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Domestic Violence and Lawyer Malpractice: Are We Revictimizing Our Clients?

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I. Introduction

Failure to recognize when a client or opposing party is or has been abused by a partner and failure to consider abuse in making strategic decisions are forms of legal malpractice. Many lawyers are uncomfortable addressing issues of abuse. Discomfort may stem from a variety of sources. A lawyer may be a victim or perpetrator of abuse, may have a family history of abuse, and may be unwilling to visit the feelings that are bound to arise if abuse issues are acknowledged in the professional setting. More simply, the practitioner may not want to deal with the additional emotional and legal complications that arise when abuse issues are raised. The family law attorney may recognize that he or she is neither knowledgeable nor skilled in the field of domestic violence. No reason, however, may be sufficient to overcome a cause of action for malpractice or other action for failure to recognize, advise on, and strategize around issues of domestic abuse.

The standard for legal malpractice is described in several ways. The most common definition is "The failure of the attorney to exercise ordinary skill and knowledge." Another definition reads: "Professional negligence or malpractice ... is defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services."

A lawyer in Texas is held to the standard of care that would be exercised by a reasonably prudent attorney. Legal malpractice is defined as "any misconduct or unreasonable lack of skill or fidelity in professional and fiduciary duties by an attorney." Specialization raises the question of whether the standard of care devised for the "ordinary" attorney suffices for the practice of law in modern time. The answer, with increasing frequency, is that an attorney undertaking a task in a specialized area of the law must exercise the degree of skill and knowledge possessed by those attorneys who practice in that specialty. To hold oneself out as an expert or specialist in a field of law elevates the practice to a higher level for liability purposes. A client may base a legal malpractice claim on several theories, including breach of contract, breach of fiduciary duty, or negligence.

II. Standard of Care for Family Law Attorneys

Family law practitioners are charged with the care of their clients' legal needs. The lawyer is charged with recognizing the clients' causes of action, advising them as to the viability of their claims, advising as to the consequences of pursuing claims, and presenting those claims in a competent manner. Lawyers are also charged with knowing the limits of the lawyer's competency. If the legal issues raised are not within the scope of the lawyer's competence, the lawyer should either refer the client to appropriate and competent counsel or suggest that the client find new counsel in the required field. Another option is to engage additional counsel to work on issues that are beyond the scope of the lawyer's expertise.

Family law cases often raise varied issues that require the skills of experts. For example, few divorce cases are without income tax consequences. Dependency exemptions, recapture of alimony, profit or loss on sale of assets, and transfer and liquidation of retirement accounts are recurring tax issues in the family law setting. Most family law practitioners have at least some ability to identify income tax issues. If they do not, they open themselves to legal liability for failure to do so.

Some practitioners have the expertise to deal with the necessary advice, tax planning, and document drafting that accompanies tax issues. Those practitioners who do not have such skill generally hire the necessary experts or refer the client directly to tax counsel for the appropriate planning and drafting. Either path will likely avoid a malpractice judgment so long as the expert hired, or the counsel to whom the client is referred, maintains a high standard of care in assisting the client. Numerous other examples of family law counsels hiring outside experts abound within the practice. For example, business, real estate, and pension valuations are commonly referred to experts in those respective fields, as few of us would dare to enter into negotiations without the adequate financial information needed to assess an agreement's fairness.
The same recognition of various fields of expertise within family law may be applied to issues involving children. In custody determinations, the lawyer often hires psychological experts on behalf of both clients and children.

One of the intellectual pleasures of family law practice is the need to understand and study whatever particular circumstances our clients bring to the case. For example, the client’s profession may be unfamiliar in the details of potential income generated, sophisticated processes utilized within a business or profession, and the education or other skills required for maximization of income. Understanding some of the details of actuarial science may be integral to adequate representation of a client whose business is being appraised. The profit margins of a particular business must be studied and understood before one can adequately cross-examine an expert on what the attorney may perceive as an under-valuation of the business.

Similarly, lawyers explore and study the issues of health and age that clients bring to the case. For example, the client who presents with a recently diagnosed major illness will prompt an investigation into the illness’s progression to determine the client’s ability to support herself or others. While failure to address such circumstances in negotiations or in courtroom presentations might occasionally be due to client preference, generally failure to address these circumstances could result in a claim of malpractice.

