LAWYERING FOR WOMEN SURVIVORS OF DOMESTIC VIOLENCE

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I. INTRODUCTION

Domestic violence represents a serious risk to physical safety for women in New Zealand. Every week a woman in New Zealand is killed or dies as a result of injuries inflicted by an intimate partner.[1] Almost half of all homicides in New Zealand are domestic-related.[2] Police attend 40,000 domestic violence incidents per year.[3]

New Zealand, like many other countries,[4] has treated domestic violence as a problem requiring a legal solution. The Domestic Protection Act 1982 created a legal framework for addressing domestic violence. It provided

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1 National Collective of Independent Women's Refuges, Inc. ("NCIWR"), *Fresh Start: A Self Help Book for New Zealand Women in Abusive* (1993) 10. This includes women who die as a result of injuries inflicted in beatings, including from damaged kidneys, intestinal and head injuries. The incidence of cancer among battered women is also well above average.

2 Fanslow, J, Chalmers, D, and Langley, J, *Injury From Assault: A Public Health Problem* (Injury Prevention Research Unit, Occasional Report Series, 1991) 10. Fanslow et. al. report that at least 39% of homicides for 1978-87 were domestic-related. In 1990 28 out of 67 homicides were domestic-related and 17 of the non-domestic homicides were the Aramoana shootings. Smith, D, *Abuse Intervention Overview* (Paper Prepared for the "Family Violence Prevention in the 1990s" Conference, at Christchurch, 1-6 September 1991). In 1993, 24 out of 55 homicides in New Zealand were domestic-related.

3 Ford, G, *Research Project on Domestic Disputes: Final Report* (1990). See also Haines, H, *Women's Mental Health: Research Issues in Women's Health Research : Report of Workshop held 21 September, 1989*, 52-55.

4 United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs, *Strategies For Confronting Domestic Violence* (1993) 12-25.

for a series of court orders designed to protect survivors of domestic violence by prohibiting certain actions by the perpetrators of the violence. The effectiveness of the legal protection provided to women in New Zealand under the Domestic Protection Act has been evaluated and critiqued.[5] In response to critique, The Domestic Violence Act 1995 (the "Domestic Violence Act") was passed by Parliament on 15 December 1995.[6] The Domestic Violence Act provides for one protection order[7] as well as various orders relating to property.[8]

New Zealand has also become an international leader in coordinating the legal and government agency response to domestic violence through the establishment of the Hamilton Abuse Intervention Pilot Project.[9] Unfortunately, while passage of the Domestic Violence Act in response to criticisms of the Domestic Protection Act seems to be a significant step forward,[10] funding for intervention programmes has all but disappeared, with 1995 governmental funding for the Hamilton programme at approximately one-third of its prior level.[11] Moreover, while attention, if sporadic, has been paid to the law, judges, police, family court personnel and procedure, and inter-agency co-ordination, little attention has been focused on the effectiveness of lawyers in assisting women seeking legal protection.

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5 Busch, R, Robertson, N, and Lapsley, H, *Protection From Family Violence: A Study of Protection Orders Under the Domestic Protection Act* (1992). This evaluation focused on judges, police and Family Court proceedings.

6 The Domestic Violence Act became effective on 1 July 1996.

7 Ibid., Section 7. The Domestic Protection Act 1982 provided for two distinct protection orders, ie non-violence and non-molestation orders. These orders differed from one another in terms of who could apply for them, the behaviours proscribed by each, and the penalties for breaches.

8 Sections 52, 56, 62, 66.

9 Busch and Robertson, "An Intervention Approach to Domestic Violence" (1993) 1 Waikato LR 109.

10 The Domestic Violence Act, for instance, adopts a power and control analysis to domestic violence.

11 Discussion with Roma Balzer, the Co-ordinator of the Hamilton Abuse Intervention Project.

This article presents the findings and conclusions of in-depth qualitative interviews with fifteen non-Maori women who are survivors of domestic violence[12] and of interviews with lawyers who represent survivors of domestic violence.[13] For lawyers and others interested in women's access to justice, these interviews provide valuable feedback about women's experiences of legal representation. The women report that along with police, judges[14] and society generally, their lawyers hold attitudes which tend to minimise and trivialise domestic violence and to blame victims for the violence. The women also report that many of their lawyers did not understand the dynamics of domestic violence and often neither believe their stories nor provided them with adequate advocacy. Based on the experiences of the women interviewed, these attitudes affect lawyer-client interactions and legal representation in ways that are detrimental to the women.

There is some good news about legal representation for survivors of domestic violence. There are clearly some lawyers practicing who diligently advocate for these clients. However, the women's reports that their lawyers sometimes presented barriers to obtaining effective protection from the legal system, and thus barriers to access to justice, require urgent attention.

This research was conducted while the Domestic Protection Act was in force, and therefore the findings are in some instances specific to practice and procedure under that Act. Some of these practices and procedures have changed under the Domestic Violence Act, and where appropriate, note will be made of these changes and of the likely impact of these changes on the findings presented here. However, the main subject matter of the research, the women's interactions with their lawyers and the

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12 While the sample of women interviewed is not representative of women who are survivors of domestic violence in any statistical sense, there is no reason to suspect that the experiences of these women vary significantly from the general population of women who hire lawyers to represent them in obtaining protection orders. Interviews were conducted in a parallel Maori/non-Maori interview process. The interviews with Maori women have been interpreted separately by Stephanie Milroy. The interviews upon which this article is based therefore do not include the interviews of Maori women. For a more complete discussion of the epistemology, methodology and methods used in the research project see Seuffert "Lawyering and Domestic Violence: A Feminist Integration of Experiences, Theories and Practices" in Stubbs, J (ed), *Women, Male Violence and the Law* (1994) 79.

13 Eight lawyers from four different towns who represent women survivors of domestic violence were also interviewed, some in person and some by questionnaire.

14 Busch et. al., supra n. 5, at 184-190.

recommendations to lawyers as a result of these interactions, are relevant to practice under the Domestic Violence Act and provide feedback that is rarely collected.

The importance of the context in which women approach lawyers for protection from abusive partners was one of the findings of the research. The article, therefore, first briefly summarises the context of the women's experiences: the legal process involved in obtaining non-violence and non-molestation orders, the histories of abuse that preceded the women's applications for these orders, the gender bias in the legal system and among lawyers, and the importance of safety to the women. It then presents findings specifically related to legal representation: first meetings with lawyers, counselling and mediation and other specific aspects of client representation. Finally, other relevant findings are discussed: the importance of support for women during the process of representation and of training for lawyers in the dynamics of domestic violence.

Because it is crucial that women who are survivors of domestic violence have the opportunity to speak, to be heard, and to give feedback to lawyers concerning their legal representation, much of the discussion in this article focuses specifically on the experiences and concerns of the women interviewed. Particularly where the women convey negative experiences with their lawyers, the conclusions and suggestions are intended to present constructive and positive possibilities and alternatives for lawyers, and to stimulate discussion about appropriate legal representation for women who are survivors of domestic violence.

II. Context: Legal Processes, Histories of Abuse and Gender Bias

The context in which women approach lawyers for assistance in gaining physical protection from abusers is integral to the response that they receive. Three aspects of this context will be focused on here. First, the legal context, including the types of protection that are available to women survivors of domestic violence. The protection available is relevant to the legal representation provided because it constrains the possible legal outcomes that the lawyers may pursue. Second, the context includes the histories of violence that the women have suffered prior to their approach to the lawyers, which often make physical safety for them and their children an overwhelming priority. Third, the context of gender bias in the legal system creates and interprets the legal responses available as well as the histories of violence and the resulting needs for safety.

This section will, therefore, present the legal framework for obtaining protection orders, with due note of the implications of intervening changes in the law; reveal the histories and patterns of violence endured by women before approaching lawyers for help; examine the gender bias of the legal system; and highlight the importance of safety to the women interviewed.

1. Legal Framework for Obtaining Protection Orders

At the time that these interviews were conducted the Domestic Protection Act set out the legal procedures and responses to domestic violence. This section will therefore set out the relevant provisions of that Act, and will also discuss the corresponding and additional provisions of the Domestic Violence Act. The Domestic Protection Act provided the protection of non-violence and/or non-molestation orders to married and formerly married persons against their (ex)spouses, and to heterosexual couples who lived or had lived together in the same household.[15] The court issued a non-violence order if it found that the respondent had used violence against or caused bodily harm to the applicant and that the respondent was likely to do so again.[16] The non-violence order prohibited the person against whom it was issued from using violence against, causing bodily harm to or threatening the use of violence or bodily harm to the applicant or a child of the family.[17]

Non-molestation orders were designed for protection from harmful actions that fall short of physical violence.[18] The statutory criterion for granting a non-molestation order was simply that the court make a finding that the order was "necessary for the protection of the applicant or of any child of the applicant's family."[19] A non-molestation order generally prohibited the person against whom it was issued from entering or remaining on any land or building which was occupied by the applicant or a child of the applicant's family or in which any of these people were dwelling.[20] It also prohibited the person against whom it was made from molesting the

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15 Domestic Protection Act, sections 4, 13(1) and (2); *Y v Y* (1984) 3 NZFLR 124; Busch et. al., supra n. 5, at 179; Butterworths Family Law Guide (4th ed. 1991) paras 7.507 and 7.512. Only non-violence orders were available where the parties were still living together.

16 Ibid., section 6.

17 Ibid., section 7.

18 *Butterworths Family Law Guide* , supra n. 15, at para 7.511.

19 Domestic Protection Act, section 15. For a discussion of the application of this criterion, see Busch et. al., supra n. 5, at 184-190.

20 Ibid., section 16(a). Butterworths Family Law Guide, supra n. 16, at para 7.514.

applicant or any child of the applicant's family.[21] A non-molestation order lapsed if the parties freely resumed cohabitation.[22]

Both non-violence and non-molestation orders could be granted on an *ex parte* basis where the court found that the delay that would be caused by proceeding on notice "would or might entail risk to the personal safety of the applicant or a child of the applicant's family"[23] or that such delay "would or might entail serious injury or undue hardship."[24] *Ex parte* applications were normally supported by an appropriate verifying affidavit.[25] Where an order was made on an *ex parte* basis the respondent could "apply immediately for variation or discharge of the order,"[26] *Ex parte* orders were interim orders; they were finalised after a hearing upon notice to the respondent.[27] The penalty for breach of non-violence orders included arrest and detention in police custody for up to 24 hours.[28] Penalties for breach of a non-molestation order included imprisonment for up to three months or a fine not exceeding five hundred dollars.[29]

As noted, the Domestic Protection Act's scheme for protecting women from domestic violence has been thoroughly critiqued.[30] In response to those critiques, the Domestic Violence Act was passed. It provides protection for people in a broader range of relationships, including same-sex partners,[31] family members, people living in the same household and those with close personal relationships.[32] It also provides for protection orders in response to "domestic violence" which is more broadly defined, consistent with a power and control analysis.[33] Physical, sexual and

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21 Domestic Protection Act, section 16(b) and (c).

22 Ibid., section 17.

23 Ibid., sections 5(1)(a) and 14(1)(a).

24 Ibid., sections 5(1)(b) and 14(1)(b).

25 *Police v Phillips* (1983) FLN-137 (2d).

26 Domestic Protection Act, sections 5(3), 8, 14(3), and 17.

27 Ibid., section 31. Under sections 60 and 61 of the Domestic Violence Act 1995, the respondent is entitled to notify the court that he or she wishes to be heard on whether a final order should be substituted for a temporary order. If the respondent does not notify the court that he or she wishes to be heard, then a temporary order becomes final three months after the date on which it is made by operation of law.

28 Ibid., sections 9-12.

29 Ibid., section 18.

30 See Busch et. al., supra n.5.

31 Domestic Violence Act, sections 2 and 4.

32 Ibid., section 4.

33 See text, infra at n. 45-51, for a discussion of the power and control analysis of domestic violence.

psychological abuse are included as well as acts which in isolation may appear trivial but form part of a pattern of behaviour that amounts to abuse.[34]

Under the Domestic Violence Act, the Court may make a protection order where the respondent is using or has used domestic violence against the applicant or a child of the applicant's family and the Court is satisfied that the order is necessary for the protection of the applicant or the child.[35] Section 19 of the Act provides for one protection order that has two sets of standard conditions. The first set of conditions, which applies to all orders, prohibits the abuser from doing a range of acts consistent with the definition of domestic violence: physically, sexually or psychologically abusing the protected person; threatening any of these acts; damaging or threatening to damage property of the protected person; and encouraging anyone else to do any of these acts.[36] The second set of conditions applies to orders where the protected person and the respondent do not live in the same dwellinghouse, and generally requires the abuser to stay away from the protected person and any land or building occupied by her.[37] The judge may also impose special conditions on the respondent that are reasonably necessary for the protection of the applicant.[38] The second set of conditions on the protection order are suspended while the protected person and the respondent are living in the same dwellinghouse with the express consent of the protected person, but they revive when consent is withdrawn.[39]

Under section 13(1) of the Domestic Violence Act protection orders may be granted on an application without notice if the court finds that delay might cause a risk of harm or undue hardship to the applicant or a child of the applicant's family. In response to critiques of judges' determinations of risk under the Domestic Protection Act, the Domestic Violence Act requires the Court in making this determination to have regard to the perception of the applicant and the applicant's family and to the effect of the respondent's behaviour on the applicant or a child of the applicant's family.[40] Where the protection order is granted on application without notice the respondent may apply immediately for variation or discharge

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34 Domestic Violence Act, section 3.

35 Ibid., section 14.

36 Ibid., section 19(1).

37 Ibid., section 19(2).

38 Ibid., section 27. The Court may vary or discharge an order upon the application of the applicant or the respondent. Ibid., sections 46 and 47.

