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Family Law Section

## Representing Victims of Domestic Violence

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In our family law practice, we have come to learn that representing and advocating on behalf of victims of domestic violence demands more from us than simply fulfilling the scope of our duties as legal practitioners. We have developed a sincere passion for and have ventured to learn more, on a microcosmic level, about the dynamics of the family, the impact of domestic violence on the family, and the interplay between families, domestic violence and the law.

We have dedicated most of our practice to representing victims of domestic violence, with these victims being, for the most part, women. The late Professor James McLeod, who was and remains well known and cherished by the Family Law Bar, took a very practical yet creative approach to issues arising in family law. He encouraged his students and reminded family law practitioners that it remains the one area of law where lawyers have a profound impact on shaping parents, their children and the family as a whole. Over our combined 18 years of experience as family law lawyers, we have developed a modest and simple protocol for representing victims of domestic violence. It has proven useful in dealing with the complexity of domestic violence; developing a sensitive and at times, creative approach to it; and, appreciating the manner in which it permeates all aspects of a family law dispute without compromising our clients' credibility, interests or rights. We hope that our protocol will be of some assistance to family law lawyers who represent victims of domestic violence, whether it is by assisting them in developing their own protocol or improving on an existing one.

### **Defining Domestic Violence:**

The phrase "domestic violence" is used throughout this article to describe various forms of abuse and is used interchangeably with the phrase "domestic abuse." The Government of Ontario has elaborated the definition to encompass any use of physical or sexual force, actual or threatened, by a partner or ex-partner. A partner or ex-partner may be of either sex. Domestic violence can also include threats of harm to children, other members of the family, pets and property. Both women and men can be victims of domestic violence, but in many cases the victims are women, as confirmed recently by Statistics Canada. Domestic violence can be a single, isolated incident of force or can occur repeatedly over a prolonged period of time. Violence may be used to scare, intimidate, humiliate the victim, or to make the victim feel powerless. Violence may include acts which in and of themselves may appear minor or trivial, but grouped together form a pattern of abuse.

### **The Literature:**

Clearly, domestic violence can take on many forms and the definition continues to be expanded upon as both society and the concept of family continue to change. Substantive literature that has been written by qualified professionals discussing the various forms of domestic violence, the short and long term impact of such violence on its victims, and the challenges that such victims, together with their children, face within the abusive relationship, as well as after that relationship has ended. It is worth your while to read the literature, as it will

enable you to better understand your own client and therefore their needs as they relate to their particular family law issues.

Reading the literature may enable you to answer the infamous “why” questions that often cross the minds of all involved in the resolution of the family law dispute, including the judges. These questions include: why your client did not leave the abusive relationship earlier; why your client failed to report the abuse to his or her medical doctor, the police, family or friends; or why your client’s recollection of the abuse may be fragmented or vague. Reading the literature will also improve your ability to determine whether your client is a victim of domestic violence in your screening process; improve your communication with your client; define the needs of your client and how to proceed in meeting those needs; enable you to assist your client in developing a safety plan; and serve as a useful tool in charting the appropriate resources for your client and connecting your client to those resources both during the relationship, the litigation or alternative dispute resolution process for which you may be that client’s representative, and afterwards.

### **Working with a Mentor:**

As a family lawyer, the client will expect you to advise him or her on their rights and obligations under the family law. Where your client is a victim of domestic violence, the expectation is more than described. Family law lawyers representing victims of domestic violence must ensure that they are competent to do so and that they have the litigation experience to handle highly contentious matters. We would recommend working closely with a mentor if you are new to the practice, especially where you do not have significant litigation experience. The Law Society of Upper Canada can refer you to a mentor in your practice area. If you are on the family law panel for Legal Aid Ontario, you can request a copy of their list of family law lawyers to research who would be an appropriate mentor and contact him or her to gauge their interest. You should also network, and with the fluency that most lawyers have with social media, it should not be difficult to connect with an experienced family law lawyer who has the credentials, experience and reputation that would be vital to your practice.

### **Use of Comprehensive Intake Forms:**

It is tremendously beneficial to use, and if you do not have one, create a Family Law Client Intake Form as it will undoubtedly assist you in gathering important information regarding the client and his or her spouse. The Intake Form should be comprehensive and ask specific questions pertaining to your client and their spouse’s marital status; age; immigration status; mental and physical health; residence; education; employment; salary; children (their ages, gender, schools or daycares, immigration status, residence); financial portfolios; property interests; current or past involvement in family law or criminal law proceedings; current or past involvement with child protection agencies; outstanding criminal charges or convictions against either your client or their spouse; the existence of any itemized and recognized abusive conduct by your client or their spouse during the relationship towards each other or the children; the existence of any domestic contracts (including foreign contracts), wills or other documents signed by the parties and which may have a bearing on how the parties expect to resolve their family issues; and the use of social media. This information will in turn help you identify the pertinent legal issues to be dealt with and flag the family law cases where your client or their spouse is a victim of domestic violence. The Intake Form is useful even where the lawyer's initial contact with the client is by phone, as it will assist the lawyer in gathering all of the relevant information and in screening the client for domestic violence at the point of first contact.