Why then are family law practitioners so willing to risk malpractice by ignoring the facts and circumstances of family law cases that arise around issues of domestic violence? This is particularly perplexing when they readily recognize the need for experts and expanded substantive knowledge regarding other issues arising in family law cases. The reasons may be *twofold. First, the practitioner may not recognize symptoms of domestic violence. This may lead to improper screening for violence and thus the practitioner’s presumption that abuse is not present in a given case. Second, if recognized, the practitioner, for many reasons, finds it easier to minimize or compartmentalize the violence. [FN8]

The practitioner may choose nonrecognition for many reasons: Denial accommodates a practitioner’s reluctance to address his or her own issues regarding abuse; [FN9] the attorney might perceive that domestic violence cases are more costly because of the myriad issues they raise around safety and liability; [FN10] or the practitioner might wrongly assume that cases involving constant struggle reflect nothing more than the immaturity of the litigants. Whatever the reason for the failure to address abuse issues, none are excusable. These reasons reveal that the family law practitioner has not maintained the necessary level of competency in the field of family law. Domestic violence has been established as both an independent body of law and one that has been incorporated into family law for decades.

III. Domestic Violence as an Established Body of Law

Domestic violence had been addressed by statute in all jurisdictions by the late 1980s. [FN11] Many states have incorporated the protective order statute within the domestic relations code. [FN12] Hawaii, for example, granted its exclusive jurisdiction over protective order matters to the family court. [FN13] Protective order statutes have been interpreted through case law in every state. The numerous provisions, from definition of family and household members to standard of proof and constitutionality, have been litigated repeatedly. [FN14]

Similar statutory and case history may be found in each of the United States. It would be difficult, therefore, for the practitioner to claim excusable unfamiliarity with abuse issues, particularly as much case law and many statutes address issues exclusively or concurrently within the jurisdiction of family courts.

Within the exclusive confines of family law are many statutory enactments that address the impact of abuse on families. Case law has addressed issues of batterers and custody. [FN15] Most states consider the history of abuse by a parent in determining an award of custody, while many have a presumption that the abusing parent not be awarded custody. [FN16]

During the past decade, law schools have incorporated domestic violence into their curricula in myriad ways. Many law schools offer courses in domestic abuse, and there are two leading casebooks in the field. [FN17] Some schools have domestic violence clinics; others incorporate domestic violence instruction into other courses such as contracts, torts and criminal law, recognizing that abuse may have ramifications in fields of law other than domestic relations. [FN18]

Much has been written on the definition of domestic violence and battered women. Many jurisdictions recognize that for a matter to be one of domestic violence or domestic abuse, it is not necessary that physical violence has to actually have occurred. The “fear of imminent harm” is commonly recognized as valid grounds for obtaining a protective order. While some states may require a physical act of violence or injury, some permit orders to enter upon a showing of imminent fear of harm. [FN19] Kentucky also addressed the “fear of imminent physical injury” in its protective order. [FN20] Civil protective orders generally are recognized to be preventative in nature. [FN21]

Merely because the protective order statutes require either physical injury or an act of physical violence, the family law practitioner is not excused from further investigation where the client has not suffered direct
physical abuse from the partner. Forms of control other than physical abuse can constitute domestic violence or be precursors of serious physical harm. *\textsuperscript{12} The family law practitioner should explore the impact of abuse on a family law case even if there has not been an act of physical violence. [FN22] The American Bar Association’s Commission on Domestic Violence has addressed abuse issues from the practitioner’s perspective in two editions of The Impact of Domestic Violence on Your Legal Practice, [FN23] Given the enormity of the literature on domestic violence within the legal profession, as well as the abundance of statutory and case law, it is unlikely that a lawyer/defendant in a negligence action would be successful in raising a defense that he or she acted "reasonably" or "prudently" in failing to identify abuse in a given case and in failing to address those issues and their consequences with the client. If the attorney represents herself in written or oral agreement as being qualified to represent the client in all aspects of a family law proceeding, breach of contract could attach for failure to competently address abuse issues. [FN24]