39 Ibid., section 20.

40 Ibid., section 13(3).

of the order.[41] While protection orders made without notice are temporary orders,[42] the new Act provides that temporary orders become final orders automatically after three months unless the respondent requests a hearing on whether a final order should result.[43]

The Domestic Violence Act also increases the penalties for breaches of protection orders, particularly where there are multiple breaches of the same order. The penalties range from imprisonment for up to six months or a fine not exceeding five thousand dollars for the first breach of a protection order to imprisonment for up to two years for breach of an order where there are two previous convictions for breach on different occasions within a 3 year period.[44]

While the new Act has taken significant steps towards providing better protection for women survivors of domestic violence, it too may have shortcomings.[45] It is, however, in the context of this imperfect scheme provided by the Domestic Protection Act that the women interviewed approached lawyers for assistance in gaining protection from abusive partners.

2. *Histories of Abuse*

Another aspect of the context in which women survivors of domestic violence approach lawyers includes the history of abuse that these women suffer. This section first explains the range of tactics used to gain and maintain power and control in situations of domestic violence. Then, the women's stories of abuse are examined, noting the power and control

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41 Ibid., section 13(4).

42 Ibid., section 13(3).

43 Ibid., sections 13(3) and 13(4).

44 Ibid., section 49.

45 For example, the new Act provides that breaches of protection orders are offences when committed "without reasonable excuse." Domestic Violence Act, section 49(1). Determination of whether a respondent has an "excuse" and whether it is "reasonable" could result in costly litigation. Further, if this determination is made without reference to the perceptions of the protected person, it may well result in determinations that are subject to the same critiques that have been levelled at the determination of risk under the Domestic Protection Act, section 5. For identification of other shortcomings see Busch and Robertson, "The Domestic Violence Act: A Reform Half Done" [1995] 1 Butterworth's Family Law Journal 216; Busch, R and Robertson, N, *Submission to the Justice and Law Reform Committee on the Domestic Violence Bill* 15-17 (Unpublished paper on file with the author).

aspects revealed in these narratives.

Power and Control

The power and control wheel (see figure 1on page vii) was developed to represent the role played by physical abuse in gaining and maintaining power and control as well as the high incidence of specific abusive, but not physically violent, behaviours used by abusers.[46] It represents physical abuse and the other tactics as intentional acts used to gain power and control over another person, rather than as an anger management problem or a problem with loss of control by the abuser. The hub, or centre of the wheel represents the intention of all of the abusive tactics—to establish power and control. Each spoke of the wheel represents a particular tactic used by abusers. The non-physical tactics include economic abuse, coercion and threats, intimidation, emotional and verbal abuse, isolation, using male privilege by treating the victim as subservient, minimising and denying the violence, and blaming the victim.[47] The abusers' tactic of blaming victims for the abuse is intended, and often succeeds, in producing feelings of guilt in women who are targets of domestic violence.[48] The rim of the wheel, which gives it strength and holds it together, is physical and sexual abuse. The design of the wheel is important to an understanding of abuse in all of its forms; physical abuse is only one part of a whole system of abusive behaviour that an abuser uses against his partner. Physical violence is never an isolated behaviour; it is used to back up and reinforce other tactics.

Minimisation, denial of violence and blaming of victims[49] are also used

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46 For a discussion of tactics of power and control see eg, Pence, E, *The Justice System's Reponses to Domestic Assault Cases: A Guide for Policy Development* (1986); Pence, E and Paymar, M, *Power and Control: Tactics of Men Who Batter* (1986) 30; Mahoney, "Legal Images of Battered Women: Redefining The Issue of Separation" (1991) 90 Mich LR 1. For discussions of a power and control approach to domestic violence in the New Zealand context, see Busch and Robertson, supra n. 9, at 116-17; Barnes, G, Fleming, S, Johnston, J and Toone, S, *Domestic Violence: New Zealand Law Society Seminar* (1993) 2-9; Busch et. al, supra n. 5 at, 10-12.

47 For a proposal for training lawyers in the power and control dynamics of domestic abuse see Seuffert, "Lawyering and Domestic Violence: Feminist Pedagogies Meet Feminist Theories" (1994) 10 Women's Studies Journal 63.

48 United Nations, supra n. 4, at 59.

49 Ibid.

by members of society in general to render domestic violence invisible[50] and not worthy of the attention of the courts. The coincidence of the use of these tactics by abusers and members of society, especially by those members who have the power to make decisions about the abuser and the victim, such as judges, tends to legitimise the perspective of the abusers and further victimise women who are targets of domestic violence.[51] This has been called the "cultural facilitation of violence."[52]

3. Women's Stories

At the beginning of each interview, the women were asked to briefly describe the abuse that they had suffered.[53] Almost all had been abused over long periods before they sought protection, and some of the women were still experiencing some forms of abuse at the time of the interviews. These long histories of abuse may be typical of women who approach lawyers for assistance, and are not unusual. Two Family Court judges have noted that long histories of abuse are typical of the applicants who approach the courts for protection.[54]

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50 See Busch, "Was Mrs Masina Really 'Lost'?: An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence" (1993) 8 Otago LR 1 for a discussion of New Zealand cases in which judicial opinions blame the women for their violent abusers' behaviours; *Gender Equality in the Courts, Criminal Law: A Study By the Manitoba Association of Women and the Law* (March 1991) xi (hereafter "Gender Equality in Manitoba Courts"); Zorza, *The Gender Bias Committee's Domestic Violence Study: Important Recommendations and First Steps* (Report presented to the Boston Bar Association, May 15, 1989) 4 (on file with The National Center on Family Law, New York, New York); Mahoney, supra n. 46, at 12-3; Ptacek, "Why do Men Batter Their Wives?" in Yllo, K and Bograd, M (eds), *Feminist Perspectives on Wife Abuse* (1988) 141-9, 154-5; Murphy, "Lawyering For Social Change: The Power of Narrative in Domestic Violence Law Reform" (1993) 21 Hofstra LR 1243, 1263, 1275.

51 United Nations, supra n. 4, at 10.

52 See Pence, supra n. 46, at 1-8.

53 For a collection of histories of abuse of women who have killed their abusers see Murphy, supra n. 50, at 1279-84. Recognition of societal barriers to women speaking about domestic violence suggests that women may not discuss the sexual abuse and extreme forms of physical abuse they suffer nor the physical and sexual abuse of their children: the women's stories may in fact underrepresent the actual levels of violence. See Astor, *Doing the Impossible: Talking About Violence in Family Mediation* (Paper presented at the 1993 Canadian Learned Societies Conferences, Law & Society Conference, Carleton University, Ottawa , on file with the author).

54 Busch, et.al., supra n. 5, at 207.

Two women described their histories of abuse.

> The abuse went on for - the [entire] twelve year relationship. It was physical, it was emotional, it was verbal, it was sexual... So every type of abuse was involved. My children were abused in all those ways as well except for my son who wasn't sexually abused...
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> Well for quite a number of years, possibly 10 or 11 years I had been...he would bash me around. He had abused the children. Physically and mentally we had both had that. I basically had no real life of my own with him.

The next woman's experiences are perhaps unusual because although the history of abuse includes sexual and emotional abuse, isolation tactics (such as alienating her from her family and making visiting unpleasant for her friends), and very violent threats of physical abuse, it does not include recent physical abuse. It may represent a situation where physical abuse was not necessary to maintain power and control as the other tactics were sufficient. She describes the abuse:

> Mine was mainly emotional, verbal and sexual abuse actually and he didn't start any abuse until after we got married and the day we got married I remember feeling this terrible sense of dread and being trapped... If he didn't get his own way or I wouldn't agree with him he would start arguing with me and it was constant. It was little things like never supporting me, never affirming me, putting me down and later on he would start screaming....he ended up smashing the place up and had me backed up in the corner with an arm chair thrown at my feet and it was that kind of level and I was with him for about twelve years.... I tried several times to get away... This was before I had children and then about the last four years of the relationship it was something like screaming at me for about three or four hours a day and smashing the place up. I was so shaken emotionally that I couldn't cope and my whole life was focused on looking after him and nurturing him so he wouldn't abuse me and the kids, yell and scream, and it was constant, the sexual abuse was constant... In the day time ....always touching me, and then at night time he was demanding sex all the time whether I wanted to or not. Even in my sleep he would have his arms around me so there was just like no escape. No escape ever.... it is that common thing systematically stripping you of anything that you enjoy, anybody that you enjoy, not having telephone conversations, not being able to read your mail, making it so unpleasant that people won't come around to the house, alienating you from your family so that there is no one and that your whole life is just based around nurturing somebody like that.

The next woman noted the similarities of tactics used by abusers, such as the reinforcement of economic dependency and use of isolation:

> I think when you listen to abused women a lot of the stories are similar in content and that a lot of the men won't let you get a job. I was never allowed a job. I don't have a driver's licence. I was never encouraged to get my driver's licence. Friends were always abused and there was deliberate attempts to break up friendships. Lying about what they had said or what you said, the whole thing, and so a lot of these things we have in common.

Without support networks and financial resources women may be dependent on their partners for many of their needs, and that dependence facilitates the abuser's control.

All of the histories illustrate the tactics abusers use to gain and maintain power and control. Continued abuse and harassment as well as memories of abuse are likely to inform the women's actions throughout the legal processes. Lawyers should remain aware of the histories of the abuse, the effects of the abuse on women and children throughout the legal process, and should make every effort to ensure that these histories inform the decisions of the court throughout the proceedings. In particular, lawyers should be aware that the Domestic Violence Act's concerns about children witnessing domestic violence have also been recently incorporated into the Guardianship Act 1968 ("the Guardianship Act").[55] This Act recognises that witnessing domestic violence is harmful to children even where the

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55 The amendments are found in sections 15(2B), 16A, 16B and 16C of the Guardianship Act.

violence is not directed at them.[56] The Guardianship Act provisions will be discussed further below.

4. Gender Bias

A. Gender Bias in the Legal System

A third aspect of the context in which women approach lawyers for protection from domestic violence is the gender bias of the legal system. In the last ten years there has been a growing concern with and response to gender bias in the legal systems of common law countries. Gender bias in the courts involves a range of issues, including the differing degrees to which women and men are believed as witnesses, clients and advocates. It can result in men receiving more favourable treatment from courts than women in similar circumstances. In the United States and Canada there

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56 These amendments were made in response to recommendations. Busch et. al., supra n. 5, at 238. *The Australian Law Reform Commission Report No 69, Part I (Equality Before the Law: Justice for Women) and Part II (Equality Before the Law: Women's Equality)* (1994) Part I, 175 [hereafter Australia Report Part 1 and Part 2]:

A substantial body of research indicates that children are significantly affected by a history of violence by one parent against the other. They are at significant risk of developing emotional and behavioural problems such as low self-esteem, depression and anxiety, passivity, self-destructive and agressive behaviour and poor school performance....These effects can arise through the child witnessing the parent being physically or pyschologically abused, becoming directly involved in the situation... or suffering more indirectly as a result of the mother's frustration or fears.

In the United States, at least 38 states are required by statute to consider domestic violence in custody cases. Zorza, J, *State Custody Laws With Respect to Domestic Abuse* (1993). A few states create a rebuttable presumption that custody or visitation should not be granted to a parent who has a history of inflicting domestic violence. Cahn, "Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions" (1991) 44 Vanderbuilt LR 1041, 1062. The American Bar Association has recently recommended that all states require judges to consider histories of domestic violence in making custody decisions, and suggests that statutes include presumptions that custody not be awarded, in whole or in part, to a parent with a history of inflicting domestic violence. Davidson, H, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (Second (Revised) Printing, October 1994) 15. "Anyone who has committed severe or repetitive abuse to an intimate partner is presumptively not a fit sole or joint custodian for children. Where there is proof of abuse, batterers should be presumed by law to be unfit custodians for their children." Ibid., 13.

have been numerous reports on gender bias in the court systems.[57] All reports have found extensive gender bias in those courts and legal systems studied.[58]

In 1993 the Australian Attorney General referred to the Law Reform Commission (the "Australian Commission" and the report the "Australian Report") the task of determining whether any changes should be made to the laws of Australia to "remove any unjustifiable discriminatory effects of those laws on or of their application to women with a view to ensuring their full equality before the law."[59] Approximately 600 submissions were received by the Australian Commission, and the major issue raised was violence against women and access to justice.[60] The Commission concludes that the "legal system fails to deal effectively with violence perpetuated by men on women."[61]

No empirical study focusing on gender bias has yet been conducted of the New Zealand legal system.[62] However, there has been some recognition that a problem exists. In 1995 the New Zealand Law Commission initiated the Women's Access to Justice: He Putanga Mo Nga Wahine Ki Te Tika Project.[63] The experiences of the women interviewed in this study also

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57 See eg Nobel, D and Roberts, M (eds), *Proceedings of the National Conference on Gender Bias in the Courts* (1989); Wikler, "Identifying and Correcting Judicial Gender Bias" in Mahoney, K, and Martin, S (eds), *Equality and Judicial Neutrality* (1987)12; Supreme Judicial Court *Gender Bias Study of the Court System in Massachusetts* (1989) 1.

58 See eg Wikler and Schafran "Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States" (Fall 1991) 12 Women's Rights Law Reporter 313, 341.

59 Australia Report Part 1, supra n. 56, at xv. Since 1993, a number of other studies concerning women and the law have been undertaken in Australia, including *Gender Bias and the Judiciary*, ibid., 5-6

60 Australia Report Part I, ibid., 4.

61 Ibid., 7.

62 See Ertel, K, Kettle, CD, and McDonald, E, *Gender Issues For New Zealand District Court Judges: A Discussion Paper* (1993); Busch et. al., supra n. 5.

63 The terms of reference for the project state that:
Priority will be placed on examining the impact of laws, legal procedures and the delivery of legal services upon:
- family and domestic relationships
- violence against women, and
- the economic position of women.

Law Commission, Women's Access to Justice Newsletter January 1996, 1.

indicate that gender bias exists in the New Zealand legal system. There is, therefore, no reason to believe that New Zealand is vastly different from the United States, Canada and Australia on this issue.

