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Beyond learned helplessness: Effective advocacy for survivors of domestic violence

BY ELIZA J. MINSCH AND JENNIFER M. NORRIS

Unfortunately, domestic violence is endemic in our society and, hence, in our law practices: Nearly one in three women and one in five men in Massachusetts have experienced physical violence, rape and/or stalking by an intimate partner.¹ Domestic violence can happen to anyone regardless of race, age, sexual orientation, class, religion or gender.

As family law practitioners, it is imperative to understand the dynamics of abuse in order to recognize it, build trust and understanding with survivor clients and better advocate for their needs. In this short article,² we attempt to outline some considerations we hope will assist practitioners in advocating for clients in abusive relationships and understanding the limits of the legal system, which regrettably has often been ineffectual in combating domestic violence and has even perpetuated systemic abuse.

This article does not purport to provide an exhaustive assessment of all domestic violence situations, responses or outcomes. As with any client, each survivor of domestic abuse is an individual who responds in their³ own way.

Initial client screening and intake

Address confidentiality with your client: Carefully explain attorney-client privilege and privacy protections so that the client feels safe disclosing abuse to you. Many survivors have been warned or threatened by their abuser not to tell anyone and speaking up about their experience can be a big risk for the client.

Ask questions about domestic abuse: Proceed sensitively, but include screening questions about abuse. Let your client know it's okay to talk about and, in fact, critical to your ability to represent them effectively.

Give your client time and space to disclose abuse and validate that you believe them: It may take time for a client to reveal abuse. Be supportive and validate their experiences. As a client's trust in you grows they may be more willing to disclose important details, so encourage them to retell their story more than once as you continue working with them.

It takes time to build trust: Be aware that it may be very difficult for your client to trust you, and they may never have complete trust in you. Be clear about guidelines of representation and communication with your client so they know what to expect from you. Try to demonstrate that you're worthy of their trust, but don't take it personally if your client remains guarded. Self-preservation is an essential tool for survivors.

Beware of well-intentioned but victim-blaming statements: Be very careful not to make statements that you may think are innocuous, but may be



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perceived as blaming the victim for the abuse, such as, "Why did you stay in the relationship for so long?" or, "Did you ever consider calling the police/getting a restraining order?" Survivors have often been told by the abuser that it's their fault — they don't need to hear it from their attorney.

Don't make assumptions: Don't make assumptions about a client's sexual orientation or gender identity until they disclose it; don't assume a client is the victim or abuser based on their gender. Don't assume that if your client's partner has accused them of abuse or has a restraining order against them that they are the abuser. Be aware of stereotypes and listen with an open mind.

Trust your client's instincts and assessment of the situation: Your client is the expert on the abuser and what he or she is capable of. Listen and trust their assessment.

Continue to monitor the situation: Even if your client does not initially disclose any abuse, continue to inquire periodically throughout your representation and remain vigilant of warning signs such as: your client's fear of their partner's temper; your client not seeing or spending time with friends or family; your client experiencing threats to keep children away, be deported or have their sexual orientation disclosed; and/or being denied access to financial resources. Obviously, this is just a sampling of what may be observable.

Be able to provide resources: Create and maintain contacts with (or at least be sure you have accurate contact information on hand for) appropriate services to connect your client with including counseling, shelters and housing programs, medical services, job training-services, welfare offices and crisis hotlines (24/7 MA hotline: SafeLink 1-877-785-2020). Instruct your client to utilize them from a public phone or library computer if their safety may be in danger if their partner discovers their activities.

Safety

Escalation of danger: Be aware that the risk of abuse (whether physical violence or other abuse) escalates when a survivor leaves the home or obtains legal assistance because the abuser's sense of power and control are

tant, are often not abided and do not deter or put a stop to domestic violence.