IV. Liability for Failure to Address Issues of Abuse When Abuse Factors Are Recognized

A. Compartmentalization and Minimization

Compartmentalization or minimization of abuse issues by the family law attorney happens when the practitioner recognizes that the client’s situation involves abusive behavior that places the client at risk but then fails to address the pattern of abuse in all aspects of representation. Joan Meier, addressing this phenomenon from the family court’s perspective, describes a common pattern in which the issue of abuse is not only recognized, but also is raised in the family court setting by one or both parties. [FN25] The court addresses the issues of abuse, generally by holding a hearing on protective order issues. For whatever reason, the court then fails to address the abuse as impacting other issues before it, including the custody of the children or access to the children by the offending party. The risk of harm to the children is, therefore, virtually ignored, particularly in those cases where the children have not been physically abused by the offending party. *\textsuperscript{13} Some family lawyers exhibit the same behavior on an individual level. For example, a lawyer who is inexperienced in handling domestic violence matters may believe that obtaining a protection order for the client satisfies the need to address abuse. By failing to conduct sufficient research in the area or to consult with a domestic violence expert, the lawyer fails to recognize the impact that the abuse has on the entire case. Such limited understanding may place the client and her children at risk. At the heart of domestic violence practice is safety planning. At each stage of the litigation the attorney and the client must discuss whether or not a certain action, inaction, or strategy raises or decreases the risk of abuse to the client and other family members. [FN26] Safety planning does not begin or end with obtaining a civil protection order. For example, one must consider whether or not it is safe for the client to seek such an order. What plan does your client have to minimize her risk of abuse? What resources does your client have available to her should the partner or former partner attempt further abuse of her or the children? What referrals has the lawyer’s office made to provide the client with assistance on safety issues? Family law may be one of the few areas of law where malpractice may be committed solely by the attorney’s aggressively pursuing all legal remedies available to the client. If one views the protective order process as completing the domestic violence aspect of the family law case, then one could hardly be aware of the risk to the client in pursuing further remedies. For example, if the perpetrator has threatened that he will kill the client if she ever pursues him for child support, the well-intentioned lawyer may dramatically increase the risk to the client by filing and insisting that the father be required to pay every dime to which the client and her children are entitled.

Before the lawyer rushes into court with financial discovery, she may wish to discuss with the client whether or not such action will increase the client’s safety risks. Often the client will wish to proceed, but may be in need of further safety planning. Does the family law attorney have sufficient savvy to address these issues? If not, has the attorney taken sufficient steps to obtain expert advice for the client? Often the answer is "no" to both questions. The lawyer has compartmentalized the abuse. Having obtained a protection order, the connection between the use of the legal process and the risk to the client has not presented itself to the practitioner. Similarly, the lawyer representing the victim of violence may not connect the batterer’s use of the legal system as perpetrating further abuse on the client. The practitioner may assume that compliance with the terms of the protective order assures the client’s safety. The lawyer may not understand that the excessive number of motions filed by the perpetrator may be an indication of increased safety risks to the client. The motion practice may also be designed to further the abuse by impoverishing the client through increased legal fees or through her firing from work for absences required to address family court matters. The opportunity for the perpetrator to discover the location of the battered woman necessitated by her court appearance could of itself increase her risk.
While the reason lawyers take a limited view of the impact of violence is for the social scientists to determine, the impact of such a narrow view in representing battered women is significant. For example, much has and is being addressed in the literature regarding the impact of domestic violence on children. When a parent is a victim of domestic violence, the child can suffer extreme trauma, even if the child has not been physically attacked by the intimate partner. The family law practitioner may take the position that a protective order that prevents contact by the batterer with the mother keeps the children safe, as well. Without an understanding that the abusive behavior may impact all aspects of the family law case, the victim’s lawyer may not understand, and indeed become irritated with, the mother who insists that the children are at risk with the father, even if there is no reported history of the father’s physical abuse of the children. This irritation may spill over to the court if the advocate is unprepared to educate the judge on the connection between partner abuse and child abuse.

Minimization may have even more detrimental effects than compartmentalization. Minimization of the client’s disclosures of abuse could prevent any further discussion of abuse between the client and the lawyer. Minimization is a tactic of the abuser. If the client hears the same from her own advocate, is she likely to disclose her fear for her own safety? If the lawyer fails to appreciate the client’s vulnerabilities resulting from the batterer’s abuse, how can the lawyer advise the client on the full range of legal remedies available to her?

B. Additional Liability Risks for Lawyers

In addition to a negligence claim, when an attorney minimizes, denies, or compartmentalizes abuse issues, there are many more risks.

1. FAILURE TO ADDRESS VIOLATIONS OF PROTECTIVE ORDERS, WHETHER IN THE CIVIL OR CRIMINAL ARENA

Frequently the practitioner is content if the physical abuse of his client ends with the entry of a protective order. Failure to address what the attorney may perceive as "minor" violations may in fact jeopardize the safety of the client. For example, a client who was regularly pushed and slapped by a spouse may have been free from physical abuse since obtaining a protective order. Three months into the term of the order, and deep into negotiations on the financial settlement of a divorce, the client receives a letter from the spouse asking her to send him copies of the most recent medical bills for the children so that he might stay current on paying his share of the bills. The letter is in violation of the "no contact" provision of the protective order. The client informs her lawyer of the violation.

The family law lawyer may respond in several ways. He may feel that the violation is minimal and not want to deal with it. He may remind the client that she has achieved her major objective in obtaining the protective order, i.e., the physical abuse has stopped. He may not want to address the violation because negotiations with opposing counsel are "going well." The client, meanwhile, views the violation as the perpetrator's message to her that he is all powerful and that he can contact her without consequences.