Gender bias in the legal system results in the system's failure to protect women from violence. It reflects and perpetuates the gender bias of society.[64] Some of the women interviewed explicitly noted the connection between gender bias in society, domestic violence, and their own self-blaming attitudes about the abuse.[65] Further, some women related experiences where blame for the abuse was focused on them. For example, the children of one woman, who had suffered twelve years of abuse, were sexually abused by her ex-husband.[66] In an attempt to protect her children from further abuse she refused to agree to allow the children to visit their father.[67] The judge suggested that the woman, rather than the abusive man, was responsible for putting the children through the "horrible process of psychiatrists" required to cut off access:

> [The Judge] said to me, not to him, do you realise that by not agreeing to some form of custody or access or whatever here that you're actually going to put your children through a really horrible process of psychiatrists... and he didn't actually say that to him.

The suggestion that the woman has unreasonably refused to agree to

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64 Australian Report Part I, supra n. 56, at 26-9.

65 Gender Equality in Manitoba Courts, supra n. 50, at (v), "Victims also experience self-blame which is reinforced by society's 'blame the victim stereotypes."

66 A very high incidence of child abuse has been found in situations where there is domestic violence: more than half of male abusers beat their children, and the more severe the partner abuse the more severe the child abuse. Significant numbers of men who abuse partners (up to one third) also sexually abuse their children. Bowker, Arbitell and McFerron, "On the Relationship Between Wife Beating and Child Abuse" in Yllo, K and Bograd, M (eds), supra n. 50, 164; Hoff, L, *Battered Women As Survivors* (1990) 240; Toone, S., *Treasure the Child* (1991); Zorza "Women Battering: A Major Cause of Homelessness" (1991) 25 Clearinghouse Review 421, 424-426.

67 One New Zealand commentator has suggested that lawyers who know that their clients have abused their children should counsel the clients against seeking custody or unsupervised access and that the lawyer is under a duty not to resist disclosure on the grounds of legal professional privilege. Enright, "Legal Ethics and the Family Lawyer" (1994) 7 Auckland University LR 821, 830-1.

access[68] implies that she is lying about the sexual abuse of the children.[69] Perpetuation of the myth[70] that women only raise allegations of child abuse in custody actions to win strategic advantage is a form of gender bias.

As noted above, the Guardianship Act has been amended to recognise the prevalence of child abuse in situations where there is spousal abuse and to recognise that witnessing domestic violence is itself traumatic and a form of child abuse. The amendments provide that the Court shall not grant custody or unsupervised access to the violent party in any custody or access proceedings where violence against a child of the family or a parent is proven, unless the Court is satisfied that the child will be "safe".[71] In deciding whether the child will be safe the Court is required to consider a number of factors, including the frequency and severity of the past violence, the likelihood that the violence will continue, and the wishes of the protected parent and the children who are able to express wishes.[72] These new provisions clearly have a number of implications for lawyers. First, lawyers should be aware that in order to trigger the rebuttable presumption, it will be necessary to prove that violence occurred. Determining whether domestic violence is an issue in any custody or access

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68 It has also been found that lawyers are very reluctant to make arguments for denial of access, apparently because "they believe that such an argument would not succeed." Australian Report Part I, supra n. 56, at 179. Roxburg, T, *Taking control: Help for Women and Children Escaping Domestic Violence* (1989) 155. "Many solicitors and barristers will go to almost any length to convince you that you cannot deny access and (a woman) must therefore agree to it before (going) into court and it can be almost impossible to have them obey... instructions and oppose the application."

69 Women have been accused of lying about domestic violence in order to gain advantage in custody and access proceedings as well. Australian Report Part I, supra n. 56, at 171.

70 Recent research in the United States has found that in cases where fathers seek custody and mothers raise allegations of child abuse fathers are more likely to be awarded custody than in cases where mothers do not raise allegations of child abuse. Statistically allegations of child abuse raised during custody determinations are just as likely to be true as allegations raised at any other time. The myth that women are lying when they raise allegations of child abuse by fathers during custody determinations is still very powerful, and this research suggests that women are punished in custody actions as a result of this myth. Liss and Stahley, "Domestic Violence and Child Custody" in Hansen, M and Harway, M (eds), *Battering and Family Therapy: A Feminist Perspective* (1993) 175, 178; Zorza "How Abused Women Can Use the Law to Help Protect Their Children" in Peled, E, Jaffe, P and Edleson, J (eds), *Ending the Cycle of Violence* (1995) 147, 152.

71 Guardianship Act, section 16B(4).

72 Ibid., section 16B(5).

proceeding right at the start of the proceeding is therefore crucial. Lawyers should consider asking all women who approach them for representation on these issues whether violence has been a part of their relationship. Where violence is an issue, lawyers will need to gather historical evidence, such as medical records, police reports and photographs, as well as current photographs and affidavits from witnesses. As this evidence is likely to be used not only to determine that violence has occurred, but also to assist the court in determining whether the child might be safe despite the history of violence, the evidence gathered should be as complete as possible. Second, the court must consider whether the other parent considers that the child will be safe and consents to custody or access by the abuser.[73] Lawyers should be aware of issues of consent and coercion surrounding women survivors of domestic violence,[74] and attempt to ensure that their client is safe enough to avoid coercion, so that her consent is given voluntarily.

Many of the women felt that the legal system is biased in favour of men. There were a number of comments expressing surprise and disappointment that the law and the legal system were not fair and neutral. For example:

> Yes, I always knew that women were inferior but I always believed that we've got a legal system that was just, prior to going through it. I thought no, well the legal system has got to be just, I mean I know out there with the average kiwi bloke that women are inferior, but surely to goodness in the legal system, it never even crossed my mind that it would be so unfair.....but now, yeah, I sort of, the understanding that I've got now is that racially and sexually the law is really just totally white male, whereas I wouldn't have believed that before. I really wouldn't. ...If you're a white woman or a Maori woman you're at the bottom. Yeah, just that it's white male thinking.

Women also talked about how they were silenced by the legal system. This feeling came about as a result of not having the chance to tell their stories, or not being heard,[75] or of having experiences of harms that did not fit into the categories recognised by the legal system for redress.

> I felt like ... there was absolutely no point in me being there, might as well not even be there. What was going to happen was going to happen. The whole system was set up

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73 Ibid., section 16B(5)(f).

74 See eg Australian Report Part I, supra n. 56, at 161-162 for a discussion of a context of domestic violence resulting in undue influence in the signing of a memorandum of transfer.

75 Australian Report Part I, ibid., 28 "I never got to tell my story. It was as if what happened to me did not matter... I felt like the player in a game that I had never played before, and was treated as if I was cheating in some way."

> to hear this poor man's needs because she had walked out on him and any time he clicked his fingers the whole lot ran, whereas I was just totally and utterly powerless and the children, especially the children had no rights whatsoever.

Clients have a right to have their point of view heard and to have their lawyer advocate for their view over any other.[76] Feminists and other legal academics have written extensively on the failure of the law to provide categories that recognise the diverse experiences of women in the law and respond to harms experienced by women in society.[77] This failure means that practicing lawyers may not be able to place women's experiences of injuries into legal categories. However, there is a rich body of literature concerning theories and practices of expanding the categories of the law and making women's voices heard in the law.[78] Lawyers who represent women should be familiar with this literature, particularly in areas where feminists have identified problems, such as the law's response to domestic violence. They should be prepared to make arguments that current laws and practices are inappropriate if the experiences of women are not addressed, and should argue for changes in the law that further its receptiveness and responsiveness to their clients' needs.

Some women compared their treatment by the legal system to the abuse that they had suffered from their partners.[79] The legal system did not protect them from violence; it furthered the abuse by condoning the actions of the abusers.

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76 Thompson, "Conflict of Interest" [February 1994] New Zealand Law Journal 64.

77 Murphy, supra n. 50, at 1253-8; O'Leary, "Creating Partnership: Using Feminist Techniques to Enhance the Attorney-Client Relationship" (1992) XVI Legal Studies Forum 207, 213.

78 McDonald, "The Law of Contracts and the Taking of Risks: Feminist Legal Theory and the Way It Is" (1993) 23 VUW LR 113; Cain, "Teaching Feminist Theory at Texas: Listening to Difference and Exploring Connections" (1988) 38 Journal of Legal Education 165; Schneider, "Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse" (1992) 67 New York University LR 520; Schneider "The Dialectic of Rights and Politics: Perspectives From the Women's Movement" (1986) 61 New York University LR 589; MacKinnon "Feminism in Legal Education" (1989) 1 Legal Education Rev 85, 89-92; MacKinnon, C, *Toward a Feminist Theory of the State* (1990) 112.

79 Busch, et. al., supra n. 5, at 20 regarding the "double victimisation" of victims, first by the criminal and then by the court system; Wilson, M, McLay, J and Johnson, L, *Sexual Violence: A Feminist Perspective* (Paper Presented at Seminar entitled "Sexual Violence: A Case for Rape Law Reform in New Zealand" (1982).

> To me, actually to speak, there's like a parallel there. There's a parallel between being in an abusive relationship with a bloke and going through a system that renders you powerless. And there's some really strong similarities in there.
>
> I'd have to say the same ... to a point, ending my abusive relationship or going through the processes to do that, I seem to have got stripped even further. I came out the other end with a lot less ... than there was when I went in.
>
> I didn't think I was that powerless. I thought I was pretty powerless but then when I came up against the law, I really found out how little I had and how much he had. And like [she] said it parallels exactly the same kind of feeling. This person's got power over and no way is emotion acceptable. It's all logic. We only want logic. We don't want to know about your fear.

This concluding comment summarises the disillusion with the legal system's ability to live up to its claims of fairness and neutrality for women.[80] Recognition of the possibility of the legal process itself being difficult and traumatic for women is important for lawyers who represent survivors of domestic violence. Lawyers should acknowledge that the legal system has the potential to be abusive and should develop strategies with their clients to address and combat abuses. Lawyers should also be prepared as a matter of course to provide women with referral information on appropriate community support services and other services early in the legal process.

Lawyers who are unaware of the gender bias of the system and who do not consider its possible implications for the cases in which they represent women may not be providing effective, or even competent, legal counsel. They should develop strategies to confront and expose gender bias.[81] For example, in the situation described above where a judge suggested that a woman was traumatising her children by insisting on psychologists' reports where there is a history of domestic violence and allegations of sexual abuse of the children, effective counsel might challenge the judge. Counsel could clarify for the judge that the reason the parties are in court is because

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80 Australian Report Part I, supra n. 56, at 29; The Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System: Report No 67* (1994) 25-30, 75.

81 Feminists have developed approaches to litigation that are designed to reveal and confront gender bias in the legal system. See eg Bartlett, "Feminist Legal Methods" (1990) 103 Harv LR 829, 836-867; Ashe, "'Bad Mothers,' 'Good Lawyers,' and 'Legal Ethics'" (1993) 81 Georgetown LJ 2533, 2551-3.

of the violence of the man, that the allegations are that he has also traumatised the children by sexually abusing them and that the client is concerned with protecting the children. Counsel might also note that studies have found that allegations of child abuse made during custody actions are just as likely to be well-founded as allegations made at any other time.[82] Counsel could point out that the client is certainly concerned about traumatising the children and willing to consider any options that provide for the children's protection and avoid the traumatisation.

B. Gender Bias Among Lawyers

A number of the women felt that their lawyers exhibited some forms of the same gender bias found in the legal system: the tendency to deny the violence and to discredit and blame the women. The law and society, including lawyers, continue to suspect the credibility of women.[83]

One woman attributed loss of custody of and access to her children to the failure of the bailiff to promptly serve the protection orders on her abusive ex-partner, and to her lawyer's subsequent refusal to listen to and believe her. During the period after she left the abuser and obtained protection orders, and prior to the bailiff serving the orders, her ex-partner continually harassed her and her five children, often in the middle of the night. In attempts to escape the harassment, she moved with the children several times over a period of several weeks. Eventually, in an attempt to protect the children, she placed them temporarily at the state-operated child care facility while she continued to wait for service of the protection orders on her ex-partner.

Custody of the children was then taken away from her.

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82 Zorza, supra n. 70.

83 Australia Report Part I, supra n. 56, at 171 ("many women considered that they were not believed by lawyers, Family Court counsellors and judges, particularly in custody and access proceedings"); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* (1990) 57-8. (Female victims as well as women in volunteer roles supporting victims in the court system have difficulty being believed); Gender Equality in Manitoba Courts, supra n. 50, at v ("Attitudes of 'blame the victim' and that women stay in abusive relationships because they enjoy being abused foster disbelief in the victim's story by investigators, prosecutors and judges"); Zorza, supra n. 50, at 4; Czapansky, "Domestic Violence, the Family and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts (1993) 27 Family Law Quarterly 247.

> I explained to [my lawyer] where the children were. Three weeks later when I went in to get the children to take them home, I was told that they were in the custody of the [child care facility] that it had been to court, they had interim custody of all five of my children and I was not allowed, then they got the police. I rang up my lawyer. He did nothing. He knew about it. No one had contacted me in all that time.

The Department of Social Welfare accused this woman of several counts of child abuse, including neglect based on the number of times the children had been moved.[84] There were also a number of allegations that the woman's abuse had resulted in what were actually symptoms of a rare disease from which one of her children suffered.

The woman said that her lawyer was aware of favourable information that could have been used to support her case for custody, including recent psychiatric reports. She described her reaction to losing custody of her children.

> I don't remember half of it. I was so busy bloody yelling at them. What would you do? You know, basically would you really remember something like that? You know, all I remember is when they done it to me for the first week I, well, I had a friend at home, I just wandered around spewing and I was just a wreck. I don't even ... I mean the first couple of weeks they done it to me, I don't even remember it.
>
> She described her lawyer's reaction.
>
> He didn't seem overly concerned or worried. He had a little bit there to say about it and next minute they were talking about whether to make my kids a ward of the Court, state wards. All I remember is that the Magistrate said they were state wards and that was it. ...I asked [my lawyer] to continue fighting, time and time again, but he wasn't interested. He said, it's pointless, and I left it....I was just sort of lost, I thought well, heck, if that's what lawyers do, where do I go now?

