-13, 2000. A further revised version will be published in Vol 18(3) of the Canadian Family Law Quarterly.

8 Criminal Code of Canada, section 515(10)(b).

9 Lavalley v. The Queen (1990), 55 C.C.C. (3d) 97 (S.C.C.). Among other things, the court determined that where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a reasonable apprehension of death when she acted in self-defence. The expert evidence would also be of assistance to the jury on the issue of whether the accused believed on reasonable grounds that it was not possible to otherwise preserve her from death or grievous bodily harm.

10 "Custody and Visitation Trends in the United States in Domestic Violence Cases" Lemon, K. D. in Children Exposed to Domestic Violence: Current Issues in Research, Intervention, Prevention and Policy Development (ed. Robert A. Geffner, Peter G. Jaffe, and M. Sudermann), The Haworth Maltreatment & Trauma Press, an imprint of The Haworth Press Inc. 2000 pp. 329-343. With thanks to Dr. Peter Jaffe for this reference.

11 Child and Family Services Act, R.S.O. 1990 C. 11 as amended

12 Refer to section 24 Children's Law Reform Act, R.S.O. 1990 C. 12 as am., and section 16 of the Divorce Act, R.S.C. 1985 c. 3 (2nd Supp.), c. 3 for the specifics of

each test. For a recent paper on the "best interests of the child" test, see Professor Nicholas Bala, "The Best Interests of the Child in the Post-Modernist Era: A Central But Illusive and Limited Concept", a Paper presented to the Special Lectures 2000: Family Law, A Colloquium on "Best Interests of the Child": New Perspectives on the Resolution of Custody Disputes, Law Society of Upper Canada, Department of Education.

13 Refer to Appendix C: "Special Issues in Visitation Disputes with Allegations of Domestic Violence"

14 Refer to Appendix E: "Spousal Violence in Custody and Access Disputes: Recommendations for Reform"

15 An earlier version of this framework was presented to the Honourable James G. Flaherty, Attorney General of Ontario, on July 31st, 2000.

16 The reference to "primary objective", a phrase also contained in the Family Law Rules (described elsewhere in the report of this working group), is not coincidental.

17 Refer, for example, to the definition of domestic violence developed by the Joint Committee on Domestic Violence, set out on page 46 of their report. See footnote 2.

18 For a sample screening tool, refer to the Initial Screening Tool found elsewhere in this report.

19 The Model Code on Domestic and Family Violence contains a rebuttable presumption against custody and joint custody by the perpetrator of family violence.

20 For a sample risk assessment tool refer to the Comprehensive Risk Assessment Tool in Woman Abuse Cases found elsewhere in this report.

21 Family Law Rule 8 (1): There are five forms - Form 8A, 8B, 8C or 8D and possibly Form 8E if the woman has previously been in Court. If the woman wishes to change a Final Order or Agreement, she would not do so by Application, but by Motion to Change a Final Order or Agreement - Family Law Rule 15

22 Family Law Rule 9: Before filing the Continuing Record, the Affidavits of Service or other documents proving service of the Application and the Continuing Record must also be filed and listed.

23 Family Law Rule 5(b): If there is immediate danger that a child may be removed from Ontario, or immediate danger to a child's or party's health or safety, the case may be started in any municipality.

24 Family Law Rule 13: If the claim is for custody or access only, it is not mandatory to file a Financial Statement but the Court may order one later on.

25 Family Law Rule 8(1)

26 Family Law Rule 39 (4)

27 Family Law Rule 39 (5)

28 Family Law Rule 39 (7)

29 Family Law Rule 39 (8): (a) the Clerk shall not set a Court date when the Application is filed; (b) a Case Management Judge shall be assigned when a Case Conference is scheduled or when a Notice of Motion is served before a Case Conference has been held (subrule 14 (4), (5) and (6), which comes first; and (c) the Clerk shall schedule a Case Conference on any party's request

30 Family Law Rule 2 (4)

31 Family Law Rule 2 (2)

32 Family Law Rule 2 (3)

33 Family Law Rule 14: Motions are also for directions on how to carry on the case and requesting a change in a Final Order or Agreement

34 Family Law Act Section 24 (1) : Order for possession of matrimonial home - Regardless of the ownership of a matrimonial home and its contents, and despite section 19 (spouse's right of possession) the court may on application, by order, a) provide for the delivering up, safekeeping and preservation of the matrimonial home and its contents; b) direct that one spouse can be given exclusive possession of the matrimonial home or part of it for the period that the court directs and release other property that is a matrimonial home from the application of this Part; c) direct a spouse to whom exclusive possession of the matrimonial home is given to make periodic payments to the other spouse; d) direct that the contents of the matrimonial home, or any part of them, i. remain in the home for the use of the spouse given possession, or ii. be removed from the home for the use of a spouse or child; e) order a spouse to pay for all or part of the repair and maintenance of the matrimonial home and of other liabilities arising in respect of it, or to make periodic payments to the other spouse for those purposes; f) authorize the disposition or encumbrance of a spouse's interest in the matrimonial home, subject to the other spouse's right of exclusive possession as ordered; and g) where a false statement is made under subsection 21(3), direct, i. the person who made the false statement, or ii. a person who knew at the time he or she acquired an interest in the property that the statement was false and afterwards conveyed the interest, to substitute other real property for the matrimonial home, or direct the person to set aside money or security to stand in place of it, subject to any conditions that the court considers appropriate. Family Law Act, Section 24 (2): Temporary or interim order - the court may, on motion, make a temporary or interim order under clause 24 (1) (a), (b), (c), (d) or (e).