### **Initial Interview with the Client:**

Screening the client for domestic violence can be extremely time-consuming because victims are often afraid, embarrassed or mistrusting and are therefore reluctant to disclose the abuse to the lawyer and to litigate their family law issues. If you are screening a client over the phone or during an interview, make sure to ask open-ended questions such as "why do you think the relationship broke down?" or "what made you leave the home?" Try to make the client feel as comfortable as possible in your presence. Mind your words and manners.

Remember that your body language speaks volumes. Do not cross your arms in a defensive position or turn your face and body away from your client as they are speaking to you. Lean in towards your client, look at him or her as they are speaking with you, have Kleenex on your desk or at your conference table, and, occasionally, smile or gesture to them that it is “o.k.” for him or her to be confiding in you. We have observed that these simple gestures and considerations make a remarkable difference during the initial interview with a client who is a victim of domestic abuse.

In our experience, many victims of domestic violence are either not conscientiously aware of that their experiences amount to “domestic violence” or are in denial. Accordingly, it is useful to breakdown the different forms of abuse and ask the client to check off (on the Intake Form) or identify whether they or their children have been exposed to any of the forms of abuse listed on the Intake Form or described by you. Where the client identifies with any of the forms of abuse listed or described, ask the client if they feel comfortable describing it to you in greater detail.

You will need to explain to the client exactly why it is important that they provide you and the court with the information you are asking for in the context of their family law proceeding. Normally, clients will respond by telling you in summation that they were kicked or punched, for example. It is your job to ask specific questions that will assist you in obtaining more information about the incidents of abuse. For example, if your client tells you that they were kicked, you would ask the client: did your partner kick you often or was it an isolated incident? Can you recall when it first happened? What part of your body did he or she kick? If they respond that it was their leg, you continue: Did your partner kick your right or left leg? Was it the upper or lower leg? Did you fall to the ground? Did he or she kick you more than once? Did you bruise? Did your partner do anything other than kick you during this incident? If so, what else did your partner do? Did your partner call you any names or yell at you? Did anyone see your partner kick you? Was your partner drunk, angry or under the influence of a narcotic? Did you tell anyone about this incident? Did you seek medical attention for your injury? How long did it take you to heal? If evidence involving incidents of abuse is to be put before the court it must be as detailed and factual as possible. Generalizations are neither effective nor convincing.

You should also ask your client questions about their cultural or religious background, and whether they have any concerns related to their cultural and religious background that you should be aware of in addressing their family law issues. More often than not, the client has salient cultural and religious concerns, which will ultimately weigh heavily on both how the client wishes to proceed and how we tailor our legal strategies to increase our sensitivity and therefore the court’s sensitivity to such concerns.

If you, the lawyer, share a similar culture or religion with the client, do not presume that these similarities are without differences. Like language, cultures and religions vary from region to region, irrespective of how close the regions are to each other. Specific questions should be put to the client to grasp whether there are any variations of cultural or religious norms in their relationship, family or community both within Canada and abroad. If your client cannot provide you with all of the information you require, you may reach out to community organizations with which your client may identify themselves to gather more information about cultural or religious norms that you may need to be aware of and sensitive to.

If English is not your client’s native language and they prefer, are more apt or more comfortable speaking with you in their native language, ensure that you have a certified language interpreter present during your initial interview with the client and during the course of the proceedings, particularly in court. You can contact several reputable agencies to engage a certified language interpreter and schedule an interpreter through the court prior to your appearance. There is no substitute for a certified language interpreter, even where you, the lawyer, may speak the same language as your client or the client has family members willing to assist. There are differences, at times, in dialects which pose serious interpretation issues and result in the material misinterpretation of facts to the court. If for any reason your client does not feel comfortable with the certified language interpreter, or you have doubts respecting their abilities, do not hesitate to discontinue their services and engage a new interpreter.

The initial interview is an information-gathering one, so it is vital that the correct information is obtained from the client, even if it takes a second interview and interpreter.

If you rush through the information gathering process, you will likely find that the client will only tell you things on a need-to-know basis and often nothing about the domestic violence they experienced, especially because in some cases, the victim does not characterize what they experienced during the relationship as 'abuse'. If the client has difficulty revisiting the incidents of abuse during the initial phone call or interview, you should offer the client another opportunity to speak or meet with you if they need more time to feel comfortable. You can also suggest that the client describe the incidents of abuse in writing (in their own language) and provide that to you if it would make it easier for them to convey the information to you.