She eventually did obtain the services of another lawyer. She described feeling scared during the first meeting with the new lawyer and not trusting "anything legal" until she started to see results from the new lawyer. The new lawyer fought and obtained access to her children for her within one month. When the new lawyer challenged the child abuse allegations they

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[84] Later, when these charges were challenged with a new lawyer, the woman compared with a public health nurse the numbers of times that their children had been moved within the same period. The nurse's children had been moved many more times, but there was no suggestion that the nurse would be charged with child abuse.

were dropped, and she eventually regained custody of three of the children, while the abuser was given custody of the other two.

Other women also felt that their lawyers did not believe them. One of the comments to the Australian Report stated that "death threats [against their clients] meant nothing to solicitors."[85] Here, three of the women have a discussion about whether the lawyers heard what they were saying.

> So what's happening is that they are not listening to you, all the way along they are not listening, they don't hear what we are saying.
>
> I actually don't even think that they are hearing your words, they are thinking of the procedure, so before you've even finished speaking, or before you've even started speaking they are thinking of the next step in the procedure.
>
> That's what I'm saying about when you are talking and they are listening to what you are talking about and they are fitting it into this book.
>
> They are not hearing you at all, their mind isn't even thinking about your words, ...

This discussion suggests that lawyers need to explicitly acknowledge to their clients who are survivors of domestic violence that they do hear what the clients are saying. An acknowledgment of the situation of the women, and the extent to which the law can offer protection and the places where the law falls short or does not provide remedies or responses can indicate to clients that the lawyers have heard what they are saying even if the law will not respond. Effective advocacy requires that, where appropriate, lawyers discuss gender bias specifically with clients to ensure that clients understand all of the factors that may be influencing the outcome of their cases. Lawyers are responsible for ensuring, in whatever manner necessary, that gender bias does not influence the extent to which they hear and believe their clients. If they cannot ensure this, they are causing a grave disservice to clients for whom they have agreed to advocate.

5. Safety

The histories of abuse that the women endured, facilitated by gender bias in the legal process and societal denial of abuse, make safety a primary concern for women leaving abusive relationships. The women talk about

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85 Australia Report Part I, supra n. 56, at 180.

the danger in which they are placed by the actions of the abusers, the accompanying fear, and the inability of others to see the danger. One woman articulately summed up what it means to know about the danger of an abuser and to know that the tactics the abuser uses may not look dangerous to others:

> [T]hings that can appear ordinary can actually be intensely threatening if you have been in an abusive relationship and you have to fight on these points that they think are nothing but in actual fact are really crucial to your safety.[86]

As noted above, lawyers should be aware that under the Domestic Violence Act domestic violence is defined to include apparently trivial acts that form a pattern of behaviour that amounts to abuse.[87] Further, in making the determination as to whether an order is necessary for protection, courts may consider whether the behaviour forms part of a pattern of behaviour which requires protection, where some or all of the abuse appears minor or trivial in isolation.[88]

The time at which women leave or attempt to leave abusive relationships may be the most dangerous period, during which the abuser may attempt to regain his power and control by escalating the infliction of serious bodily harm or committing homicide.[89] This fact sheds light on the question often asked about women in abusive relationships—why didn't they leave? For the most part, women who are targets of domestic violence cannot leave by walking out of the door of the domestic residence;[90] the abusers often make leaving as difficult and dangerous as possible in order to

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86 Domestic violence is a "pattern of interaction that inevitably changes the dynamics of the intimate relationship within which it occurs. Thereafter, both parties understand the meaning of specific actions and words within the continually changing context that includes a history of violence or abuse and the resultant physical injuries and psychological, social and economic consequences of it.... The meaning of the communication extends far beyond what is being said or done in the moment." Dutton, "The Dynamics of Domestic Violence: Understanding the Response from Battered Women" (October 1994) Florida Bar Journal 24.

87 Domestic Violence Act, section 3(4).

88 Ibid., section 14(3).

89 Fanslow, supra n. 2; Fanslow. J,*The OASIS Protocol: Guidelines for Identifying, Treating and Referring Abused Women* (1993) 13, 28-32; Mahoney, supra n. 46, at 58 ("at the moment of separation or attempted separation...the batterer's quest for control often becomes most acutely violent and potentially lethal").

90 Mahoney, ibid., has suggested re-defining "leaving" in the context of the dynamics of domestic violence.

encourage the women to stay, or to return, thus enabling the abusers to perpetuate their power and control.[91] Separation under these constraints becomes a lengthy, even heroic enterprise.[92] As contact with lawyers and the legal system is also most frequent during the period of separation, lawyers should be aware of the likelihood that the actions of women will be motivated by concerns for their own and their children's safety, often within the context of increased threats and physical violence.

It is also important to acknowledge that the women are the best predictors of the danger.[93]

> I felt like I was going go be murdered, any day and every day. That just went in one ear and out the other ear, with the lawyer....I can just remember sitting there and saying I feel like I am going to get murdered tonight, I really do, and that wasn't crazy.... that was a real thing, I mean I had guns held to my head, there was no problem getting a non-molestation order for me.

> I get these, I don't get them so much now, I get these sort of anxiety attacks when he used to start getting wild or raising his voice. I used to get these they are actually anxiety attacks and you start shaking...

The women often fear that the abusers will carry out threats to find them wherever they attempt to hide. This fear is reasonable; one United States study found that half of the women who leave violent partners are subsequently followed and threatened,[94] or "stalked"[95] by their abusers,

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91 It has been noted in the United States that women may also be punished for staying in abusive relationships in custody determinations by having the fact that they stayed held against them, even though the legal system and police may have been unresponsive in assisting them to leave, and the court system may have encouraged them to participate in mediation. Zorza, J, *Couples Counselling and Couples Therapy Endanger Battered Women* (1993).

92 When President Bush signed Pub. L. 102-528, Sec. 2 [adding U.S.C. § 10705(c)(13)] which amends the federal State Justice Institute Act authorising funding for research relating to child custody decisions in litigation involving domestic violence on November 2, 1992, he stated, "spousal abuse does not always end with divorce. In fact, the abuse can become worse, especially in connection with child custody litigation."

93 Mahoney, supra n. 46, at 58 and n. 273.

94 Browne, A, *When Battered Women Kill* (1987) 110.

95 At least thirty-one states in the United States have passed stalking statutes that criminalise behaviour by which, for example, a person "wilfully, maliciously, and repeatedly follows or harasses another person and... makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury." S.D. Codified Laws Ann. § 22-19A-I (1992); see generally Note "Developments in the Law: Legal Responses to Domestic Violence" (1993) 106 Harv LR 1498, 1534-5. Busch, et. al., supra n. 5, at 269.

some for long periods after separation. "Stalking" may include behaviours such as repeatedly following victims, lurking outside of victims' houses, and harassing victims.

> He was stalking me and coming around the property and screaming for hours on end and I phoned up in great distress one day and absolute terror. My pre-schoolers and I were lying on the floor under the windows at one stage because we were so frightened. We couldn't go out.

One excuse that abusers seem to use for breaching protection orders by stalking and by harassing is to say "I just wanted to talk to her", or "I just wanted to talk to the children."[96]

Lawyers should be aware that after separation abusers present a continuing danger to the women who are the targets of their violence. Lawyers should be wary of these excuses and aware of the effects of police failure to follow through on all breaches of protection orders. Lawyers should also be aware that many of their clients who are survivors of domestic violence will be experiencing on-going safety issues, even after the issuance of protection orders, and during other proceedings, such as access and custody processes, and should consider all possible legal options that might assist in ensuring the safety of the women and their children.

III. THE LEGAL PROCESSES

1. First Visits to Lawyers

It is in the context of long histories of abuse, the gender bias of society, the danger presented by the abusers, and sometimes unsuccessful attempts to obtain police protection on their own that women who are survivors of domestic violence approach lawyers. It may be their first encounter with a lawyer. At times, the first visit to a lawyer will also be the first time that a woman has told anyone about the abuse. The women interviewed discussed the disincentives to revealing domestic violence.

> It is like coming out of the closet, the expression of coming out of the closet, when you come out and declare he is abusing me, he is violent to me, look at my injuries, ...you get a lot of attitude of well, you probably deserved it anyway, you must have got really mad to have got him to do that, and if you really want to get rid of him that much, why are you sort of making it so hard for him. It is this guilt thing again. You

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[96] Busch, ibid., 27-52, 190-9.

> are not an equal, it is not male equal with female, it's male above with the female below on a scale and it's right from the word go.

Lawyers should be aware of these disincentives for women in talking about domestic violence. The abuser's and society's denial and blame of the victim also often result in feelings of shame on the woman's part, as well as in the women denying the existence and severity of the violence herself.[97] These factors suggest that women are far more likely to downplay the level of violence that they have experienced than to exaggerate the violence: in fact, some women may not talk about the violence at all with their lawyers.[98] A number of the lawyers interviewed noted that they identify cases as involving domestic violence only when the client offers information about domestic violence. Lawyers should consider asking routinely whether female clients seeking separation or divorce feel safe with the process or are in need of protection.[99] When women do talk about domestic violence lawyers should provide signals that they believe the women, and create an atmosphere in which women will feel safe to talk about all forms of abuse.

Women who are survivors of domestic violence may have many conflicting emotions about approaching lawyers for assistance; hesitation on the part of the woman may not be a reflection of the severity of the violence or of the need for protection.

> It was actually the first week of [the month] I think. I went there, I knew what I was going to do but I wasn't sure whether I should be or I shouldn't be. I was sort of a bit scared of what he would do if he found out, confused to know whether I really was doing the right thing because at this stage he was still living in the house. ..I remember feeling very scared and confused. It was my first sort of dealings that I had ever had with a lawyer and probably more sort of scared than anything what my partner would

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97 Mahoney, supra n. 46, at 16-17.

98 White, "What You Didn't Learn in Law School: Family Law and Domestic Violence" (October 1994) Florida Bar Journal 38, 38 ("[I]t is not always easy to uncover a history of abuse. Many battered spouses are reluctant to tell anyone, including their attorney, about actual or threatened violence. Further, attorneys fail to invite disclosure because they assume the client will automatically tell them about something this important—but the client frequently does not"; Judge Tepper "No One Ever Asked" (Feb 1994) Family Law Commentator.

99 See Waits, "Battered Women and Family Lawyers: the Need for an Identification Protocol" (1995) 58 Albany LR 1027, 1030 ("This Article will argue that family lawyers should use a protocol designed to identify which of their women clients are battered.")

> do when he found out you know that I had done this and I had done that. I wasn't sure whether I should really be doing what I was doing. I knew I wanted to but I just ..

At the same time, the context (often of threats and violence) in which the women have made the decision to approach lawyers suggests a deep determination to take charge of their lives in the face of society's denial of domestic violence. Reassurance that a client has the right to decide what is best for herself and is capable of doing so may be important in some situations. The difficulty of the decisions and the courage necessary to make them may also be appropriately and explicitly acknowledged by the lawyer in a manner that supports the woman's ability to make decisions for herself about her life.[100] These acknowledgments can send the message that the lawyer has an appreciation of the situation that the woman has endured and respect for the woman as a person.

There were also a number of comments specifically focused on the physical layout of lawyers' offices. Some of the women discussed their preference not to be talking to the lawyer across a large, imposing work-desk; some suggested that they could best discuss these difficult topics with a cup of tea in a more informal seating arrangement. Other women discussed what it was like to have their children present in the lawyers' offices. All of the women who discussed this issue had clearly thought about it and about what was best for their children at the time. This suggests that lawyers should explicitly discuss childcare arrangements with the women.

Women also discussed safety in the lawyers' offices, especially where the office was a shop front or had large windows facing the street. Lawyers should be aware of on-going safety issues for their clients, in their offices and throughout the legal processes, and should take steps to ensure clients' safety.

One possible scenario for a first meeting with a women who is a survivor of domestic violence is presented here in order to stimulate ideas about ways in which lawyers might begin to address some of the concerns raised by these comments.

In my own experience of representing women who are survivors of domestic violence I began (often over the telephone prior to the meeting)

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[100] United Nations, supra n. 4, at 60 ("Practitioners can help a woman by offering her different options to consider. Practitioners should not impose their own values or decisions. They should not judge women for the decisions that they make.")

by asking the woman whether she had a safe place to stay for that night. While many women do not telephone lawyers until after they have left the house shared with the abuser, some women do so, and others may not be in the shared house but still be unsafe. The homes of family and friends are often the first place the abuser will look for the woman, and therefore may not be safe. A Women's Refuge may be the only safe alternative. Ensuring the woman's immediate safety is crucial for obvious reasons. It also allows her to focus on the legal process and procedures.

I set aside a substantial block of time for the first meeting. I made it clear to the woman in advance that she was welcome to bring a friend or support person from Refuge to the meeting. I held the first meeting in a conference room, where I would not be disturbed by telephone calls, secretaries, or associates. The woman had the option of having her children with her in the conference room or having them looked after elsewhere. In either situation, toys were provided for the children. With the permission of the woman, I sometimes asked a specially trained female paralegal to sit in on the meetings and take notes, or I tape recorded the session. I explained to the woman that it was important for us to catch all of her words so that we could present the court with an accurate picture of what was happening. Turning over the recording of the session to someone else also freed me to respond appropriately to the woman's story. Tea or coffee, and food at mealtimes was made available, just as it would be for any client.

In this setting I asked the woman for her story of the violence and abuse in the relationship, explaining to her the process for obtaining protection orders, and the necessity to demonstrate to the judge the need for protection. I responded to her story by acknowledging her courage and the difficulty of her situation where appropriate. The difficulty of telling stories of domestic violence to strangers was acknowledged and I always made certain that tissues were readily available. At times I offered to leave the woman alone to recover her composure if that seemed appropriate.