35 Paper presented at the National Family Law Program, St. John's Newfoundland, July 10-13, 2000. A further revised version will be published in Vol 18(3) of the Canadian Family Law Quarterly

36 The Canadian Bar Association adopted the Code of Professional Conduct in August 1987. The Foreward to the Code summarizes that the 1974 predecessor to the 1987 Code, "has been used by and large, as the authority in terms of ethics and discipline matters by all Law Societies in Canada, and to a lesser extent, by the Barreau du Québec. It has been adopted by some provinces in its entirety, others have used it as the basis of their own provincial publication". (Quotation from Robert P. Fraser, Q.C. in his report to the National Council of the Canadian Bar Association August, 1987.)

37 Code of Professional Conduct, Rule 2, Commentary 5.

38 Curtis, Carole, Representing the Assaulted Woman in Family Law Cases - A Practical Approach, a paper presented to the 1999 Annual Institute of Continuing Legal Education, Canadian Bar Association-Ontario, January 29, 1999.

39 At the present time, it is difficult to obtain a comprehensive risk assessment. Risk assessments can be conducted by woman abuse experts and certain specialized police units, such as the Ontario Provincial Police's Behavioural Sciences Unit if criminal charges are laid. More resources are needed to expand the availability of experts to conduct risk assessments.

40 For a sample intake tool, refer to the Initial Screening Tool found elsewhere in this report.

41 For a sample risk assessment tool, refer to the Comprehensive Risk Assessment Tool in Woman Abuse Cases found elsewhere in this report.

42 See footnote 2.

43 See Carole Curtis' paper, footnote 37.

44 For further information on the subject, see Torts and the Family Law Practitioner, Professor Nicholas Bala, Faculty of Law, Queen's University, (1998) Vol. 17. Canadian Family Law Quarterly.

45 Wilson, Jeffery, Wilson on Children and the Law, Butterworths. See §2.103 - §2.104

46 See Baker v. Baker (1979), 8 R.F.L. (2d) 236 (Ont. C.A.); revg (1978), 3 R.F.L. (2d) 193 (Ont. H.C.J.); Kruger v. Kruger (1979), 11 R.F.L. (2d) 52 (Ont. C.A.)

47 This point made by Professor Bala following his review of an earlier draft.

48 Be aware that an assessor or mediator may recommend joint custody out of fear of retaliation or harm by the abuser or as a result of intimidation by the abuser.

49 Refer to Appendix C

50 The citation for this case is (1999), 48 R.F.L. (4th) 314 (Sask. C.A.).

51 Bala, Nicholas, "Spousal Abuse in Custody and Access Disputes: A Differentiated Approach", Paper presented to the East Region Meeting of Judges of the Ontario Court of Justice (General Division), June 19, 1998. Adapted from an article at (1996), 13 Can. J. Fam. L. 215-285.

52 See section 30, Children's Law Reform Act, R.S.O. 1990, C. 12

53 Courts of Justice Act, R.S.O. 1990, c. 43, s. 112, as am. S.O. 1994, c. 12, s. 37.

54 Courts of Justice Act, R.S.O. 1990, c. 43, ss. 89, as am. S.O. 1994, c. 12, s. 37.

55 See Professor Nicholas Bala's paper referred to in footnote 5 at pp. 210-211.

56 Refer to the Focus Group Research section of this report for a fuller discussion of the impact of domestic violence on children.

57 Solicitor General of Canada, "Female Victims of Crime," Canadian Urban Victimization Survey Bulletin 4 (Ottawa: Research and Statistics Group and the Communications Group, Program Branch, Ministry of the Solicitor General, 1985).

58 See for example, Jaffe, Peter G. and Geffner, Robert. "Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service and Legal Professionals" in Holden, George W., Geffner, Robert and Jouriles, Ernest N., eds. Children Exposed to Marital Violence: Theory, Research and Applied Issues, American Psychological Association, Washington, D.C. See also Bala, Nicholas, "Spousal Abuse in Custody and Access Disputes: A Differentiated Approach" (see footnote 50) and case law cited therein.

59 See Act of May 21, 1996, ch. 85, 1996 N.Y. Laws 273, 273 cited in Susser, Kim "Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and their Children" in Fordham Urban Law Journal [Vol. XXVII 2000] p. 875. With thanks to Dr. Peter Jaffe for this reference.

60 Family Law Rule 24(8): If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately.

61 Refer to Family Law Rule 24(9) "Costs Caused by Fault of Lawyer or Agent".

62 We thank Penny Contreras and Denise Hannivan, Victim/Witness Services, Ministry of the Attorney General and John D. Scott, Q.C., Crown Attorney for the Region of Durham for providing us with much of the material for this section.

63 With thanks to Professor Nicholas Bala for much of the material that forms the introduction.

64 Family Law Rules, Rule 24. See Tauber v. Tauber (2000), 48 O.R. (3d) 577 (C.A.) for a summary of the considerations on an award of costs in family law cases.