You should also take the time to properly explain to the client what they can expect in the family court system. This would include the various types of court appearances the client will attend; the important timelines to adhere to; the important documents to be prepared, served and filed with the court; the opportunities for early, court-assisted settlement; and the nature of the orders which may be made at different times and under different circumstances, such as orders made on an urgent, ex-parte motion. Familiarize your client as much as possible with the family court system so that they neither feel intimidated by the process nor afraid to engage in it to obtain the relief they need.

### **Support Services for Victims:**

Representing victims of domestic violence requires that a lawyer have knowledge of the various resources available to their client in the community in order to gather all of the relevant information that will substantiate the client's claim that they are a victim of abuse, so that for example, where children are involved, the court will take the abuse into consideration in determining custody and access issues; and refer your client to the resources which would be of assistance to them in coping with the abuse they suffered and in rebuilding their life moving forward as a survivor of domestic violence.

During your representation of the client, they will likely still be struggling with the emotional, social, financial and/or spiritual realities of being a victim of domestic violence, and as their lawyer, you should be able to refer them to various professionals, community resources and support networks to assist them in coping and healing. You should not presume that your client has sought or is seeking and obtaining counselling and support. Unless your client is staying at a shelter, your client is likely not obtaining any counselling or support, which could be a huge obstacle in your representation of the client. It will not only assist the client, but you as the lawyer if they obtain counselling.

If your client has sought counselling, get in touch with the counsellor. Gather information from the counsellor that will be of assistance in your representation of the client. Be sure to obtain your client's written authorization to communicate with their counsellors, therapists or doctors from the onset.

It is difficult for the client to move forward in family law proceedings towards some resolution or closure if they cannot move from being a victim of abuse to a survivor of abuse. It can be difficult to try and convince the client to focus on their future, and that of their family, when they are still consumed by past abuse.

It is useful to have a directory of resources for your clients and their children and voluntarily offer your assistance in accessing these resources. If possible, make a phone call on behalf of your client so that he or she may set up a consultation or intake appointment to enrol in a support group, individual or family counselling, or a heal program.

You can provide your clients with printed handouts containing important contact information for police services, hospitals, shelters, emergency hotlines, and community services for counselling and support. You should refer your clients to the website for the Ministry of the Attorney General for Ontario which provides information for

victims of domestic violence, including important contact information for various victim services and hospital networks that respond to the needs of domestic violence victims and their families.

You should also provide your clients with the contact information for Canada Revenue Agency, since in many cases they will need to report that, although they are now separated from their spouse and living at a separate address, the children continue to reside with them and any federal or provincial benefits should be mailed directly to your client their new address.

Where the client has not yet left the abusive relationship, you can provide them with a ‘safety plan’ handout which will contain important information about what they need to be aware of while planning to leave the home, before leaving the home with their children (if any), and after they have left the home. For example, many victims do not know that they need to take all government issued identification for themselves and their children with them, or that a taxi can be arranged and paid for by a local shelter to pick the victim and their children up from the home and drive them to the shelter.

You cannot be a one-dimensional lawyer. You cannot simply be a source of legal advice – you have to be able to provide your client with a wealth of information related to domestic violence while at the same time being cognizant of your own limitations. You are not a psychologist but you need to know about the cycle of violence and its implications on the victim. You are not your client’s best friend, but have the capacity to be supportive, understanding and patient. You are not a social worker, but have access to the resources that would be helpful and instrumental to your client’s healing and the rebuilding of their life. You cannot tell your client to call the police, but you should be able to describe to your client all of the avenues available to them in coping with the abuse, one of those avenues being to report it to the police, their medical doctor or counsellor. You are not an investigator, but you need to know what to ask and how to get the information you need to fit all of the pieces together and present the best possible case for your client. Ensure that your client is made aware of all of the steps that lie ahead of them in the proceedings. Explain the process and the time involved. Keep them up to date on any progress or new issues that might arise. Canvass with them the various resolutions to the issues in their matter, keeping in mind that the ultimate goal for your client is to move forward and to start a new life free from violence.

### **Disclosure:**

While you need the disclosure, the client should not be rushed in making it, because this can often lead, not only to incomplete disclosure, but often inconsistent or inaccurate accounts of the incidents of abuse. Make sure to always explain to the client why you need to know the information and how it relates to the issues in their case. Sometimes clients are reluctant to disclose the abuse they suffered because they do not understand the relevance of it to, for example, their claim for custody of the children; the non-removal of the children from the jurisdiction; the removal of religious barriers to remarriage; the supervision of their spouse’s access to the children; or restraining orders to protect both the client and the children. It is therefore incumbent on the lawyer to explain the nexus between the domestic violence experienced by the client and the relief that they are seeking from the court. If the client cannot appreciate the nexus, it will be difficult for the lawyer to gather the disclosure that will substantiate the claims being made and the relief being sought.