Failure of the lawyer to recognize the possible increased risk to the client could be actionable if the lawyer elects to ignore the legal consequences of the violation. What possibility of compliance is there with subsequent orders of the court, including the divorce agreement or judgment if the offending party is given the message that the court's orders will not be strictly enforced? Could the attorney be held responsible for the increased attorney's fees and costs faced by the client as violations escalate? Could the attorney be responsible for the financial loss to the client for either injury to herself or others as the violations escalate?

2. FAILURE TO RECOGNIZE CAUSES OF ACTION THAT COULD RESULT IN A FAVORABLE DIVISION OF ASSETS TO THE CLIENT IN THE DIVORCE PROCEEDING

In equitable jurisdiction states that consider conduct of a party as a factor in divorce, abuse cases present clear opportunities for the client who has suffered abuse by the spouse for a more favorable division of assets than what might generally be presumed to be an equal division.

Should a lawyer proceed on an "irretrievable breakdown" divorce complaint when such an action would preclude testimony as to abuse suffered by the client? Could that decision be grounds for a negligence action against the lawyer if the client is thereby precluded from being awarded a greater division of assets as compensation for the abuse? One would argue "yes" where the client has not been fully informed as to the consequences of the decision. What remedy would the client have other than a negligence action against the attorney, particularly in jurisdictions where she is then precluded from pursuing compensation from the abuser in a post-divorce action in another court?

3. FAILURE TO SEEK ALIMONY FOR VICTIMS OF SPOUSAL ABUSE

In many jurisdictions, a client may be eligible to receive alimony from the perpetrator spouse due to an inability to work resulting from abuse-related injuries. Posttraumatic stress disorder, mental illness, and
physical limitations may all have their origins in the abuse the client suffered at the hands of the spouse. Counsel may not make the connection between a client’s work limitations and the abuse. This is particularly true where the abuse most often took the form of nonphysical violence. In addition, sexual abuse can have long-term emotional and psychological effects that impair the client’s ability to function at maximum capacity.

4. FAILURE TO SUBMIT CAREFULLY DRAFTED PLEADINGS THAT PRESERVE THE CLIENT’S CIVIL REMEDIES OUTSIDE OF THE DIVORCE
Jurisdictions differ on how one must preserve civil claims that arise as a result of the marital relationship but are not made a part of the divorce. For example, in Massachusetts one must list a civil claim on a party’s financial statement, the claim being considered an asset. Disclosure would include claims against the opposing party. [FN28] In Heacock, the requirement of disclosure of a claim against another party on one’s divorce financial statement was deemed to be prospective. [FN29] If the client has a tort claim for injuries suffered during the marriage, the action may be waived if not preserved through disclosure in the proper pleadings. The lawyer must determine whether defenses of issue or claim preclusion might prevail when a separate tort action is brought against the abuser following conclusion of the divorce. [FN30] The Heacock court relied upon a Utah case, as well, in determining lack of claim preclusion where a tort action was deemed not to be based on the same underlying claim as the divorce. [FN31] Certainly the outcome of an attorney negligence case would likely be judgment for the plaintiff if the case arose in a jurisdiction that required joinder or disclosure of all claims between spouses within the divorce action. Some states limit evidence of “acts of misconduct” if the party has filed on grounds of irreconcilable differences. [FN32] The lawyer might consider the favorable impact that a judgment on cruelty grounds might have in the long term. If a battered woman obtains a divorce on grounds of abuse, it is difficult for the abusive partner to later argue that the survivor has exaggerated or fabricated the allegations. Frequently lawyers advise a client to hold allegations of abuse in abeyance to see if the matter will settle. This strategy minimizes the chance that there will be any record of the abusive treatment, particularly if an agreement is reached. The client may be comfortable with this result for a variety of reasons, but can make an informed decision only if the lawyer fully understands the consequences of this strategy and discusses them with the client.

5. FAILURE TO ADVISE THE CLIENT OF HER RIGHT TO PURSUE CRIMINAL COMPLAINTS
Most statutes make violations of a protective order a crime. Often the client could report and file criminal charges against the perpetrator for crimes committed against her. Frequently, assault and battery, rape, theft, and/or destruction of property have been committed against the client by her spouse or former partner. Failure to advise the client of her criminal remedies could constitute negligence, particularly if a criminal conviction would increase the client’s safety. In addition, a criminal conviction might ensure a favorable civil judgment should the client pursue a civil action.