Safety planning: Encourage your client to keep a list of resources they can turn to for support, to look for a safe place to stay and to consider other logistical and financial implications of escaping domestic violence. Take steps to have abusers surrender keys to your client's home and/or car and refrain from shutting off your client's utilities or interfering with their mail and accessing email, social media, cell phone records, etc. Be aware of and take precautions for cyber security. For additional suggestions, see Quirion, Chapter 25.3 and the National Domestic Violence Hotline (www.thehotline.org)

Understanding the dynamics of abuse

Not all domestic violence is physical: Abuse can be physical, emotional, sexual or economic — the key is that the behaviors are used to maintain coercive control over the victim. ALL of these are abuse and must be seen and recognized and confronted. "Abuse is a >18

threatened. Encourage your client to be open with you about what they believe their partner is capable of. Take this danger seriously and engage in taking safety precautions for your client, their children, and yourself, if needed.

Legal protections: Be aware of what legal protections and avenues related to domestic abuse are available to your client — 209A protective orders, harassment orders, workplace protections and new criminal statutes pursuant to An Act Relative to Domestic Violence. Also be aware that legal measures, while impor-

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repetitive pattern of behaviors to maintain power and control over an intimate partner. These are behaviors that physically harm, arouse fear, prevent a partner from doing what they wish or force them to behave in ways they do not want. Abuse includes the use of physical and sexual violence, threats and intimidation, emotional abuse and economic deprivation. Many of these different forms of abuse can be going on at any one time.”⁴

Abuser tools: There are many different tactics used by abusers to control their partners. When an abuser’s sense of power and control are threatened or tactics used previously are unavailable to them (such as if their partner has left the home), they may engage in other forms of abuse. Abusers may want to exact revenge on their partners and do anything to hurt them, even if it hurts the abuser as well (such as letting the house be foreclosed, losing their job, or harming their children).

Survivor responses: There is no uniform, predictable, correct way to respond to abuse. Survivor responses to abuse can vary greatly. Some survivors may seem numb, some may seem passive and subdued, while others may be angry and outspoken or even seem obsessed with the abuse they suffered. All are valid and should not be judged.

Psychological effects: Some survivors may experience Post Traumatic Stress Disorder, depression, anxiety and/or dissociation.⁵ Others may exhibit symptoms of these conditions in the absence of a diagnosis. Educate yourself about these conditions and the effect on your client to help you better understand and represent your client. Psychological conditions also may be relevant to many legal issues including child custody and alimony.

LGBT domestic violence: Educate yourself, seek training and be sensitive to issues specific to clients in lesbian, gay, bisexual and transgender relationships. While the dynamics of abuse are the same, there may be additional dynamics including fear of disclosure of sexual orientation, discrimination and systemic oppression, hostility of judges, difficulty obtaining services, concerns about losing custody and barriers within the community.⁶

Issues in representation

The “irrational” client: Often, survivors have been made to feel that they are crazy, irrational, unreasonable and/or have been told the abuse didn’t happen or was their fault. Your client may be very sensitive to feeling heard, believed and understood. An abuse survivor may also be perceived to be exaggerating or overly paranoid or alarmist. Hyper-vigilance or hyper-sensitivity to the abuser’s triggers is a perfectly rational, understandable and necessary response to protect him or herself from abuse, but may make the client come off as un-credible or unlikely. Understanding this dynamic can help you confront and mitigate it.

The “charming” abuser: Most abusers are per-

fectly likeable, affable people. A colleague who works in domestic violence once commented, “I never met an abuser I didn’t like.” Don’t be taken in by a charming abuser, and be sure to make your client aware that while you may be cordial in dealings with the abuser, it doesn’t mean you are aligning with them.

Educate judges about abuse: It is essential to try to make your judge understand and understand the context of abusive relationships. Be prepared for judges to be unreceptive and even hostile to your client’s experiences. Often, domestic abuse is not recognized and such cases are instead mislabeled as being “high conflict” with victims being held to blame. Judges who don’t understand the dynamics and effects of abuse are likely to characterize and penalize the survivor as being unreasonable, difficult, or obstructionist. Use whatever resources you can, including domestic violence experts and mental health providers, to make your judge understand.