Where you suspect that the client is a victim of abuse because they appear to be completely withdrawn or introverted and will not admit to being subjected to any form of abuse by their partner, it will no doubt take greater effort and patience on the lawyer’s part to assist the client in making the disclosure. This process is sometimes complicated by the fact that there may be a pressing issue which needs to be dealt with immediately by the court by way of an urgent motion and time is of the essence. Under these circumstances, the lawyer is faced with the challenging task of trying to obtain an admission of abuse from the client, an accurate and cohesive description of the abuse suffered and a survey of the evidence which will corroborate the abuse and is immediately available for the purposes of proceeding on an urgent basis to the court.

### **Criminal Charges and Police Records:**

It is crucial that you ask the client at the time that you review the Intake Form whether any charges have been laid against the abuser in relation to the abuse alleged by the client and/or the children, and whether the abuser has been convicted of any charges in relation to the abuse alleged by the client and/or the children. If the client answers “yes,” then you can proceed with specific questions related to the timing of the charges and convictions, release conditions and/or sentencing provisions. Where the abuser has been charged and released on conditions, you must obtain a copy of the conditions. The conditions will have a direct bearing on the issues at hand, including the abuser’s access to the children, restrictions on communication between the abuser and the client and/or the children, and in some cases, travel. A copy of the conditions can be obtained directly by the client through Victim Services.

If you are looking for police records, they will generally not be made available to the victim until the criminal trial has been heard and the abuser has either been acquitted or convicted. If no arrest has been made, or the abuser has been convicted or acquitted, the police records and reports should be made available sooner and can be obtained by applying directly to the Freedom of Information department of the regional police headquarters where the incident took place. Information pertaining to the abuser will be blacked out for privacy reasons, but this is not the least bit problematic since the records often contain more than enough information to clearly convey what transpired from the time of the 911 call to the time the police intervened. Victims can also request copies of any 911 calls or video statements to police. When representing a victim of domestic violence, you should be sure to review the police records thoroughly as there is always margin for error whether the police misunderstood something the victim said during the investigation or recorded something incorrectly.

When the criminal matter is proceeding at the same time as family matter, lawyers representing victims of domestic violence and putting their evidence of the abuse to the court in their client’s sworn affidavits must be extremely careful. Family court documents filed with the court are public record, and if there is an inconsistency between what the client deposes to in an affidavit and what the client reports to police in the victim statement, the abuser and his lawyer might use the inconsistency against the victim and capitalize on it by calling into question the credibility of the victim and raising a reasonable doubt as to whether the offence was committed (this is especially the case where we have ‘he said/she said’ evidence). This is a dangerous feat for any lawyer representing victims of domestic violence regardless of the quality or length of the lawyer’s litigation experience. It is important to rely on the facts that cannot be disputed and that can be corroborated without being too vague.

Often, police records reveal a prolonged history of police involvement with the couple or family for domestic disturbances, but with no charges laid, and no reports of harm or threats of harm by the victim. This is not uncommon and while some lawyers would argue that the victim is simply “crying wolf,” a lawyer who represents victims of domestic violence and is apprised of the literature knows that often victims try to reach out for help but are ultimately afraid to report the abuse to police, particularly in the presence of the abuser for a number of different yet completely rational reasons.

### **Child Protection Agencies:**

In cases of domestic violence, where there are children involved and domestic abuse is reported to the police, the police will in turn contact a child protection agency. The child protection agency will thereafter dispatch a worker to ensure that the victim and the children are safe from harm. The records of the child protection agency involved may become relevant, especially where the abuse has crossed over to the children, or there is a threat that it will if the children are taken from the care of the victim and returned to the abuser. Obtaining these records is difficult, unless done so with the consent of the abuser and the child protection agency, or by court order. Where time is of the essence, most child protection agencies can provide you with a brief letter summarizing their involvement with the family and the outcome of their investigation. Where proceedings have been commenced, such letters are useful in informing the family court judge that a child protection agency is or has been involved with the family, and the outcome of their involvement. Judges will often require further disclosure from the child protection

agency and are apt to order the disclosure provided that the information is used strictly for family court purposes and the child protection agency is compensated for the cost of producing its records. Most courts have standard terms that they use when ordering disclosure from a child protection agency. Likewise, child protection agencies have standard wording that they require in letters from legal counsel seeking a brief, summary letter or a court order for disclosure, on consent.

In cases where there is no police involvement, but the victim and the children move into a shelter for protection and report the abuse to shelter staff and a child protection agency, the child protection agency will send a worker to the shelter to ensure that the victim and the children are safe from harm and that the victim does not intend to return to the abuser with the children. Regardless of how the agency is contacted, it will remain involved until it is assured that the victim and children are safe from harm and if so, will close their file.