6. FOR EVERY CRIMINAL OFFENSE, THERE IS A CIVIL CAUSE OF ACTION
Often clients do not understand what most lawyers do: For every violation of the criminal code, there is a civil remedy for which the client may receive relief. In all likelihood, the client may receive substantial monetary compensation, as well. Whether the client wishes to pursue civil relief is up to her. She cannot, of course, make an informed decision unless she has the advice of her lawyer. While a family lawyer may not feel qualified to commence an action in tort, the lawyer could be flirting with liability for failure to advise the client of her possible claims. In jurisdictions where *18 courts have addressed how tort claims against a perpetrator should be handled in conjunction with a divorce proceeding, it would be difficult to argue that the family law practitioner does not have an obligation to recognize such a claim. The practitioner has an obligation to take those simple, but reasonable steps to preserve the claim. The lawyer should advise the client that she may have civil claims and either refer her to appropriate counsel or advise her to consult with appropriate counsel.

7. FAILURE TO ADVISE THE CLIENT OF APPLICABLE STATUTES OF LIMITATION
On both the criminal and civil aspects of the survivor’s case, statutes of limitation are likely to apply. Again, if the practitioner is unaware of the exact length of the statutes, or is unclear whether or not a statute has tolled, the family lawyer should advise the client to seek appropriate counsel. There is one area where the family law lawyer might be subject to a valid negligence claim for failure to provide accurate advice as to the statute of limitation and the consequences of the lapse. For example, the client presents with evidence of having suffered abuse at the hands of her partner. The lawyer representing her in a divorce action before the family court believes both the criminal and civil statutes of limitation have expired. This particular jurisdiction, however, would allow the client to pursue remedies under the divorce for abuse suffered during the marriage. It is then the practitioner’s obligation not only to advise the client that no separate civil or criminal action is available, but also to inform her that her only remedy may be to pursue compensation through the divorce.
8. FAILURE TO SEEK ATTORNEY'S FEES AND COSTS
Many jurisdictions provide for the application of attorney's fees. Generally these may be had on either application at the commencement of the family law proceeding or at the conclusion of a matter. Any financial award received by the client may be meaningless if those funds must be used to pay for the lawyer's services. Often the court makes provision for payment of one party's attorney's fees and costs by the other party. Failure to seek payment could be negligence on the part of the family law practitioner. Inadequate funding of a case could result in the client's inability to pursue discovery, conduct investigations, or take simple measures such as serving subpoenas. Since it is the batterer who generally controls the financial information as well as the finances during the marriage, he will be able to continue his control over the victim if she is unable to finance the necessary litigation.

9. FAILURE TO ARGUE UNENFORCEABILITY OF A PRENUPTIAL AGREEMENT BASED ON A HISTORY OF ABUSE DURING THE MARRIAGE
Abuse in a relationship is not "bargained for." Most prenuptial agreements fail to make provision for either termination of an agreement or permitting additional compensation if abuse occurs during the marriage. Family law attorneys representing victims of violence have an obligation to aggressively pursue appropriate remedies so that victim compensation is not limited to that permitted under an otherwise valid prenuptial agreement.

10. PLACING THE CLIENT IN HARM'S WAY
"No contact" means "no contact." The attorney should not assume that there is any exception to an order that the abuser have no contact with the victim. Unless mandated by rules of court or court order, the attorney arranges meetings between clients and opposing parties at his own risk. Contact is just what the abuser desires. Control is easily asserted face to face. Indeed, your client is at huge physical risk (as could be counsel) if contact is permitted in violation of an existing court order. It would seem that there is little likelihood of defense if the attorney is sued for any injury to the client if injury occurs at or as a result of a voluntary meeting arranged or recommended by counsel. This applies to voluntary mediation, arbitration, or meetings with other providers.

In addition, mediation is not usually less expensive for litigants in domestic violence matters. Since the issues of abuse are rarely addressed or resolved through the mediation process, it is more likely that the parties will be involved in ongoing litigation. The litigation can be in the form of contempt for noncompliance or modification in ongoing child custody and visitation matters. The abuser frequently continues to control the victim through litigation, which can be not only vexatious but dangerous. [FN33]

Given the numerous writings on the topic, practitioners should already be alerted to the risks of mediation. Agreement to mediate should be made only after thorough discussion and safety planning with the victim. There are some, but very few, mediators who understand the risks of mediation in the domestic violence context. [FN34] Should a client determine that the safest approach for her would be to engage in mediation, the mediator could easily arrange for separate meetings with the parties and even meet the victim at an undisclosed location. Teleconferencing is also a possibility so that there might be real-time participation (should the victim agree to mediation) without fear of disclosing the victim's location.

Again, mediation between victim and abuser should be an unusual event in domestic violence cases. Should the client and lawyer determine that mediation is the best and safest avenue for resolution, there are measures to be taken to ensure a safe and productive process. It would not be unusual for the abuser to decline mediation once he learns that he will not have face-to-face contact with his victim.