I also asked the woman whether she had any questions about the legal processes or protections, or about anything else. At the time of leaving abusers, women may be required to deal with a bewildering plethora of agencies, including the Department of Social Welfare, the Income Support Service, the Children and Young Persons Service, Housing New Zealand and others. Leaving permanently requires successfully negotiating a path through these agencies at a time when the women are often exhausted by relentless abuse, sometimes suffering from physical injuries, and overwhelmed by fear and the logistics of moving a family. Legal protection is meaningless if these hurdles cannot be overcome. Lawyers should be

prepared to provide as much information on these other processes as possible, to make contact with sympathetic and efficient people within government agencies, and to refer women to other support people.

Although this initial meeting could be time consuming, the investment of time early in the case invariably paid off later. A cooperative lawyer-client relationship, in which the client received clear messages that her case was important and that she was respected, was established. Obtaining the entire story at the beginning of the case also paid off in the development of a coherent long-term strategy from the beginning. As well, there were rarely surprises from opposing counsel. Taking the time to hear the complete story also meant that the affidavit could more accurately represent the complete history of violence in the relationship, setting the appropriate tone about the seriousness of the violence, the threat that the abuser posed to the woman, and the need for protection.[101] The affidavit could also be referred to at appropriate times during the process, and the consistency of later arguments with the affidavit lent credibility to those arguments.

Using the first meeting to obtain the entire story from the client also recognised that although the client may initially obtain only protection orders, these cases often lead into further proceedings. Initiating the case in a manner that recognises this possibility of further proceedings and immediately places the client in the most favourable position possible for such proceedings may be crucial to setting the stage for advocacy that can ensure continued success in the form of protection for the client from violence. Further, as discussed above, under the Domestic Violence Act it will be necessary to prove the violence, as well as its level and severity in order for courts to make determinations as to the safety of the child. This process is facilitated by the attention to the woman's entire story at the beginning of the case.

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[101] There has been some discussion by judges in New Zealand about the possibility that affidavits filed in support of applications for protection orders are too brief. Busch, supra n. 5, at 206. Rule 26 of the Domestic Violence Rules 1996 states that (1)"Every application without notice for a protection order or a property order, or both, must include a certificate, signed by the lawyer, and certifying (a) that the lawyer has advised the applicant that every affidavit that accompanies the application must fully and frankly disclose all relevant circumstances, whether or not they are advantageous to the applicant..."

2. Counselling and Mediation Conferences

As a result of the plethora of critiques of mediation[102] and counselling, especially joint counselling,[103] and the recommendations against joint counselling and mediation in situations where there is a history of domestic violence,[104] under the Domestic Violence Act it appears that joint counselling will not normally be ordered where there is a history of violence, and that an abused woman cannot be required to attend counselling with the abuser.[105] The experiences of the women interviewed in this study support these changes. However, mediation conferences will continue. The women interviewed had many of the same comments regarding mediation conferences as they did about joint counselling; in fact, some of the women could not distinguish between joint counselling and mediation. This section will therefore briefly discuss the provisions of the Domestic Protection Act regarding counselling and the women's

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[102] See eg, Astor, "Violence and Family Mediation: Policy" (1994) 8 AJFL 3; Astor, "Domestic Violence and Mediation" (August 1990) Australian Dispute Resolution Journal 143; Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 Harv Women's LR 57; Adams, "Counselling Men Who Batter: A Profeminist Analysis of Five Treatment Models" in Yllo and Bograd (eds), supra n. 50, at 176-199; Walker, "Psychology and Violence Against Women" (1989) 44 American Psychologist 695; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 Buffalo LR 441.

[103] Busch et. al, supra n. 5, at 241-255; Lapsley, Robertson and Busch, "Family Court Counselling, Part I" (March 1993) 3 Butterworths Family Law Bulletin 152; Lapsley, Robertson and Busch "Family Court Counselling, Part II" [June 1993] 1 Butterworths Family Law Journal 9.

[104] Busch et. al, supra n. 5, at 254-255; *A Review of the Family Court: A Report for the Principal Family Court Judge* (Auckland, April 1993 ("where domestic violence is evident, joint counselling and/or mediation is not appropriate. This should only be cautiously considered if there is informed and free agreement by both parties...Domestic violence, as a reflection of power, is obviously an important concept when it comes to considering how a Court process should operate when domestic violence exists. **We believe that mediation should be avoided by the judicial process as a legitimate means of dispute resolution in such circumstances.**") 119 (emphasis in original). See Busch et. al., supra n. 5, at 244-255 for an excellent discussion of Family Court counselling and the experiences of women who are survivors of domestic violence generally.

[105] Domestic Violence Act, section 31 provides that:
A protected person and a respondent, or, as the case may be, a protected person and an associated respondent, cannot be required to attend programme sessions at which the other person is also present.

experiences with counselling and mediation, and discuss ways in which these experiences might inform lawyers' conduct under the Domestic Violence Act.

Under the Domestic Protection Act[106] the judge was authorised to recommend counselling for applicants seeking protection orders. The applicant was not obliged to attend counselling. However, judges could *direct* respondents to attend counselling.[107] This meant that a woman who applied for protection orders could not be required to attend counselling, whether individual or joint. Under the Domestic Violence Act "counselling" is replaced with "programmes".[108] Applicants have a right to request Court Registrars to provide programmes for themselves, children of their families and other specified persons.[109] Lawyers acting for applicants have a duty to ensure that the applicant is aware of her or his right to request the provision of a programme, and, where the applicant wishes to exercise the right, to take steps to enable them to do so.[110]

Many women who apply for protection orders also file applications for separation orders and/or apply for custody or maintenance orders, thus invoking the jurisdiction of the Family Proceedings Act 1980 (the "Family Proceedings Act").[111] Under section 10 of the Family Proceedings Act, couples may be required to attend conciliation counselling when there is an application for separation. Judges may also make a referral to counselling when there is an application for a custody or maintenance order.[112] The Family Proceedings Act makes it clear that in counselling, reconciliation, or at least conciliation between the couple, is to be sought. Section 12 of the Family Proceedings Act states that counsellors

> (a) Shall explore the possibility of reconciliation between the husband and wife; and
> (b) If reconciliation does not appear to be possible, shall attempt to promote conciliation between the husband and wife.

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106 Domestic Protection Act, section 37.

107 Ibid., section 37A.

108 Domestic Violence Act, section 29.

109 Ibid., section 29(a).

110 Ibid., section 29(6).

111 Moore, J, *Is a Non-Molestation Order Enough? Women's Experiences of the Family Court* (Unpublished M.A. Thesis, Victoria Univesity, 1989).

112 Family Proceedings Act, section 10.

In some geographical areas these objectives are reflected in the letter that is sent to the parties informing them of the referral to counselling, which states that the purpose of the counselling is to explore reconciliation and promote conciliation.[113] Further, reconciliation and conciliation are objectives for the Family Court in general,[114] and lawyers have a duty to promote at least conciliation of husbands and wives.[115]

The Family Proceedings Act recognises the inappropriateness of counselling where domestic violence has occurred by granting judges the discretion to dispense with counselling in section 10 where the respondent has used violence or caused bodily harm to the applicant or a child of the applicant's family. Amendments to the Family Proceedings Act passed with the Domestic Violence Act expand section 10 to allow judges to dispense with counselling where the respondent has used domestic violence as more broadly defined in the Domestic Violence Act or where the delay in the proceedings required for counselling would be undesirable, or other reasonable causes to dispense with counselling exist. Further, the amendments add a new section 19A to the Family Proceedings Act. This section prohibits requiring a party who has had violence used against them by the other party to attend counselling with the other party.

Many of the general comments that the women made about counselling and mediation conferences were negative. The women felt that the reconciliation and conciliation goals of Family Court counselling were inappropriate and fuelled their abusers' hopes of their return. Some women were adamant that the abuser only wanted them to return in order that he might continue the abuse and maintain power and control.

> Through the Court appointed counsellor, psychologists, that system put a bigger wedge between the family, so although it's called conciliation counselling it actually did a lot of damage, it did as much damage as going to a lawyer would do, for our family it did....Because the original counsellor heard only his story and was only there for reconciliations, so there was one side saying I want to reconcile and really sounding good about wanting to reconcile and coming up with the goods and then there was the other side saying, I don't want to, I don't even want to sit here, and that was me. ...who desperately just wants to get rid of this guy, just desperately wants to be on her own and has got no desire at all to reconcile. So they are making the opportunity for him to be with you even if it is just in a counselling session or him to pull your

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113 See Lapsley et al., Part I, supra n. 103.

114 Family Proceedings Act, section 19.

115 Ibid., section 8.

> strings...and with you the more that he keeps on coming into your space, the more you want to go away.[116]

Some of the lawyers indicated that they routinely reassured their clients that counselling was not about reconciliation. Under the new Act, lawyers should be certain to ascertain cases where domestic violence is an issue and to ensure that these women are not directed to any programmes against their will. In addition, lawyers should ensure that reconciliation does not become the focus of mediation sessions where such a focus does not reflect the interests of their client.

Safety during joint counselling and mediation conferences was also a major concern for many of the women interviewed. Given the high level of danger that these women are in, especially during the period in which they are separating from their abusers, this fear is not surprising. Its justification is also borne out by reports of abuse before, during and after counselling and mediation sessions.

> He [the counsellor] actually did make him wait until I had left before he left. We didn't leave at the same time because I actually refused to leave at the same time as him. Because I knew he'd get me in the street.

> When I came out [of the court room] he threatened me outside in front of my lawyer, so there was no court officers anywhere to be seen even though you do see them going in and out all the time but there was none around like they should have one on duty or something.

> Outside the counselling session each time, I would be hassled by my ex-husband, and you know physically hassled and emotionally hassled by him, and then we would have to go up this lift into the counselling room.

Even individual counselling sessions were dangerous for some of the women, as the abusers had sessions scheduled right after their sessions.[117]

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[116] Other researchers have found a focus on the abuser's needs in the Family Court. Busch, supra n. 5, at 236. See eg *N v N* (1986) 2 FRNZ 534, where Judge Inglis focuses on the needs of the abusive father (who is in jail for raping the mother) in making a decision about the schooling of the child.

[117] See also, Busch, et. al., supra n. 5, at xiv ("the risk of compromising safety is most obvious where joint counselling sessions are held but as the case studies show, even individual sessions can be dangerous (one woman was killed as she left a[n individual] counselling session)."

The women discussed how to make joint counselling and mediation safe; their concerns focused on physical proximity and eye contact with the abusers. Several of the women suggested that having a security guard or police officer present in the mediation conference would have made them feel safer. A lawyer's request for police or security protection may highlight for the other actors the seriousness of the abuse and can ensure in a very visible manner that the historical context of the abuse is not lost[118] in the mediation conferences and court sessions.

Safety is a major concern for women who are survivors of domestic violence in situations where the legal system requires that they be in close physical proximity to the men who have abused them. At least one Family Court Judge has acknowledged that "[t]he security for the customers of the Family Court is a matter of real concern".[119] Lawyers should consider and discuss issues of safety with their clients, including the possibility of providing overt means of protection for clients, such as police or court officer presence, in all situations where they are required to be near the abusive men.[120] Lawyers should also investigate the physical layout of each of the areas used for counselling, mediation and court hearings, and design a safety plan for each location that will ensure the maximum protection possible for clients.

The Domestic Violence Act and the amendments to the Family Proceedings Act state clearly that women cannot be *required* to attend joint programmes or counselling with the men who have abused them. However, joint attendance is still possible if the women consent. The women identified lawyers to varying degrees as supporting the position that they should go to Family Court counselling and joint counselling in order to look reasonable and to enhance the perception that they are cooperating in the process.[121] Many of the women often felt a strong compulsion from

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118 Ibid., 184-190.

119 Ibid., 230.

120 Instances of police attendance at Family Court have been recorded, so there is some precedent for these arguments. Ibid. at xvi, 39, 49, 228, 229-230.

121 Similarly, in the United States a number of states have enacted "friendly parent" provisions in custody statutes which make parents' receptivity to sharing parental responsibility a factor for consideration in custody decisions. These provisions are problematic for women who have been primary caregivers, especially where they object to joint custody or access on the basis of the abuse of the father, because they allow women to be punished for such objections. Zorza "'Friendly Parent' Provisions in Custody Determinations" (1992) 26 Clearinghouse Review 921. Especially in the context of denial of abuse and refusal to grant credibility to women's allegations of child abuse, requirements, express or implied, that women cooperate in custody and access, especially joint custody, where there is a history of abuse are another form of gender bias.

counsellors and lawyers to attend joint sessions with the abusers.[122] Some of the lawyers interviewed also acknowledged that they encourage women to attend counselling even where domestic violence has occurred. Some lawyers also noted that they tell women that it is in their interests to participate in counselling and mediation because they will have input into, and control over, the outcomes. However, research suggests that in any divorce case, mediation empowers only the already more powerful husband.[123]

The promotion of counselling and mediation sessions by lawyers may be seen to be consistent with the lawyers' duty to promote conciliation under section 8 of the Family Proceedings Act. However, the often long histories of violence that precede these sessions, the high levels of danger and fear and the existence of on-going explicit or implicit threats of continued violence must be seen to be a serious factor influencing any agreements reached by negotiation or mediation. These factors call into question the consent upon which the agreement is based. Section 8 should therefore be read as consistent with section 10, including the new amendments: where the partner has used domestic violence against the woman or a child of the marriage, which would be almost invariably the case when there are protection orders in effect, lawyers should also recognise that joint programmes and joint counselling are inappropriate. Lawyers should recognise this policy statement and support women in refusing to attend joint sessions with abusers. They should discuss the option of applying for dispensations with clients and should assist clients in obtaining such dispensations under the Family Proceedings Act section 10(3). Lawyers might also consider making arguments that mediation is inappropriate in situations where there has been domestic violence, based on the recommendation in *A Review of the Family Court.* [124]

The women's comments also highlight confusion about the roles of

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[122] Another study found that divorce lawyers manipulate clients to settle. Felstiner and Sarat, "Enactments of Power: Negotiating Reality and Responsibility in the Lawyer-Client Interactions" (1992) 77 Cornell LR 1447, 1463.