Where the victim has fled the home with the children for safety reasons, yet there has not been any report made to the police respecting the domestic abuse they are fleeing from, the abuser can and often does file a complaint with their local police that both the victim and the children are missing, or that the victim has kidnapped the children. The police do have access to the names of victims and their children staying at local shelters, and may confirm that the victim and their children are safe, without disclosing to the abuser or complainant the specific name and location of the shelter. In these circumstances, the police will notify a child protection agency as well and the victim can expect a visit from a worker soon after.

If you are representing a victim with whom a child protection agency has become involved under any of the circumstances described, it is important to know the child protection agency's mandate and to explain that mandate to your client so that he or she is not afraid, worried, anxious or angered by their involvement. You will want to obtain from your client the name of the worker involved and have your client sign an authorization so that you may speak to the worker directly on your client's behalf. You need to ask your client whether there is a child protection agency involved with the family, and if so, have your client sign an authorization form at the outset to facilitate the flow of information well in advance of any scheduled court appearances. It is important to ask the client whether the child protection agency had any involvement with the family prior to the incident of domestic violence. The agency may have a historical involvement with the family owing to reports by the children's teachers or doctors of child abuse at the hands of your client, the abuser or both. You need to be fully aware of any prior involvement with the family and the reasons, so that you will be prepared to explain any wrongdoing by your client without undermining their credibility.

### **Evidence from Witnesses:**

Although victims of domestic abuse often do not report incidents of abuse to the police, child protection agencies or other professionals such as their medical doctor, there may be individuals who are aware of the abuse first-hand by either witnessing the abuse or witnessing injuries resulting from the abuse. For example, often neighbours or a family friend will note that your client often had a black eye or a swollen cheek and, when asked why, would explain that he or she walked into a door or a wall. After a while, neighbours and family friends, although unwilling to pry or involve the police, suspect that the victim is being abused by his or her partner. After the couple separates, and the victim discloses or admits the abuse to neighbours or family friends, they are often very supportive and are willing to provide sworn evidence that they observed various injuries and although they cannot attest to the fact that it was the alleged abuser who caused the injuries, they can attest that they believe it was the alleged abuser because of the injuries they witnessed and because the victim disclosed to them that the injuries were caused by them. While the evidence may be disputable, it is still very helpful in that it supports the victim's allegation of abuse, especially where you are proceeding with an urgent motion for a restraining order.

Where the victim discloses the abuse to family and friends, but they did not witness first-hand any of the abuse or injuries suffered by their victim, their evidence may be characterized as hearsay evidence, biased or unreliable. There is an expectation that the victim's family and friends will align themselves with the victim, which can work against the victim in some cases. If you are considering presenting the sworn evidence of family or friends to the court, it is important that it is objective, factual and, where the information has been obtained from another

source, that they identify the source of that information and state their belief in its truth. You should weed out the family and friends who are not objective and do not have any factual basis for their allegations against the abuser, because their evidence may be more damaging than supportive.

### **Photographs, Letters, E-mails, Text Messages and Social Media:**

Lawyers should always ask their clients, especially given the regular use of cell phone cameras, whether they have any photos of their injuries. While victims may be afraid to report the abuse, they appear to be less afraid to photograph the injuries and store them just in case they find the courage to hold the abuser accountable for the abuse one day. Such cell phone or camera images of their injuries can and should be used as evidence to identify your client as the victim of abuse, the extent of the injury and, in some cases, the weapon used. Where photographs will be used to corroborate the victim's allegation of abuse, they should be colour photos and, if possible, dated by the camera or other device used at the time the photo was taken.

Likewise, lawyers should always ask their client's if they have saved any letters, text messages or e-mails which demonstrate the violent, vulgar and controlling nature of the abuser, or where the abuser has unwittingly admitted assaulting the victim in their campaign to gain the victim's forgiveness or a "second chance" to prove that they have changed. Abusers often post damaging messages or photographs on their Facebook pages and/or have damning communication with their followers on Twitter or other social media sites which, if obtained and submitted as evidence, would corroborate and bolster your client's claim of abuse. Lawyers should also be sure to investigate whether their own client has engaged in similar, social media misconduct. Given the prevalence of such communication technology amongst the general population and their general unawareness as to the inherent danger in its use, it has become quite commonplace to enter into evidence text messages and e-mails between the abuser and the victim to corroborate the victim's claim of abuse, particularly where there is no other substantive evidence available. Judges appear to be inclined to construe such evidence as, in some cases, *prima facie* evidence of abuse. If the messages are text messages, they should be transcribed and placed in an official transcript to be used as evidence. E-mails from the abuser to the victim can be printed and submitted as evidence as well. Facebook pages and tweets can also be printed and submitted as evidence. In family court, such evidence is submitted by appending it as an exhibit to the victim's sworn affidavit.

### **Letters from Counsellors and Other Community Resources:**

Sometimes victims of abuse will seek counselling and support from community-based resources and services. Normally, such resources and services will keep record of the victims that they service, when and how. This information can be useful in assisting to demonstrate that the victim sought support prior to reporting or disclosing the abuse. However, any letter provided by the community resource or service should be screened carefully as it may contain information that the victim does not want before the courts.