In July 2000, the American Bar Association House of Delegates voted to recommend that court-mandated mediation programs contain an "optout" provision for those individuals impacted by domestic violence. In its report in support of the resolution, the ABA Commission on Domestic Violence wrote that mediation may be "counterproductive and dangerous" where one of the participants has perpetrated violence against the other. The report cited three concerns:
First, domestic violence arises under circumstances where an imbalance of power is entrenched in the relationship. Second, perpetrators of domestic violence may use the legal system to further manipulate and abuse their victims. Third, mediation may endanger victims by placing them in a situation where they have to see their abusers in person and discuss issues that threaten the abuser's sense of control. [FN35]

11. FAILURE TO ADVISE AS TO GROUNDS FOR APPEAL
Family law judgments in domestic violence cases can be fertile ground for appeal at trial. The many stereotypes that accompany battered women wherever they go may have more influence over a decision than the evidence presented. A court may be more offended that your client does not present as the ideal mother rather than focus on the destructive family consequences of the perpetrator's abuse. Similarly, the court may ignore a
statutory presumption regarding custody because your client does not fit the court’s image of a "victim." A court may not understand the heightened risk of child abuse when the mother has been abused by the father. Whatever the result or the reasons for it, often there are substantial grounds for appeal in family law decisions. While the divorce practitioner may not be responsible for pursuing an appeal, he may be at risk for failure to advise the client of possible grounds for appeal and the time-frame for filing a notice of appeal. While the above is certainly not intended to provide an exclusive discussion of areas of possible negligence by attorneys representing victims of violence in the family law arena, it certainly is representative of the concerns. It is not only the victim's attorney who is at risk for negligence and other claims, but also the batterer's attorney.

V. Malpractice Risks to Family Lawyers Who Represent Abusers

The same obligations as to competency that apply to victim's attorneys apply to counsel for the batterer. The obligation to recognize symptoms of a domestic violence case is vitally important because the attorney for the perpetrator can have some influence over his client's behavior. At a minimum, the behavior and competency of the perpetrator's attorney could greatly influence the safety of the victim surrounding court proceedings.

Competency includes understanding the dynamics of domestic violence. Once the lawyer recognizes behavior that is symptomatic of an abuser, the lawyer must then be careful to provide competent representation while not encouraging the abusive behavior. Just as the victim and her lawyer must understand the safety repercussions of undertaking a particular strategy, the attorney for the batterer must do the same. While an abuser might want to take the most aggressive action possible during the course of litigation, the attorney must consider the impact of supporting such a strategy. Will the lawyer's support be interpreted as support of the abusive behavior? Is the goal of the aggressive strategy to force the other party into financial straights, thus increasing her dependency upon the batterer, and possibly back into an unsafe situation? Similarly, the lawyer's failure to respond to (or his agreement with) a client's routine sex-based disrespectful language in referring to his partner is dangerous. So would be the lawyer's failure to address with his client the use of the legal system to engage in contact with the victim. Should the client interpret the lawyer's behavior as supporting tactics designed to continue the abuse of the partner, the abuser will feel further empowered.

Should the lawyer be male, the client may interpret the support as reinforcement of male entitlement. What exposure does this give the lawyer should the client commit further acts of abuse, particularly those that are criminal in nature? There are some specific risks to the lawyer representing an abuser.

1. FURTHER EMPOWERING THE BATTERER'S BEHAVIOR THROUGH EXCESSIVE COURT ACTION MAY ENCOURAGE THE CLIENT'S FURTHER CRIMINAL BEHAVIOR

If the client requests that frequent motions be filed with the court, the lawyer may not believe that all, indeed most, of the motions are necessary. The lawyer can see the consequences to the other party. She will need to take frequent days off from her job, risking firing. She will incur substantial attorney's fees, while having little access to resources with which to pay the bill. More importantly, the client is under a "no contact" provision of a protective order. Court appearances are literally the only time he is permitted to be within one hundred yards of the other party. If the lawyer files motions even though he or she believes that most are unnecessary, the lawyer may have participated in heightening the safety risk for the opposing party.

*22 Assume that the client seriously injures the opposing party following one of the court hearings. What is the lawyer's liability for providing the vehicle for the client's access to his victim? What if the lawyer believed that the motion filed and heard that day was frivolous? Can the lawyer claim protection under cover of the litigation? Maybe not.

Consider the case of Millennium Equity Holdings, LLC, et al. v. Mahlowitz. [FN36] Plaintiff was opposing party in a divorce action in which Attorney Mahlowitz represented the wife. The plaintiff/husband filed suit alleging that the defendant/attorney had filed a lien against the husband's corporation knowing that the action was "improper, excessive" and would halt a favorable real estate sale. The business subsequently went into bankruptcy. [FN37] The plaintiff alleged abuse of process, malicious prosecution of a civil action, and intentional interference with a contract.