Going to court

Protect your client: The experience of facing the abuser, even in controlled environments such as the court room or in mediation, may be harrowing for your client. Prepare them ahead of time, and tell them they don’t have to speak with the abuser. In the courtroom, physically place yourself between your client and their former partner. Don’t hesitate to ask a court officer to stay nearby or detain the abuser after the hearing until your client has safely left the court.

Legal issues

(Obviously there are a plethora; these are just a few tips.)

Litigation as a means of re-victimization: Abusers may use scorched-earth tactics and use the legal process to harass your client. Be prepared and expose the abuse to the court and seek to dismiss baseless actions and seek sanctions.

Mediation or cooperative law: While it may be appropriate in some cases, approach with great caution due to the power imbalance between the parties, the lack of protections available through the courts, and the potential for the abuser using the process as a tool for maintaining control and perpetuating abuse.⁷

Grounds for divorce. Although common practice is to file the complaint for divorce on the grounds of “irretrievable breakdown,” consider filing on the grounds of “cruel and abusive treatment.” While there is no tangible legal benefit to doing so, failing to plead abuse grounds may result in the judge discounting or minimizing evidence of abuse sought to be admitted.

Custody: While not always followed, there are strong presumptions under Massachusetts law against awarding custody to a parent who has committed a “pattern of abuse or a serious incident of abuse towards a parent of child” and, further, the court is *required* to

consider past or present abuse toward either a parent or child as a factor contrary to the child’s best interest. M.G.L. c. 209C, §10(e). Utilize these presumptions when advocating for your client. Don’t assume that your client will get custody if challenged.⁸ The abuser’s parents may even attempt to litigate for grandparent visitation rights — be prepared to defend against it on the basis that it’s truly the abuser seeking control and/or is a violation of your client’s restraining order, if they have one.

Alimony: The Alimony Reform Act of 2011 specifically includes “a party’s inability to provide for that party’s own support by reason of physical or mental abuse by the payor” as a potential ground for judges to deviate from the alimony guidelines. Advocates for survivors should argue their client’s entitlement to alimony under this provision whenever appropriate and use it to further educate judges about the harm of abuse.

Mutual protective orders: Vigorously protest against any protective order against your client, including a mutual protective order, even if it might hasten a settlement or if your client fears going to court. A mutual protective order can have seriously detrimental future consequences including weakening the client’s future claims, putting them at risk of criminal violations, and posing a risk of deportation for non-citizen clients.

Conclusion

While it can be challenging and frustrating working to achieve just results for survivors, it is critical for family law practitioners to gain an understanding of the nuances involved in representing victims of abuse and utilizing the sometimes limited strategies available.

We are grateful and indebted to our survivor clients, who have shared their stories and helped us grow as lawyers and human beings. ■

1. 2010 National Intimate Partner and Sexual Violence Survey data for Massachusetts, quoted in Jane Doe Inc., “Massachusetts Snapshot.”
2. For a much more thorough exploration of issues related to representing abuse survivors, see Pauline Quirion, Esq., MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL, Vol. III, Chapter 25, “Representing Victims of Domestic Violence” (MCLE 2014). The American Bar Association Commission on Domestic Violence and U.S. Department of Justice Office on Violence Against Women also offer helpful materials on domestic abuse for practitioners.
3. Domestic violence affects all genders and gender-identities. In an effort to be gender-neutral, this article uses “their,” “they” and “them” to refer to survivors rather than gendered pronouns.
4. The National Domestic Violence Hotline: What is Abuse? (www.thehotline.org/is-this-abuse/abuse-defined)
5. Quirion, Chapter 25.3.1
6. ABA Commission on Domestic Violence, in Collaboration with the National LGBT Bar Association, “Tool for Attorneys Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Survivors of Domestic Violence.”
7. Margaret B. Drew, “Collaboration and Coercion: Domestic Violence Meets Collaborative Law,” 1 Irish Law Journal 27, p. 38-39.
8. Studies show that abusive parents are more likely to seek sole custody than non-violent ones, and are successful about 70% of the time. ABA Commission on Domestic Violence, “Myths about Custody and Domestic Violence and How to Counter Them,” 2006.