In addition, the client may have attended the counsellor with their abuser. The counsellor may be precluded from disclosing the details of those sessions, and in particular, whether any admissions of guilt were made by the abuser as a result of privacy legislation. If the evidence is crucial to your client's case, you should obtain a court order for its release.

If the counsellor providing a letter is affiliated with a shelter where your client may have stayed during the relationship or after leaving the home, be sure to black out all information that would identify the name, location and contact information of that shelter for the protection of your client and any other victims staying at the shelter. Remember, it is the anonymity of the shelters in which victims of abuse find solace.

### **Medical Records:**

You should always ask your client they disclosed the abuse to their medical doctor or other healthcare professional, whether in whole or in part. In some cases, the victim will admit to disclosing bits and pieces of



information to their medical doctor without disclosing the abuse. This can be tricky for the lawyer representing victims of domestic violence and expensive, so knowing that it is worth the read and the money is a must. Another important question is whether your client was ever treated for any injury sustained as a result of the abuse or prescribed any medications to assist them in coping with the abuse. The client may tell you that they have seen their medical doctor for anxiety and depression resulting from their ‘marital issues’ or that their doctor treated the cut they said they got opening a can of tuna, but really it was the abuser that used a broken beer bottle to cut them during a fight. The client may tell you that they have gone to the hospital three times in the last year with broken ribs, a broken arm, or a dislocated finger, and that each time they told the treating nurse or physician that they fell down the stairs. The abuser may have accompanied them to the hospital each time. You would definitely want to get a hold of these records because, even though in isolation they may not convince a judge of the abuse, taken together, surely raise a red flag.

Hospital records are definitely more affordable than medical records. If cost is a major issue for your client, canvass the cost of a letter from the medical doctor summarizing his or her knowledge of any marital issues and whether the client was treated at any time for conditions arising from the marital issues or other injuries, such as wounds, fractures, bruising, etc. If such a letter is more affordable for your client, then you should proceed with requesting it since it will likely be effective and more legible than the doctor’s hand written medical or clinical notes.

### **Child Witness and the Office of the Children’s Lawyer:**

What happens when the only witness to the abuse and source of corroborating evidence is the child? Making the child a witness is a never a road you want to take in family litigation, especially because children should not be exposed to the trauma of litigation or be placed in a situation of dividing loyalties, being forced to pit one parent against another. There are other less invasive ways of putting the child’s information before the court without making them a witness.

While it is not appropriate in all cases, in many cases, the child’s views and preferences can be put to the court because it is relevant to determining custody and access and what is in their best interest. This is done through legal representation. A lawyer can be retained for the child, and in Ontario for example, the court can invite the Office of the Children’s Lawyer (“the OCL” including both its lawyers and clinical investigators) to represent the child in a custody and access dispute or to investigate and make recommendations to the court respecting custody and access issues. If the child discloses to the OCL the abuse that they either witnessed or experienced, this will be taken into consideration by the OCL in their representation of the children and/or their recommendation to the court.

Before requesting an order for the court to recommend the involvement of the OCL in your client’s matter, give careful consideration to whether it would be appropriate to the circumstances to do so. If so, you should seek an order recommending the involvement of the OCL as soon as possible, in order to obtain an early response from the OCL as to whether they will become involved. The earlier the OCL becomes involved, the more time your client will gain between the disclosure of the OCL’s position or recommendation and the trial of the issues. If the OCL declines involvement, your client may need to obtain a custody/access assessment or retain separate legal counsel for the children. It is important to remember that where a child protection agency is involved with the family, the OCL will not become involved.

### **Urgent Motions:**

In family law matters where domestic violence is an issue, more court appearances tend to be required, and they are often initiated on an urgent basis. For example, often a victim of domestic violence is forced to bring an urgent motion to the court for exclusive possession of the matrimonial home or a restraining order against the abuser prior to serving him or her with the originating court documents in order to protect the victim from any backlash or violent reaction by the abuser once he or she is served with court documents. This is especially the

case where there are no criminal charges against the abuser and, therefore, the victim does not have the benefit of the protection afforded by a Recognizance of Bail, which will often contain conditions prohibiting the abuser from coming within a measured distance from the victim and from contacting or communicating with the victim. If the abuser breaches the Recognizance, he will be charged and likely re-incarcerated.