The defendant filed a motion to dismiss claiming immunity from tort damages as protected by zealous representation during the course of litigation. [FN38] In denying the motion to dismiss, the court made two notable comments. First, the court recognized that many courts deny attorneys absolute immunity from liability from malicious prosecution of actions. [FN39] Secondly, the court noted that the tort actions alleged have material elements of motivation and intent. [FN40]

When representing parties in any litigation, the lawyer should examine his or her own motivations as well as those of the client. Whether or not the instant case is successful, the warning contained therein is clear. If litigation is used as a weapon to impoverish, harass, or otherwise harm the opposing party, counsel's support
of the action could lead to her liability.

2. PROVIDING OPPORTUNITY FOR THE CLIENT TO FURTHER ABUSE THE OPPOSING PARTY
The same cautions as to four-way meetings, mediation, and other contact between the parties apply to the abuser's counsel as well. The competent attorney will understand the risks of contact between an abuser and his target whether or not a protective order is in place. Insistence upon clients meeting in a setting that does not have the necessary safety precautions could lead to liability on the part of counsel. This is particularly true if the client is under a protective order, even if the order requires only that the client "refrain from abuse." It is not unforeseeable that the attorney be exposed to liability for not only providing a vehicle for client contact with his target, but also for participating in the contact that heightened her risk. Most protective orders will prohibit communication between the abuser and the victim. Communication is prohibited whether direct or indirect. The attorney who delivers a message from an abuser to the victim or her attorney is participating in the violation of any "no contact" provision of the protective order. Violations are generally criminal offenses. Is the attorney who so communicates part of the criminal act? Before one dismisses this example as unlikely, note that at least one state (Hawaii) makes it clear in its protective order statute that such communication to the victim through the abuser's counsel is prohibited. Indeed, attorneys are among the class of agents named in the statute to whom the order applies. The statute makes explicit what is implicit in other statutes that prohibit third-party contact on behalf of the abuser.

3. FAILURE TO WARN OPPosing PARTY OF THREATS TO HARM
Zealous representation has its boundaries. What is the lawyer's obligation when he is privy to the client's threat or plan to harm his former partner? While the so-called "Tarasoff" warning is the obligation of therapists, we must consider the obligation to warn by the lawyer as well. It is of interest to note that several lawsuits brought by batterers against their counsel have been dismissed. These claims, however, have been brought primarily against criminal counsel. The cases were dismissed because the former client may be required first to have his conviction vacated or otherwise prove that he was not guilty of the underlying acts of abuse before proving a negligence case against former counsel. It may be that a similar burden will be assigned to a batterer/plaintiff who sues divorce counsel. If the grievance is based upon a finding that the client was abusive during the marriage, the client may have to prove that finding erroneous before succeeding in a negligence action against counsel. It is not the perpetrator who should be of primary concern to family law counsel in terms of liability in tort. It is the victim or her estate that may sue the perpetrator's counsel if he or she is perceived to have escalated the abuse directly, provided a forum for its escalation, or failed to warn of a serious threat of harm.

VI. Ethical Considerations
Support for the above hypotheses is found in the ABA Model Rules of Professional Conduct. For example, Rule 1.1 provides: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A family law attorney does not have the luxury of claiming ignorance on matters of domestic abuse. The body of domestic violence law is extensively intertwined with family law matters. Awareness is insufficient, competency is demanded. Rule 1.2(d) cautions in part that the lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal...." In addition to possible liability in tort, the lawyer who communicates information or messages from the client who is the subject of a protective order to the individual to be protected under the order may risk an ethical violation as well. Rule 1.3 addresses diligence. Most lawyers consider this rule to require "zealous advocacy." It is worthy of note in two regards. The commentary to the rule states that the lawyer need not press for "every advantage" on behalf of the client. "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the process with courtesy and respect." There certainly is no obligation for the attorney to carry the abuse over into the legal process. To continue the abusive behavior contributes to the trauma of the victim and encourages the batterer in what is dangerous and often criminal behavior. Rule 2.1 demands: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, socio and political factors that may be relevant to the client's situation." Domestic violence, as an integral part of family law, fits squarely into the category of advice that may go beyond strictly legal advice. Since domestic violence focuses on safety and safety planning, one may...
assume that the family law lawyer dealing with either a victim or perpetrator must counsel on safety throughout the representation.

An additional risk is the family law attorney's decision to support his client's claim that abuse did not occur when the evidence clearly indicates otherwise. Often police photographs and reports, medical records, and witness statements support the partner's claims of abuse. Evidentiary and other trial issues aside, the abuser's attorney must consider the impact on the abuser's behavior if the lawyer supports the denial beyond providing a competent courtroom defense. Unqualified support of the client may be inappropriate. Unqualified support or minimization of the behavior is not. Counsel's failure to confront the inappropriate behavior during client counseling may contribute to the escalation of the abuse and commission of further crimes.