[123] Bryan, supra n. 102, at 445 ("Proponents proclaim mediation's superiority to lawyer negotiation because mediation purportedly enhances autonomy and individual dignity by empowering the couple to order their post-divorce lives...[exploration of]...power disparities between husbands and wives and the impact these disparities have on the spouses relative negotiating abilities...clarifies that, absent ... intervention, mediation empowers only the more powerful husband.").

[124] Supra n. 104.

counselling and mediation. This should alert lawyers to the necessity of clarifying each step of the legal process for their clients, and ensuring that clients who do choose to attend counselling and mediation do so fully informed of their rights and obligations in each situation, including the level of compulsion to attend, to remain, and to agree in each forum.

3. Preparation for Court

Several of the women stated that they had had no preparation at all for the court hearings, or for any other part of the legal process. The women talked about preparation for the mechanics of the court hearings, including issues such as who would sit where, how to address the judge, and what would actually happen during the hearing. Other women also talked about explanations that used "legal jargon", which they found difficult to understand.

Several women talked about receiving no preparation at all for their participation in the legal processes.

> My lawyer just gave me no preparation at all. I haven't really had any preparation at all. I sort of went to the first custody hearing and was ordered to go to counselling, and went, and that's where I found out what counselling was about, and then years later at the final custody hearing, I found out what a custody hearing was about when I went there.... a strange lawyer came up to me and gave me all the information, you know, it was amazing. I remember sitting there thinking 'far out, this is great, someone's come and told me, you know what it's going to be like' and he just said, be polite to the judge etc.

Lawyers should give careful thought to explanations of court processes. The lawyer's preparation should cover both the legal process and the mechanics of the proceedings, such as the physical surroundings, who will sit where, what the judge will do and how long the procedure is likely to take. The physical surroundings and the placement of the parties in the court are likely to have a direct effect on the safety of the women. It is important to ensure that the women are as safe and as informed as possible sufficiently in advance to enable them to direct their attention to participation in the legal proceedings.

The women also talked about the difficulties encountered when their lawyers used legal jargon.

> I think there is a huge difference when you see in family courts or any type of family law there is often a huge gap between counsel and client and understanding what is

> actually happening in communication of what is going on. Sometimes lawyers can communicate to their clients what they think is a very straightforward way, very clear language or whatever and the client may just simply not understand and may not be able to explain what they do and what they don't understand.

Some women talked about the difficulty of focusing on legal terminology when overwhelmed by emotions.

> They may have been saying things to me, but I actually didn't hear what was coming because my emotions were over-ruling ...

The women also talked about the difficulty they encountered in asking their lawyers questions.

> I always had the impression whenever I left, the lawyers, my head full of questions, they weren't clear, and feeling really quite dazed.

> And why didn't you ask the questions? Do you know? I mean, what was it that was happening that ...

> I think I just felt like I was the one that's in the wrong, and the quicker these meetings were over, the less time I had to spend there, the less embarrassed and guilty I felt.

It is important that lawyers not only be prepared to explain the legal processes, but that they be prepared to do so in a manner that their clients can understand. Further, it is not enough for lawyers to assume that clients understand simply because they do not ask questions. They may not be asking questions for reasons completely unconnected to their level of understanding. Lawyers should assume the burden of positively ascertaining that their clients are comfortable with their level of understanding, and should consider stating explicitly to their clients that they have a right to understand the processes and should ask as many questions as necessary to ensure that they do. It is impossible for clients to make informed choices about their legal representation and the strategy decisions involved, which may impact on such crucial issues as physical safety and custody of children, if they do not understand the legal process, including their options in that process.

A clear explanation of the process for the client requires first that the lawyer be familiar with the process and any local variations. Lawyers should think through the steps of the process, and the possible implications at each step for the clients. Lawyers should then ascertain that they can explain the process in a manner that is understandable to non-lawyers, if

necessary, by practicing explaining it to non-lawyers. Through a questioning dialogue lawyers might determine which aspects of their explanations are clear and which need refining. They might also ascertain which aspects of the procedure are the most obscure to non-lawyers.

4. Understanding Orders

The women discussed the ability of their lawyers to facilitate understandings of the orders, including their understanding of when the orders are effective, what protection the orders provide, how they are actioned, and when the orders lapse. The women also noted the importance of provision by lawyers of realistic assessments of the use and enforcement of the orders.

> I thought once you had been into court and you had got those orders that was it, I didn't know that he actually had to be served the orders before they became effective.

This first comment, along with the story presented earlier about the result of a bailiff's failure to serve protection orders promptly, suggests that there may be misunderstandings about the time at which protection orders become effective. As separation may be a particularly dangerous time for the women, lawyers should be certain that clients understand the timing of the effectiveness of protection orders. Lawyers should also be diligent in following up the service of the orders, and willing to hire private process servers if necessary to ensure that the orders are served immediately. Some of the lawyers interviewed noted that they have successfully had the costs of private process servers reimbursed by Legal Aid. However, it was unclear whether this cost was covered under the Legal Services Act 1991,[125] and it is not clear that these costs will be covered under the Legal Services Amendment Act 1995,[126] which becomes effective concurrently

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125 Section 20 provides that legal aid covers legal representation "including all assistance usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings." It may be argued that process serving is usually carried out by the bailiff and therefore is not usually provided by the solicitor and so is not covered by the Act.

126 The Legal Services Amendment Act 1995 amends the Legal Services Act 1991 by adding sections 49A and 49B to provide that persons who are parties to domestic violence proceedings shall not be required to make contributions to those proceedings and shall not have charges imposed on their property by the District Subcommittee with respect to those proceedings.

with the Domestic Violence Act. Clearly, the danger that women are subjected to as a result of delayed service of process justifies coverage of private process servers by Legal Aid.[127]

This next set of comments highlights other misunderstandings about the operation of the orders.

> Oh yes his mother died and we ended up back together, but it was only for a short time, but they were broken that time. But there was other times, like when I wasn't with him and he came on to the property and I thought well that's it, they are broken.
>
> Oh because I was told that if I got a non-molestation order and you invited him onto your property, then it is broken.[128]

Under the Domestic Protection Act a non-molestation order lapsed if the parties freely "resumed cohabitation".[129] The definition of "resume cohabitation" remains unclear—how long does the party against whom the order has been made have to be on the property in order for the order to lapse?[130] As a result, when the police respond to calls about breaches of orders, the breaching party may claim that cohabitation has resumed and that therefore the orders are no longer effective. Without clear guidelines, it may be difficult for the police to determine whether the order remains in effect.[131] Under section 20 of the Domestic Violence Act, the standard conditions of a protection order are suspended while the protected person and the respondent are living in the same dwellinghouse with the express consent of the protected person. This provision only suspends, rather than causes to lapse, the protection order, and therefore provides better protection than the Domestic Protection Act. However, the meaning of "living in the same dwellinghouse", like "resume cohabitation", may cause difficulties in interpretation.

Lawyers should explain to their clients that this lack of clarity may be interpreted in favour of the abuser. The best manner in which to ensure

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[127] See also Busch et. al., supra n. 5, at 210-12.

[128] Domestic Protection Act, section 17.

[129] Idem.

[130] Section 17 provided that a non-molestation order lapsed upon resumed cohabitation. The case law defining what resumed cohabitation means is unclear. However, it is clear that simply inviting the man named in the order onto the property is not enough to cause the order to lapse. See Busch et. al., supra n. 5, at 216-218.

[131] Busch, et. al., ibid., 210.

protection is for the women to be very clear at all times that they do not want any contact with the abuser. However, while strategically this is the best course of action for the women to follow, they may have good reasons for allowing the respondents onto the property. This situation is complicated by section 49(1) of the Domestic Violence Act, which provides that breaches of protection orders are offences only when committed "without reasonable excuse". This may allow abusers to enter onto property whenever they can think of a plausible explanation. Especially in light of these complex legal provisions, lawyers should not hold contact with abusers against the women. The activities of the women protected by the orders are not constrained by the orders; they remain free to choose their own actions. It is the job of the lawyers to ensure that they receive the maximum protection possible from the legal system.

A related issue was raised in the lawyer interviews. A number of lawyers noted that they were frustrated when their clients returned to their abusers, especially when they later returned to the lawyer requesting another set of orders. This problem should be alleviated under the Domestic Violence Act as orders become final unless the respondent takes positive action, and as living in the same house only causes suspension of certain conditions of the orders. However, it is still possible for orders to be defended, changed, and discharged,[132] and, therefore, repeat applications are possible.

It has been recommended that reluctance on the part of judges to grant repeat non-molestation orders is inappropriate,[133] and it is at least as inappropriate for lawyers to hold reconciliation against their clients.[134] Lawyers should offer to review with the women any safety, resource, housing or other constraints that may have prompted their return to the violent relationship and to explore whether there are legal or other services available that might remove these constraints.

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[132] Domestic Violence Act, sections 76, 22, 46, and 47.

[133] Busch, et al., supra n. 5, at 210.

[134] Women who are survivors of domestic violence often lead extremely complicated lives, raising children and running households under horrific conditions. They may choose to remain in or return to violent situations due to a complex set of circumstances that are difficult for outsiders to understand. For example, some women have indicated that they have returned to violent relationships because in the context of a society that will not or can not protect them from the abuser, it is easier to know where he is and have some ability to predict his actions than to always be hiding in fear of his sudden, violent discovery. Other women may reconcile because their children have medical crisis that they are physically unable to cope with without the help of another adult, and the abuser may be the only possible choice.

Several women commented that they wanted a realistic assessment of their legal options, their chances of obtaining protection orders and of the protection that the orders would afford.

> Oh now I'd like to know both sides of it, what really to expect, what your position really is, there is lots of maybes and mights and want to bes....You really do have to know what consequences you could suffer. As far as I was aware I would ring the police, they would come, arrest him, take him away, I could get a night's sleep, but that is not how it is. You are peering out the windows at 5 o'clock in the morning thinking 'oh has he gone'. The police aren't going to come even though I've rung them. They've said it is a waste of time because he is half way back to [town] by now.
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> And they need to be honest....They need to have said to you, 'look the law is not going to help you that much, the law is going to play games with you and your children's' lives, the law is absolutely hopeless and it is not fair', and they need to tell you that when you walk in there and they need to say, 'this is going to be really tough and the law is not on your side' and if they had said that to you in the first place then you knew what you were up against but they don't, they say, 'the law is fair, the law is this and that and the other thing'.

These comments stress the importance of providing clients with realistic assessments of the protection that the law affords. Although one might expect a realistic assessment of the types of remedies that the law provides and the usefulness of these remedies in any case from a lawyer, and certainly even more so in an area where there has been so much criticism of the adequacy of the law, the women recount few experiences of receiving realistic assessments of the operation of the law from their lawyers.

The second interview conducted with each group of women presented the women with flowcharts of the legal processes that they had used or were using, including one flow chart published in a pamphlet about the custody process that is distributed by the Department of Justice. The flow charts were intended to help explain the legal processes and also to clarify issues concerning the women's understanding of those processes.

The women's positive responses to the flow charts suggest that the use of graphic illustrations could be a positive step toward fully informing survivors of domestic violence about the legal processes in which they are engaged. Lawyers could make the information available in waiting rooms[135] and explicitly review the charts as part of their explanations of the process. Other educational programmes, such as the Court Orders

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[135] Some lawyers offices in Hamilton do have Department of Justice brochures, including the custody brochure and flowchart, available in their waiting rooms.

Guidance Groups at the Henderson Family Court and the Hamilton Abuse Intervention Project,[136] might also find flowcharts useful.

5. Lawyers As Advocates

Another major theme to arise from the interviews was the women's perceptions of their lawyers' abilities as advocates. The widely accepted "fiduciary model" of lawyering requires the lawyer to further the interests of the client.[137] This model recognises the power that lawyers exercise in the lawyer-client relationship[138] and places duties on the lawyer to act in the client's interests in exercising that power.[139] The lawyer is required to "fearlessly uphold the client's interests."[140] A requirement of partisanship is common to professional ethics in common law countries.[141] Upholding the interests of the client includes, at a minimum, discerning what outcome the client would like, presenting legal options to the client, advising the client concerning the options and assisting the client to choose among those options.[142] Once the client has chosen, the lawyer is responsible for making the strongest possible argument in support of the client's case. The comments in this section deal with concerns that the women have with these aspects of their legal representation.

The first group of comments concerns the decision-making process used to discern the client's preferred outcomes. While the legal process for obtaining protection orders may be fairly straightforward compared to other legal processes, there are still opportunities for clients to make

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136 Busch et. al., supra n. 5, at 214-16.

137 Thompson, supra n. 76, at 64.

138 Divorce clients are typically weaker parties in negotiation with lawyers. Felstiner and Sarat, supra n. 122, at 1497.

139 Thompson, supra n. 76, at 65.

140 New Zealand Law Society, *Rules of Professional Conduct* (2nd ed 1992) Rule 8.01 Commentary.

141 Enright, supra n. 67, at 823. In New Zealand, Family Court lawyers also owe a duty to the Family Court, which includes a duty not to mislead the Court and which overrides the duty to the client where there is a conflict. Ibid., 822. New Zealand Law Society, supra n. 140, Rule 8.01 commentary.

142 It has been noted that clients' wishes cannot always be clearly discerned, and that no matter how clear the client, lawyers will have a part in interpreting clients' wishes and should take responsibility for those interpretations. Lawyers' actions, like those of other actors in the legal system, are not neutral. White, "To Learn and To Teach: Lessons From Driefontein on Lawyering and Power" [1988] Wisc LR 699, 765.

decisions and to participate in choosing from among available options. There are, for example, decisions to be made about exactly which orders to apply for, when to apply, and whether to apply with or without notice. In addition, applications for custody and matrimonial property actions present another range of options for the women.