In order for the victim to be successful in bringing an urgent motion, he or she must first justify the urgency in order to be heard prior to a case conference, which would be the first step in most family court proceedings. Proving that a motion is urgent is a high threshold to meet, so a lawyer bringing such a motion should be prepared to explain why the motion is urgent and to substantiate the impending threat to the health and safety of the victim and/or the children. That being said, a lawyer representing victims of domestic violence should have sufficient litigation experience to be able to advocate effectively on behalf of the victims and/or their children. Litigation experience should include experience in gathering information pertinent to the issues at hand from all of the relevant collateral sources, not only the client, in order to present that information to the court in a objective and cogent manner, especially since the evidence of the victim will in most cases be weak or unreliable without concrete, corroborative evidence.

Urgent motions are challenging from a procedural perspective as well. If it is an urgent, ex-parte motion, it is likely that a judge will read the motion materials in chambers as opposed to counsel making oral submissions in court, and therefore, factums should be filed at the same time. It also helps to have draft orders ready whether or not the motion is brought on notice. A motion brought ex-parte will return before the court for another hearing within a very short period of time, usually a week to ten days, after service of the order and the victim's court documents on the opposing party. Service of these court documents, which includes the original Application to the court, needs to be carried out by special service or personal service on the opposing party. It is important to have an experienced process server working for you who can carry out service within such pressing deadlines. If you are seeking restraining orders to protect your client and/or the children, it would be prudent to have the CPIC forms ready with the physical description of the opposing party to assist the process server in identifying the individual to be served. Ask your client if a recent, colour photograph of the opposing party is available, whether in print or digital imaging. You should ask your client whether the opposing party has any distinguishing features such as scars or tattoos. It is important to have an alternative address for service, such as the work address or gym where he or she frequently attends. If you anticipate that you will encounter difficulties in carrying out personal service because, for example, the opposing party has "disappeared", you may want to obtain an order for substituted service on his or her parents, employer, probation officer, or other close relative.

If the urgent motion is your first step in the court proceeding, it will be a pivotal one. The result that you obtain for your client will, in almost all circumstances, establish the *status quo*. It is crucial to be well prepared for such a motion and, if the evidence that your need to succeed on the motion is either scant or entirely unavailable, carefully assess whether the motion should be brought altogether.

### **Presenting Evidence to the Court:**

The information gathering process is integral to the representation of any client, and more so where that client is a victim of domestic violence. In many cases, abuse is extremely difficult if not impossible to prove. However, given the pertinence of domestic violence to family law issues, and in particular the issues of custody and access, the information gathering process must be pursued vigorously and without exception. Once you have the information in hand, what do you do with it? As a lawyer representing victims of domestic violence you need to know how to present that information to the court in a cohesive and persuasive manner, especially if your first court appearance is an urgent motion.

There is no need to infuse emotion or passion in your evidence or submissions. Presenting the evidence categorically or chronologically is prudent. Ensuring that the evidence is objective and factual is crucial. If photographs are available, you should use only those and leave nothing to the imagination. If medical, hospital and/or police records are being proffered as evidence, you should highlight all of the information that you want

the judge to be drawn to immediately. Most importantly, there must be a clear nexus between the evidence that you are putting before the court and the reason for putting that evidence before the court – what does the evidence demonstrate, and why should it be taken into consideration in determining any of the family law issues at hand? We know that domestic violence is relevant to the determination of custody and access issues, but it is also relevant to other issues, such as whether a restraining order is warranted for the protection of the victim; whether the abuser should be prohibited from removing the children from the jurisdiction; whether any damages or compensation should be paid to the victim for the abuse suffered during the relationship; and whether the abuse prevented the victim from being or becoming economically independent from the abuser, thereby warranting spousal support. While domestic violence may impact many of the issues at hand, it may not be relevant to other issues, such as child support or the division of property, so there is no need to produce or revisit evidence of domestic violence when addressing these issues.

### **The Self-Represented Abuser:**

In many cases where domestic violence is an issue, there is no lawyer on the other side, only a self-represented litigant, and this appears to be the case, even where the abuser may qualify for Legal Aid. It would be in your interest, as well as that of your client, to notify the abuser in writing that he or she should retain legal counsel, and if they cannot afford to do so, they should speak with duty counsel and/or Legal Aid Ontario to inquire as to their eligibility for legal aid.

The self-represented abuser will characteristically employ the same abusive tactics in court and in dealing with you (the victim's lawyer) as they did during the relationship. While the courts afford self-represented litigants some flexibility in respect of court procedures and documents, it is important where you are representing the victim, to ensure that he or she does not succeed in abusing the process which is designed to be fair to both parties. There are remedies available to the victim where the opposing party abuses the court process, causes unnecessary delays and costs to the victim, swears false and misleading affidavits, and does not comply with court orders.

### **The Victim Facing Criminal Charges:**

You may come across a case where both the victim and abuser have reported domestic violence as against each other and are both facing criminal charges; or, a case where the abuser has reported domestic violence as against the victim, and the victim is facing criminal charges. In the latter case, you may find that the abuser has applied to the court for interim custody of the children; or, where the victim is staying in a shelter with the children, you may find that the abuser has reported the victim and children missing to police, and applied to the court for an order to locate, apprehend and return the children to them. In either case, if the abuser is successful, they will forge a new *status quo* and, as the victims' lawyer, you need to work quickly and diligently to reverse it.