VII. Conclusion

Resources abound to assist the family law practitioner in becoming sophisticated in domestic violence law. The written material is extensive, and continuing education programs on the topic are available in most jurisdictions. More importantly, there is no reason for the practitioner to handle these cases in isolation. Clients with resources will permit the lawyer to hire either experienced co-counsel or consultants and expert witnesses. For those who represent lower income clients, a local shelter advocate or domestic violence prosecutor may be able to assist in finding expert witnesses or providing direction to counsel experienced in matters of abuse. Aside from issues of ethical violations and civil liability for failure to adequately represent a client who presents in a domestic violence situation, there are practical reasons for addressing the abuse issues in a competent and straightforward manner. If abuse is acknowledged, or at a minimum, not denied, all parties are more easily able to move forward. Litigation may be minimized. Resolution can provide for the enhanced safety of the survivor and the children. The abuser will then have the optimal opportunity to break the cycle of abusive behavior.

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[FN1]. The terms domestic violence, abuse, and domestic abuse are used interchangeably in this article. The terminology is intended to encompass all forms or patterns of control of one intimate partner over another whether it be physical, financial, sexual, emotional or otherwise. The terms "battered woman," "victim" or "survivor" are designed to encompass a partner subjected to one or more forms of control, as described above.


[FN8]. Nonrecognition refers to the attorney's failure to correlate certain behaviors with abuse. It does not indicate that the lawyer is not "seeing" certain behaviors. For example, during the course of a divorce, the lawyer might understand that the client has limited access to financial information or that the client is making it exceedingly difficult for the other party to obtain financial information. The lawyer may not recognize that such behavior may be symptomatic of an abusive situation that warrants further exploration.

[FN9]. Imagine our defense to an action of negligence in failing to divide a pension that actuarial matters make us uncomfortable!

[FN10]. This assumption cannot stand, as the long-term cost of not addressing abuse may be very costly for the client. If not addressed in the initial action, the abusive behavior is neither recognized within the court system nor "over." Clients may find themselves involved in numerous post-divorce actions in order to address issues of ongoing harassment and noncompliance.


[FN21]. Barnett v. Wiley, 103 S.W.3d 17 (Ky. 2003). OR. REV. STAT. ch 107 (cite includes the "Family Abuse Prevention Act").

[FN22]. See John M. Burman, Lawyers and Domestic Violence: Raising the Standard of Practice, 9 MICH. J. GENDER & L. 207, 238 (2003) (discussing the lethality assessment for the practitioner who represents victims of domestic violence, detailing the ethical issues raised in representation of victim and batterer; and addressing issues of screening and safety planning).


[FN26]. Burman, supra note 22; The Impact of Domestic Violence on Your Legal Practice, supra note 23.


[FN29]. In a later hearing on the same case, it was determined that it would be inequitable for the matter to proceed. In large part the decision was based on the wife's failure to timely serve a copy of the complaint upon the husband. The matter was filed for over one year before service was made. The matter had been filed while the divorce action was pending but yet remained undisclosed to the husband. Heacock v. Heacock, 568 N.E. 2d 621 (Mass. App. Ct. 1991).

[FN30]. See, e.g., Aubert v. Aubert, 529 A.2d 909 (N.H. 1987) (finding that a prior divorce did not preclude
hearing on a separate tort claim arising out of marriage).

[FN31]. Lord v. Shaw, 665 P.2d 1288 (Utah 1983), (affirming trial court's refusal to permit a woman to pursue post-divorce claims for abuse suffered during marriage after she failed to proceed with her divorce upon fault grounds (cruel and inhuman behavior). The divorce was heard prior to the filing of the tort claim). This case points out the pitfalls of not considering the far-reaching consequences of choice of pleadings, including the procedural consequences. It may be argued that the wife's attorney was not negligent if there was no prior indication in case law or statute that the dismissal of the cruelty claim or settlement of a case on other grounds would be "with prejudice" or constitute claim or issue preclusion. See Chen v. Fischer, 783 N.Y.S.2d 394 (2004).


[FN33]. Joan Zorza, What is Wrong with Mediation, 9(6) DOM. VIOL. RPT. 81, 94 (2004).

[FN34]. One such mediator is Diane Newman, of Newton, Massachusetts, who ensures that the parties have competent counsel in the domestic violence arena and who structures mediation sessions around safety issues.


[FN37]. Id. at 3.

[FN38]. Id. at 4.

[FN39]. Id. at 5.

[FN40]. Id. at 6.


[FN42]. See Burman, supra note 22.


[FN44]. See commentary to § 2.1.

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