Some women felt that they were not included in the decision-making process in their cases.

> No, I don't think I made the decisions. I think [the lawyer] would have made a lot for me....I was given no choices.

> There wasn't much choices to go with. The law is the law and if you disagreed with it, you have got no choice anyway, you have got to do it otherwise you are in contempt of court.

> I felt like I was a pawn in the game. It seemed to be that [the lawyer] was having a - now how can I describe it - a point scoring thing between him and my husband's lawyer. It seemed like a game to them.

As the decisions in family actions sometimes involve complete life changes, lawyers should be certain that the women are given the opportunity to participate in decision-making.

This next woman's experience illustrates a situation where she is left feeling powerless after having had little participation in two important decisions in her case. This woman identified herself as a lesbian during the interview. The current case law in New Zealand provides that the fact that a mother is a lesbian is not in itself grounds for a denial of custody.[143] However, this woman described receiving an ultimatum from the judge in her custody case that required that she choose between living with her female partner and retaining custody of her children.

> [W]hen I think of the custody battle....I would never have gone through what I [went] through if I hadn't been involved with a woman.... The children had to go and see someone because we were living together. Way before this as well. She was in the house, sharing the house with my girls....And then it must have been a social worker was called in and she had to visit us at our home....My girlfriend had to move out of the house until it was settled.

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[143] See *Y v Y* (Unreported, High Court at Auckland, 17 June 1981, M 1451/80, Barker J).

> And, on whose advice was that she moved out?
>
> The lawyers....
>
> Were there any other options?
>
> Until it was cooled over, like until it was sorted. It was the only way that she thought that I was going to be able to have them. By moving her out. Any other options? No, I don't think there were any other options given to me....
>
> How did you feel about that? ...
>
> When I look back, that is the real thing that she let me down on. I think there possibly could have been, it could have been worked better.
>
> The final decision came ... that I had to make a choice, ...[between] my girlfriend or my children. I chose the children. Yeah, that she never was to live with me again. Unless I applied to the court....I've been left anti- what a lawyer, how the lawyer works for you as far as what I went through.

This woman does not recall her lawyer discussing with her any options to her partner moving out of her house or suggesting to her that she might have good grounds for appeal. The point of this story is not, however, that the lawyer failed the client by not suggesting or pursuing an appeal. There are obviously a number of factors involved in such a strategy decision. The point is that the woman is left feeling powerless after not having participated in decisions that profoundly affected her life.

Establishing mutual respect in the lawyer-client relationship, beginning with believing the client, is likely to be an important first step to acknowledging and respecting the client's contributions to the decision-making process, and to advocating zealously for the woman, and upholding her interests. These women noted a lack of respect from their lawyers, which underpinned all of their interactions.

> I think things would have been made a lot easier if I had been given straight answers. I mean, I knew what I wanted. I used to walk in with a list of questions I would have written down in my head and I would ask for, I would want to know you know exactly what was going on and I would get fobbed off or get very general kind of answers. He was very obstructionist you know in a very nice charming kind of way. He just wouldn't give me access to information.
>
> She wasn't actually telling me what she wanted to know. She didn't say like this is

> what the story is, what I need is this and this, can you give that to me. She wasn't treating me as an equal on that level. She was just saying well what happened then, which aggravated me because I have done some years of law and that aggravated me. That made me feel annoyed. I didn't need to be treated in that way...Yes she kept me in the dark a bit as if there was a lot of stuff I didn't need to bother my head about. You didn't really need to know or whatever which I found annoying.

These comments, combined with earlier discussions of first visits to the lawyers and the lawyers' disbelief, suggest that women detect patronising and condescending attitudes of lawyers.

A few of the women did feel as though they were included in the decision-making concerning the legal processes. These women were quite enthusiastic in discussing their lawyers.

> It was really good. I understood everything and, yeah, because I'd been doing a lot of reading, because I was actually doing my refuge training at the same time while I was staying in the refuge. So, I was reading legal books and so, I really understood it. So, I knew sort of what questions to ask him, so it was better that way.

This next woman describes a decision-making process that fits the traditionally accepted model of the professional lawyer, discussed above, and with which she was happy.

> I mean even now like when I ring her or have to have any dealings with her she says well what do you want to do. Tell me what you want. I mean she will tell me, she will say no in my opinion I don't think we should go about it that way. We should go about it this way. But she doesn't say, you know you should be doing this or you should be doing that. She says well what do you want to do about it. Do you want me to do this or do you want me to do that. He has actually, I have spoken to him and he has actually agreed to give me some of the property. I mean this has been going on for months and I spoke to her the other day and she said well do you want me to send another letter to his lawyer regarding the property or should we just leave that and see what happens. I am away on holiday for the next couple of weeks, if you need me I will be in Friday or Monday. If nothing works we will continue what we were going to do.

This description of interactions with the lawyer suggests that this woman was satisfied with a relationship in which there was a dialogue based on mutual respect between the lawyer and client. She emphasises that the lawyer would share an opinion but refrain from forcing a particular course of action on her, respecting her ultimate decision. Scholarship on lawyer-

client interactions emphasising power-sharing[144] and dialogue[145] has recently blossomed, and lawyers should be familiar with this literature.

Strikingly, and at times tragically, a number of the women reported that their lawyers sometimes, or even often, did little or nothing on their cases, or made few or no arguments in their favour in court. One such story, which involved a woman losing custody of five of her children, is recounted above in the discussion of the lawyers' disbelief of their own clients. In that woman's experience, when action was taken to deprive her of custody of her children her lawyer did not even tell her. This complete lack of advocacy certainly falls short of the model of the professional advocate sketched above.

This next woman endured twelve years of abuse and her children were abused, including sexually. Although she received an interim non-molestation order from the court, she was not granted a final non-molestation order. Her lawyer advised her that she probably would not receive a final non-molestation order because her ex-husband had not physically abused her during the period in which the interim order was in place. Physical abuse by her ex-husband during this period would have, of course, constituted a breach of the interim orders. The reasoning appeared to be that because the interim orders were working, she did not meet the statutory criteria of being "in need of protection". This reasoning is irrational; there is no statutory requirement of a breach of an interim order in granting a final order. The woman's story also suggests that the

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144 White, supra n. 142; Gilkerson, "Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories" (1992) 43 Hastings Law Journal 861; O'Leary, supra n. 77; Felstiner and Sarat, supra n. 122; Ashe, supra n. 81; Tremblay, "Rebellious Lawyering, Regnant Lawyering and Street-Level Bureaucracy" (April 1992) 43 Hastings LJ 947; Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (August 1989) 87 Mich LR 2411; Lopez, "Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration" (1989) 77 Georgetown LJ 1603; Alfieri, "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, (1991) 100 Yale L. J. 2107; White, "Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak" (1987-88) XVI Review of Law and Social Change 535; Abrams, "Feminist Lawyering and Legal Method" (1991) 16 Law and Social Inquiry 373.

145 White, supra n. 142; Simon, "Visions of Practice in Legal Thought" (1984) 36 Stan LR 469; Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 Univ Penn LR 291.

abuser would have breached the order had he been able to find her.[146] Consistent with this reasoning then, in order to be granted a final order the woman would have had to expose herself to further abuse. The lawyer appears not to have made any arguments challenging this reasoning in favour of her client's receiving the non-molestation order.

> My lawyer said to me that I would probably come out without it, without any protection orders because he hadn't done, like there was the interim period between the order getting put on, interim order being put on him, and the hearing, that mattered, and because he actually hadn't done anything terrible during that time, ... so I guess I went into court thinking, oh, I'm going to come out with no protection, and not understanding that the past, like the past abuse didn't actually have any bearing on the ...[outcome]... [at the hearing my lawyer] didn't say anything, she didn't actually argue it, ...and yet on the affidavit it was really clear, and like the orders went through ex parte, which meant that there was sufficient there for them to do that and I still to this day don't understand why I didn't come out with [the] non-molestation [order].

This lawyer may have been aware, from appearing before this judge in the past, that the judge would not issue final orders absent a breach during the interim period. She may, therefore, have known the futility of making an argument. Such futility might support an argument for failure to advocate for a client, but it is not a persuasive argument. In addition, the criteria applied by the judge, requiring a breach of interim protection orders to support final orders, is not found in the Domestic Protection Act, which should have suggested the possibility of an appeal. The client has no recollection of any discussion about the possibility of an appeal. This particular issue should not arise under the Domestic Violence Act as protection orders are automatically finalised after three months unless the respondent takes positive steps.[147] However, lawyers should take note of the more general issue. The fact that a particular judge has an idiosyncratic

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[146] This quote, presented above as part of the discussion of safety, relates to these experiences. We got a call to say we had better leave [the refuge and the town] and I think ....I don't know, I really don't know, a lot of that I have blocked out because I was right in fear then, but I can remember quite often getting phone calls to say, get out of [town] and then the Refuge workers would say, well are you going to run for the rest of your life. And I would stay and we would all be petrified that he would find the Refuge and couldn't go out without two or three workers with us and stuff. But no he got into Government Computers and found out our address and when we had signed up tenancy and our phone number, because he had access through work.

[147] Domestic Violence Act, section 13(3).

interpretation of a statute does not necessarily require lawyers practicing in front of that judge to accept that interpretation uncritically. Where there are good grounds for appeal, and good reasons to do so in particular cases, lawyers should advise their clients appropriately.[148]

A related issue arose from the interviews with lawyers. Lawyers may screen out women who would like to obtain protection orders based on the criteria that they have experienced judges applying, even where these criteria are not contained in the statute.[149] The lawyers may therefore be screening out women who should be able to obtain orders under the statutory criteria but cannot because of the manner in which the local judge applies the criteria. Is it the role of lawyers to screen out these cases, or should lawyers make these applications and appeal denials of orders? The fiduciary model of lawyering suggests that once the lawyer-client relationship is established, the lawyer should present the strongest argument possible to the judge and consider an appeal if the argument fails.[150] At a minimum, these decisions should be discussed with clients.

Lawyers refused to represent the next interviewee in applications for protection orders because she had not been recently physically abused by her partner.[151] She was then forced to fight a custody case without protection orders. There was also evidence that her daughter had been sexually abused by the ex-partner, but none of the actors in the legal system were prepared to take the allegations seriously, including her lawyer.

> And what was your lawyer doing through all this?
>
> Well I would phone him up and he would chat to me or I would go and sit and chat to him in his office and nothing much would happen you know.

Other women also had the experience of their lawyers failing to provide adequate advocacy for them.

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148 The Legal Services Amendment Act 1995 specifically provides for appeals in domestic violence proceedings, and clients are not required to make a contribution towards or have a charge imposed upon their property with respect to such proceedings. Legal Services Act 1991, section 49A.

149 Interviews with judges and a review of the cases indicate that some judges applied criteria not found in the Domestic Protection Act. Busch et. al., supra n. 5, at 200-204.

150 Ibid.

151 While it was unclear whether emotional abuse was a sufficient ground for a non-molestation order under the Domestic Protection Act, it is clear that it is under sections 3 and 14 of the Domestic Violence Act.

Although it may be possible to imagine scenarios in which doing nothing is an effective advocacy strategy, it is unlikely when representing a client attempting to obtain protection orders. The comments above suggest that doing nothing was clearly inappropriate in that situation. The lawyer's job is to ensure protection of his or her client's stated interests. Complete inaction or failure to make arguments is not likely to achieve this goal.

> I'd like them [lawyers] to stand up for us more.

Lawyers' failure to advocate can result in grave injustice to women survivors of domestic violence.

6. Positive Aspects of Legal Representation

Several of the women also had positive things to say about their interactions with their lawyers. There were four types of positive comments. First, the women appreciated lawyers who they felt listened to them. Second, they spoke highly of lawyers who supported them and their decisions. The women also spoke highly of lawyers who they felt understood the situation that they were in, and this understanding was associated with women lawyers, although some women noted that they felt that male lawyers could have this understanding. Finally, lawyers who could give clear explanations of the process also received favourable comments.

One of the research questions involved asking women what they thought the ideal lawyer would be like. The answers varied.

> Direct. [The first lawyer] never directly said to me that he thought I was guilty of all that trouble with the children. He just quietly got rid of me in an indirect way. You know what I am sort of meaning. If [with the second lawyer], because we had had a lot of contact, if I was wrong in something, I was told.

> Well he would have to be really understanding.

> Definitely got to get results out of them. I would expect them to know that I was telling the truth about everything and I would expect them to get results for me. Yes, definitely.

These two interviewees talked about women as ideal lawyers and what that might mean.

> I'd like to walk into an office that had nice easy chairs and no desk, you weren't sitting across a desk, plenty of ash trays, coffee urn in the corner and then sat down

> with this woman who was a real feminist and she heard your story so that you could actually get through that. You go in there with all that emotional stuff, so initially you off load that, like they've actually got the skills to sit there and hear that and hear what you are saying and let you let go of all that stuff and then maybe you are in a better position to get on with the writing of affidavits and hear what the procedure is going to be because you are so emotional, I was that you don't hear.
>
> I think I would imagine that I would want a woman lawyer, but then I feel that it's too hard for women lawyers anyway in the system, so perhaps you are better off with a man lawyer, and then you have got to get a man lawyer that actually...you have got to get a lawyer, male or female, that has some tiny idea of what it is like to be on the bread line, which is practically impossible. You can't get a lawyer that knows that. You have got to get a lawyer that understands what it's like to be abused and that's fairly rare too, I would imagine, I don't know. You have to get someone that knows what children are, understands what children are. Everything I would imagine would be to go for a woman, but then having a woman represent you is a risk, I reckon. I can't even picture what a good lawyer is. And quite often I have thought to myself, you just want the most cut throat bastard there is out there and I think, someone that is just going to go in, do it [by] whatever means, don't worry about it. I don't know.