Where your client is facing charges, it is important to assess how those charges will impact your client's allegations of abuse in the family law proceedings. It is imperative that you have a true understanding of what transpired to give rise to such criminal charges and whether your client has any real responsibility for their actions. There is no point in sugar coating a situation that is just plain bad. You will cost your client their credibility as well as your own as a lawyer. It is better to have an honest explanation that will gain credibility points for your client in the final tally and may earn the empathy of the bench when digesting that information together with the history of abuse that preceded it.

### **Alternative Dispute Resolution:**

While we have discussed the representation of victims of domestic violence in family law matters before the courts, which is often the safest way for victims to resolve such matters, there are alternative forms of dispute resolution that may be appropriate. However, the lawyer must first assess whether there is a power imbalance between the victim and abuser (there almost always is) and whether that imbalance can be balanced by the

lawyer's representation of the victim in negotiating, for example, a domestic contract to resolve their family law issues. The lawyer should take into consideration whether the victim feels intimidated, helpless or insecure in the presence of the abuser; whether the victim is able to speak up and against something they perceive to be unfair; whether there are any restraining orders in place that would prevent the victim and abuser from being within a measured distance of each other; and whether, the victim is ready to focus on resolving their family law issues. If the answers to these questions are positive, there may be other forms of dispute resolution available to your client, such as negotiation through legal counsel or mediation services. Arbitration may also be another forum for resolution. Negotiation, mediation and arbitration are all voluntary processes. In most cases, parties agreeing to mediate will be screened for domestic violence, and in Ontario, parties choosing to arbitrate must first be screened for domestic violence. Assessing whether these other forms of dispute resolution are appropriate or safe for your client is important because in some cases, the victims of abuse do not wish to partake in the court process and often feel re-victimized by it. They may wish for their family law issues to be resolved expediently, cost-effectively and confidentially, without having their personal affairs made public record. Often victims do not want to recount or revisit the abuse they suffered and opt for a process where they can resolve their family law issues with the assistance of a lawyer, who will be their advocate, or with the assistance of a mediator, who will try and assist the parties in levelling the playing field, and maintaining respectful and structured communication to reach an agreement. As a family law lawyer representing victims of abuse, you should not presume that the court process is the only and ideal process for resolving your client's family law issues. Talk to your client about it and discuss the various options available to him or her.

### **Representing the Abuser:**

As family law lawyers, we are officers of the court. We must assist the court in its judicious resolution of family law disputes in a timely and equitable manner. If you represent the abuser in a family law dispute, the onus is on you to ensure that your client does not abuse the process, but like yourself, champions a sensible approach to the resolution of the dispute, so as to manage your client's expectations and balance those expectations against the circumstances at hand and the needs of the family moving forward. Not only will you ensure that your client does not abuse the court process, but that the litigants will resolve the dispute on terms which will ensure that safety and wellbeing of all affected after the litigation has concluded, and in addition, will ensure that the family is neither stifled by the family court system nor caught in it in perpetuity. If your client requires counselling and support, be sure to connect them to the resources that they will need both during the proceedings and after they have been concluded. You should be able to furnish them with information respecting support groups, hotlines, parenting classes, etc. should they require intervention or assistance in the future. If the litigants will need to communicate with each other respecting the children, and your client may not be capable of doing so without reverting to abusive communication, you may want to recommend such sites as 'The Family Wizard,' which allow parents to communicate regarding the children using an online tool that censors language and tone. There is a nominal annual fee for this service. Of course, you will need to ensure that such communication does not breach any restraining orders.

### **Final Words:**

This article is not meant as a testament to academia, jurisprudence or case law. There is no substantive reliance on statistics, articles or essays. It is simply an article written by two lawyers practicing family law, who have experience representing clients who are victims of domestic violence; who have read extensively on issues related to domestic abuse, the representation of victims, and family law; and who may have something to lend other lawyers in developing a protocol for identifying and representing victims of domestic violence. We hope that this article will serve as a useful, starting tool for family law lawyers providing more comprehensive and sensible legal services to clients who are victims of domestic violence. Our ultimate goal is to draw more attention to the issues that the family court system and the legal profession face in representing victims of domestic violence so that we can collectively work towards ensuring that the system and the profession can facilitate equal access to justice for all victims of domestic violence. We face a deeper, more complex issue that this article has only been

able to briefly touch upon given its limited scope, that being how to remove the barrier immigrant victims of domestic violence face in obtaining equal access to justice.

*(Note: We invite our readers to contact us via email if they have any questions for us or tips to share. If you are interested in reviewing our Intake Forms, we would be more than happy to forward those along to you. Simply email either one of us.)*

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