These comments suggest that it is possible that women prefer to talk about violence to other women, and male lawyers should consider giving clients the option of telling their stories to women or being represented by women. Not surprisingly, getting results also emerges as an important aspect of a lawyer's job, as does an understanding of the dynamics of domestic violence, and respect of and support for the women.

7. Opposition Tactics

The women discussed tactics used by their former partners as part of the legal process in which they were engaged. There was considerable discussion about how abusers can use the legal system to continue the abuse.[152] Several women also reported that the men who abused them lied throughout the proceedings, including when they were in court.

The first two women quoted here both endured custody battles that lasted for years and involved issues of abuse of the children.

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[152] Busch, et, al., supra n. 5, at 16, noting that abusers use court systems as weapons, ("Women can be pursued for many years on matters such as custody by vindictive abusers, for whom the courtroom is the final arena in which they can try to exert power and control.") Australian report Part I, supra n. 56, at 169.

> I felt much worse after the Court case than I ever did in the marriage because I felt that the abuse had been institutionalised against me.
>
> Something that amazes me is that this guy can play games for so long, use up so many resources for so long and then turn around and being told that it is okay, the game is okay, you have lost nothing and we'll protect your loser feelings, you haven't lost.
>
> My ex-husband used the court system to continue abusing me.
>
> I think that in our situation when you have an aggressive partner the likelihood of a court battle turning into a real battle is a very disturbing thing because you know it can drag on for five years and it can cost you every cent you own. Everything you have and it's simply because of the antagonism and the hatred that the other person puts your way, and they use the legal system.

Lawyers should be aware of the possibility of abusers using the system to abuse and harass through multiple filings, failure to appear, multiple extensions and physical intimidation, coercion and harm in and around the courthouse. Lawyers should be prepared to bring these abuses to the attention of the court by assisting clients in pressing charges where physical intimidation, assault, breaches of orders or other criminal activities occur. Lawyers should also be prepared to argue, where appropriate, that the opposition is using the legal system to harass or intimidate, is filing unnecessary or frivolous papers, or has a pattern of failing to appear or asking for extensions at the last minute.[153] Recognition of, and response to, these tactics is especially important where such tactics serve to keep clients in suspense over important aspects of their lives, such as the finality of protection orders, custody of children or matrimonial property settlement.

Other women talked about lies by their former partners.

> Well, at the court case where the father got custody of those boys, [my ex-partner] and his lawyer, ... lied through their teeth in that court. They told this magistrate that [my ex-partner] was on his own and was not in another relationship ... no one would listen to me in the court or to my lawyer, nothing....as an example, say he got custody of the kids today. Within three weeks the kids come home for me, for the school holidays at Christmas. The day they move back into his house, [his new partner] was there with her kids and him. They've never lived with their father on their own. You

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[153] Section 163 of the Family Proceedings Act confers upon the court the power to dismiss frivolous or vexatious proceedings and, where a person has "persistently instituted vexatious proceedings," to prohibit the commencement of future proceedings without leave of court.

> can't tell me that he applied to Housing Corporation for a rental, got a four-bedroom house just for him and three kids. He must have applied to the Housing Corp for her and him and all of them. You can't tell me that Welfare lawyers, [his lawyer] and all them weren't aware of it [at the court hearing].
>
> I felt pretty confident myself because I knew what was lies and what was the truth. I said to her oh well he can lie as much as he likes but underneath he knows what is true and what is not. There was nothing I could do about it because this was the case where his friend came in there and lied point blank. Absolutely lied point blank and so did his mother. I mean it was only sort of little things she told the court that she had heard him saying to me please not to phone him and that wasn't what the case was. He asked me to ring him at least three times a week but she was saying that she had heard him saying don't ever, don't ring me.
>
> He was working and his lawyer got up and lied and said he didn't have a job and he was unable to get a job, because he was on a sickness benefit and working at the same time, and said he was unable to work and made him out to be really pathetic.

These statements should be read in the context of the gender bias of the legal system, and the historical legal rules that challenge the credibility of women.[154] One reading of these comments in this context suggests that women may be unlikely to be believed, even if they are telling the truth, and that men might be more likely to be believed even when they are lying. In fact, experts in the United States report that batterers' public and private images are often wildly divergent. They are usually well-liked and highly regarded in their communities and work places, in contrast to their private behaviour, which includes "pathological dependence on their partners and a need to control and dominate them through repetitive physical and psychological abuse."[155] Their public persona may increase their credibility. Further, in custody disputes, if the history of domestic violence is not considered relevant, but the women's history of coping with the violence is introduced as relevant to her parenting, the abuser "may actually appear to be more stable even though in fact he created the destructive environment."[156]

The statements might also be read in the context of an adversarial legal system that is based upon the assumption that lawyers will believe their

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154 Mack, "Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process" (1993) 4 Criminal Law Forum 327.

155 Zorza, supra n. 50.

156 Liss and Stahly, supra n. 70, at 178.

clients and present their clients in the best possible light. This process can lead non-lawyers to conclude that lawyers "coach" their clients to "lie" in court. One conclusion that is suggested by even this weaker interpretation of these experiences is that the lawyers for the male respondents are advocating vigorously for them throughout the proceedings. This interpretation supports the arguments made above that lawyers for women who are survivors of domestic violence need to advocate strongly for their clients.

IV. Lawyer Training

The themes discussed above concerning societal denial of domestic violence, gender bias in the legal system, lawyers' disbelief of women who are survivors of domestic violence, and the level of advocacy that these women receive as compared to the level of advocacy that the respondents receive converge in the theme of lawyer training. Many of the women felt that their lawyers did not understand the dynamics of domestic violence within the context of society and the legal system.

> Well talking as a person who I feel who has been done over by the legal system I think it boils down to whether or not you have got an advocate that (a) believes in you, (b) is going to fight for you, and maybe we could go back to training...

> I think [lawyers] need to have a really good understanding of abuse, to have a really good analysis of what that is. I also think that they should have some sort of training of skills in listening, not necessarily counselling, but being able to kind of use some feedback or some sort of creative listening skills, so that you know that what you are saying is being understood and you know that they hear what you are saying ...

Some of the women continued the discussion of lawyer training. These two women, who both participated in the same group interview and have both worked in refuges, concluded:

> I think that lawyers dealing with this stuff should have a really good analysis, they should have a really good understanding of what abuse is about. I think that would greatly improve [the way that they represent women]. It's got to. And I can't see why it's not ... a specialist area. ... I mean if one lawyer wants to go off and specialise in property that's what he or she does. And if they want to specialise in [domestic violence] and sure okay we can say some of them specialise in family law, but in fact that's [domestic violence] what they do, but they don't have that analysis. They don't have that proper analysis of it.

> I always sort of felt like every person that comes out of law school should have to do

> a years, voluntary work for refuge or something before they would even get anywhere near on to it.
>
> Yes, that's the one.
>
> Yes but isn't it when that factor of being human and mature or having that attitude towards abused women takes a lot of, it is almost as if you need another degree.

These comments suggest that lawyer training in the area of domestic violence is inadequate.[157] Some lawyers also indicated an awareness of the lack of training. For example, one lawyer replied:

> Have you done any training specifically in this area, ...that is specifically about the dynamics of domestic violence or anything like that?
>
> No and I'm sure it's a great lack, I had no other university training other than the straight forward family law course, but looking back I think it was very poorly taught. I have been to seminars over the years on family law issues and I've been to in-depth seminars training as counsel for child, but nonetheless these things are, are only the most superficial introduction. And beyond being a person in this society, so watching TV documentaries and reading the same books and information and magazines and newspapers that we all read, I've had no proper training. So I am just coming totally from sort of instinct that probably is often completely wide of the mark.

Except for two lawyers who had attended refuge training, no other lawyers interviewed indicated any training other than the seminars referred to in this comment. Lawyers have a responsibility to undertake ongoing training in their areas of practice.[158] The commentary to Rule 1.02 of the Rules of Professional Conduct states that lawyers should only agree to work on matters that they have the ability to handle "promptly and with due competence."[159] Handling domestic violence cases competently requires

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157 White, supra n. 98. ("Law school does not prepare an attorney to understand the dynamics of domestic violence—how to recognise it in an initial interview, how to merge your client's safety into case planning, and how to prove what is often hidden as a 'private, family matter'.")

158 Schafran "Gender Bias in Family Courts: Why Prejudice Permeates the Process" (Summer 1994) 17 Family Advocate 22, 27. ("Whatever the biases and shortcomings of the courts in these cases, lawyers are also at fault for the perpetuation of violence against women and children. There is no excuse for a family lawyer's ignorance of domestic violence and its consequences. Fighting for custody or unsupervised visitation for a violent parent is effectively fighting for an abuser's right to batter a spouse and/or children again.")

159 New Zealand Law Society, supra n. 140, Rule 1.02 commentary.

an understanding of the power and control dynamics of domestic violence.

While there has been increased training of lawyers and judges in the area of domestic violence since the time of these interviews, lawyers should be aware that practice in this area requires specialised knowledge. There is a vast body of literature about domestic violence with which lawyers should familiarise themselves. Professional, responsible practice in this area also requires that lawyers demand and pursue appropriate continuing education in the dynamics of domestic violence.[160]

V. Support

People who provided support to the women as they progressed through the legal process, often Refuge workers or friends, were recognised as providing very important services by both the women and some lawyers.[161]

> I had that support from the time I hit the refuge through every interview or meeting or whatever, right through. Having somebody go up to Court and be there for me when I came out. Coming to lawyers, if I felt there was something I needed clarifying, or something that somebody else needed to listen to, that I felt I may not grasp, so I had that support from beginning to end of the whole process and I think that I came out of that having felt that I got everything that I needed to get from the system. Oh, no, no, that's not true, no I didn't. That I had achieved everything that was achievable within the system....Yes, practically I guess this has made me realise that I probably didn't use my lawyer for information in the same ways that I would have, had I not had that support that could provide the information. So yes, in a practical sense, yes and emotional, yes. The emotional support actually kept me going through a really horrific year.

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[160] Seuffert, supra n. 12; Barnes et. al., supra n. 46. See *A Review of the Family Court*, supra n. 104, at 159-160 for a recognition of the specialist nature of Family Court practice and a recommendation that practitioners participate in continuing education programmes; The American Bar Association also recommends that the organised bar offer specialised domestic violence training to all family law practitioners, and support the development of specialised legal centres for victims of domestic violence and their children. Supra n. 56, at 9-10.

[161] McDonald, "Transition Houses and the Problem of Family Violence" in Pressman, B, Cameron, G, and Rothery, M (eds), *Intervening With Assaulted Women: Current Theory, Research and Practice* (1989) 121-3 (finding that most women's experiences in shelters are positive).

Lawyers should attempt to determine whether their clients have or would like to have support and assist the clients in locating a support person. The fact that support can be a crucial issue should be evident from the discussion above concerning the extent to which the legal process acts to continue the women's traumatisation, especially in situations where the abuser uses the system to continue to abuse the women. Lawyers should invite clients to bring support people to appointments and should actively explore options which provide support. These options should include having support people attend counselling, mediation, criminal court and family court appearances.

Lawyers themselves can also support their clients, as this comment points out.

> I think that my lawyer could have supported me in saying, look ... don't worry about it, you are a good Mum you don't have to go to counselling if you don't want to go, believing me when I'm saying I want this marriage ended, just believing me and supporting me and not pushing me through things I don't want to go through and being out to give you full support and get for you what you want and making sure it is very clear in layman's terms you know, really clear, and just trying to do it as fast as possible, making sure that you understand, making sure that you know what you are saying, you know what you want, and then to just speed it up really quick, and not to pussy foot around the other lawyer at all.

Some of the lawyers interviewed acknowledged the importance of support for the women, and even relied on support people, who are often refuge workers, to provide a variety of services. These services included ensuring safety at counselling and mediation and explaining legal processes to women as well as providing child care and emotional and sometimes economic support. Although this reliance on support people reflects the invaluable services that supporters of survivors of domestic violence have provided, it must be questioned whether it is fair or realistic to rely on support people for such services as ensuring physical safety. Refuge workers, for example, are not trained to provide physical protection and should not be requested to do so. Where physical safety is an issue during legal proceedings lawyers should deal with that issue directly. Having to provide child care may also detract from the quality of support that refuge workers are able to provide to the women.

Child care and support for the women should be recognised as two separate activities and child care should also be directly addressed. It is not inconceivable that refuges could provide both child care services and support as two distinct services, but it must also be acknowledged that

refuges in New Zealand are grossly underfunded and often provide these services to women on a volunteer basis. Given that the importance of support is highlighted by both the experiences of the women interviewed and the lawyers, it seems that lawyers might also acknowledge the cost of this support by explicitly supporting increased levels of funding for refuges.

VI. Conclusion

Perhaps the most significant findings of the research are the frequency with which the women felt that their lawyers did not believe them, especially with respect to the level of danger in which they live and the severity of the abuse that they endure, and the lawyers' concurrent lack of understanding of the dynamics of domestic violence. These findings provide a backdrop to the other issues raised by the research, especially the lack of involvement of the women in decision-making and the lack of advocacy provided by lawyers. Effective legal representation requires lawyers' awareness of the context in which women seek protection from the legal system, and lawyers' willingness to advocate for protection throughout the legal process. Lawyers should also be prepared to confront and expose gender bias as it operates in particular cases in a manner that furthers the interests of their clients, and to assist in ensuring that women receive adequate support in using the legal process.

Lack of understanding about the dynamics of domestic violence, and a tendency to minimise and trivialise violence, are not unique to lawyers. However, these attitudes on the part of lawyers do raise serious issues about the access to justice available to women who are survivors of domestic violence. If the advocates that the system provides to facilitate access to justice share the same minimising and trivialising tendencies as other members of society, do women who are survivors of domestic violence have access to justice? It is time for lawyers to fulfil their responsibility to act as facilitators of access to justice, rather than as barriers to justice for women who are survivors of domestic violence.